

(Delivered by Hon'ble Dilip B Bhosale, Chief Justice
&
Hon'ble Yashwant Varma, J.)

1. Rule.

2. Heard forthwith by consent of learned counsel for the parties.

3. The petitioners, who claim to be social activists, have instituted this petition in the public interest under Article 226 of the Constitution of India, challenging the resolution/proposal which has been passed/approved by respondent no. 4-Kanpur Development Authority (for short "KDA") in its 112th Board meeting dated 14.10.2014. By this resolution, KDA have decided to construct an underground parking in Phoolbagh, which, according to the petitioners, is contrary to and in defiance of the judgement of this Court dated 12.9.2014 rendered in Public Interest Litigation (PIL) No. 42083 of 2014. The petitioners have also made consequential prayers in the PIL.

4. PIL No. 42083 of 2014 was also filed by the petitioners, challenging the validity of a decision of KDA to construct an underground car parking area for 680 cars in the lower basement with a shopping complex of 150 shops in the upper basement in a portion of Phoolbagh park at Kanpur. The challenge was on the ground that the construction of an underground shopping complex and car parking in an area reserved for a park under the Master Plan is unlawful. The project, that was under challenge in the said PIL, envisaged the construction of an underground multilevel car parking facility of between 7000 to 8000 sq. meters and a shopping complex of 150 shops in the upper basement with a facility of providing for the parking of 680 cars in the lower basement, in addition to which, surface parking of 200 cars. The terrace garden was also envisaged over and around the central area where construction was to be carried.

5. In this backdrop, the issue which the Division Bench addressed was whether the construction of an underground shopping complex in an area which is reserved under the Master Plan as a park would violate the provisions of the Master Plan. Further, it was considered whether the construction of 150 shops which was liable to attract a large number of vehicles of persons who visit the shopping complex would at all alleviate the problem of traffic congestion outside Phoolbagh. The Division Bench after considering judgments of the Supreme Court in **Bangalore Medical Trust vs. B.S. Muddappa**, AIR 1991 (SC) 1902, **G.N. Khajuria vs. Delhi Development Authority**, AIR 1996 SC 253 and **M.I. Builders Pvt. Ltd. vs. Radhey Shyam Sahu**, AIR 1999 SC 2468 held that the decision of KDA to construct an underground shopping complex and car parking in the area of Phoolbagh was legally impermissible and was contrary to the provisions of the Master Plan prepared under the U.P. Urban Planning and Development Act, 1973 (for short "Act, 1973"). While so declaring, it was also observed that it would be open to KDA to conduct a fresh survey on the likely need for a car parking facility in the area and after a due and proper enquiry and survey, to conceive of a project involving the provision of a parking facility as an amenity appurtenant to the park. It was also clarified that the said judgement would not stand in the

way of the Authority in taking necessary measures for beautification and maintenance of Phoolbagh as a park without disturbing its integral feature as a recreational open space.

6. Thereafter, KDA, it appears, conducted a survey and enquiry and has taken the impugned decision. It further appears that after following the due procedure, KDA also commenced with the construction of the underground car parking, providing parking space for 650 cars.

7. Feeling aggrieved and dissatisfied with the impugned resolution dated 14.10.2014, the petitioners have filed the instant PIL alleging that KDA, in the name of survey and enquiry and under the garb of limited liberty given by this Court in the judgment dated 12.9.2014 in PIL No. 42083 of 2014, deliberately misread and misinterpreted the order and commenced the construction of underground parking. Petitioner no. 2 and the residents of Kanpur city, it is stated in the petition, submitted objections before KDA which, it appears, have been shelved by the Authority, inasmuch as it had pre-decided to proceed with the plan and just covered up with paper formalities. In short, according to the petitioners, the decision of the respondents, in particular KDA, was in contravention and defiance of the order passed by this Court dated 12.9.2014 in PIL No. 42083 of 2014, inasmuch as they wilfully misread the limited liberty given by this Court to proceed with multilevel parking as was originally conceived of by them earlier and which in unequivocal terms, as held by this Court, legally impermissible.

8. The Vice Chairman of KDA has filed counter affidavit denying all allegations made in the writ petition and has placed on record the materials including survey report dated 24.9.2015 (Annexure CA-14) in support of the impugned resolution. It would be relevant to reproduce paragraphs 37, 39, 41, 42, 44, 53, 54, 76 and 78 to know the exact stand of the KDA, which read thus:

"37. That further, the tract of land over which the car parking is now being constructed was a barren piece of land which was not being utilized for any purpose. It is stated that neither ecology of the park has been disturbed nor there would be any change in the nature of park. The multilevel car parking below the ground level would only add to the convenience of the visitors to the park and nearby areas. The said facility is presently a necessity in the city also.

39. That it is stated that the project of underground parking is being carried out after the survey was conducted under the directions of this Hon'ble Court. This project has also included the future possibilities and future inflow of the persons / vehicles in the park.

41. That it is specifically stated here that the Kanpur Development Authority has undertaken the beautification and renovation of the park in question. Various facilities / amenities are being provided by the Kanpur Development Authority in the park that would certainly attract a large crowd to the park. These visitors would certainly require a big parking lot.

42. That it is specifically stated here that the Kanpur Development Authority is creating walking track/ path way 3 meters wide about 960 meters, 2.5 meter about 210 meters. This walking track / path way would cover an area of 3273 square meters.

44. That the Kanpur Development Authority has further proposed to construct a separate jogging park of 380 meter length.

53. That in the meanwhile the officers of the Kanpur Development Authority started conducting survey which took three weeks time and the survey report was submitted and considered in a meeting dated 24.09.2015.

54. That the answering respondent brings on record a true copy of the survey report conducted by the Kanpur Development Authority. A true copy of the survey report dated 24.09.2015 is annexed herewith and marked as **Annexure No. CA-14** to this affidavit.

76.In reply it is stated that the answering Development Authority has merely constructed an underground multilevel car parking that too without disturbing the ecology of the park in any manner. It is specifically stated here that the ground area above the car parking would remain as a park. It is specifically stated here that no commercial activity whatsoever is either contemplated or would be permitted at the site in question.

78.However, it is specifically stated here that even after the construction of underground multilevel car parking the land above it will be restored in the shape of park and would not be utilized for any other purpose and the same will continue to be an integral part of the Ganesh Udyan that too as a park."

9. In reply to the counter affidavit, petitioner no. 2 has filed rejoinder affidavit and in paragraph 5 thereof stated that "the development authority have not made any proposal for constructing parking facility appurtenant to the park but had made the proposal for constructing multilevel parking in the park itself, considering the need of the entire city. The proposal was against the Master Plan of the development authority and even against various judgments of Hon'ble Supreme Court, which forbade any change in user of park or green area, contrary to the Master Plan." The petitioner no. 2, apart from denying the averments made in the counter affidavit filed on behalf of KDA, has also tried to demonstrate as to how the decision of the construction of an underground parking facility is also contrary to the provisions of Uttar Pradesh Parks, Playgrounds and Open Spaces (Preservation and Regulation) Act, 1975 (for short "Parks Act") and also against the Master Plan. In short, in the rejoinder affidavit, petitioner no. 2 once again made an attempt to demonstrate as to how the construction of underground parking facility in the park is likely to cause injury to the environment and ecology of the public park.

10. We have heard learned counsel for the petitioners and learned senior counsel for KDA and other learned counsel appearing for the remaining respondents at considerable length and with their assistance perused the entire materials placed on record.

11. Mr. Rahul Mishra, counsel for the petitioners, at the outset, submitted that construction of an underground car parking facility in an area which is reserved under the Master Plan as a park would violate the provisions of Master Plan. In support of this contention, he placed heavy reliance upon the judgment of this Court dated 12.9.2014 in PIL No. 42083 of 2014. He vehemently submitted that the impugned resolution is not only contrary to and in defiance of the judgment dated 12.9.2014, but going ahead with the proposal for construction of underground parking facility, would also amount to flouting of the said order of this Court. In support, he invited our attention to the conclusion drawn in the judgment dated 12.9.2014, wherein it was held that "an area reserved in the Master Plan as a park must be used as a park and a terrace garden above an underground shopping complex is no substitute for a park", as held by the Supreme Court in **M.I. Builders (supra)**. He submitted, in any case, the construction of an underground facility for parking of 650 vehicles is not an amenity associated with the use of the park itself. He then submitted that if the underground parking lot is built then the park would no longer adhere to the definition of park under clause (b) of Section 2 of the Parks Act, 1975, which provides for minimum 95% of area should be laid out as a garden with trees, plants or flower beds or as a lawn or as a meadow and maintained as a place for the resort of the public for recreation, air or light. He then submitted that if underground car parking facility is provided then in that portion of the park, above the parking lot, trees cannot be planted apart from the fact that number of trees are likely to be cut for construction of the underground parking facility. He submitted, the park, which is of historical importance, cannot be allowed to be destroyed by constructing an underground parking facility, and thereby losing its character as a park. Lastly, he submitted that no survey as directed by this Court vide order dated 12.9.2014 and as observed by the Supreme Court made in **M.I. Builders (supra)**.

12. On the other hand, Mr. Shashi Nandan, learned senior counsel for KDA, apart from reiterating what has been stated in their counter affidavit, on instructions, submitted that for construction of underground parking lot, KDA shall not cut a single tree. As a matter of fact, he submitted that the area of 1.5 acres where KDA proposed to construct underground parking lot, as on the date of decision, did not have a single tree and even today, this portion does not have a single tree. He further submitted that, in any case, KDA would construct the underground parking facility in such a way that the surface (ground level) of the park would not be disturbed nor any levels would be created and that one would even not realize that there is an underground parking lot beneath the park. He also submitted that KDA shall use modern technology for providing exhaust facility without causing any pollution in the park. In the course of arguments, he submitted, as a matter of fact, as of today, the portion where KDA propose to construct underground parking lot is vacant and is not used for any purpose whatsoever. After construction of the underground parking facility, KDA propose to develop a very attractive garden/park over this portion. In support of this contention, he also invited our attention to several paragraphs, few of which we have already made reference, of the counter affidavit.

13. The principal question that falls for our consideration is whether the construction of an underground parking in an area, which is reserved under the Master Plan as a park, would violate the provisions of the Master Plan, more particularly in the light of the judgment of this Court dated

12.9.2014 in PIL No. 42083 of 2014. At this stage, it is relevant to notice the question that was raised in the earlier PIL and the liberty given by the Division Bench, while disposing of the said PIL. The question was "whether construction of an underground shopping complex in an area which is reserved under Master Plan as a park would violate the provisions of Master Plan" and the liberty granted, while disposing of the PIL, was to conduct a fresh survey on the likely need for a car parking facility and after a due and proper enquiry and survey, to conceive of a project involving the provision of a parking facility as an amenity appurtenant to the park. Thus, the challenge in the earlier PIL was to the proposed construction of an underground car parking and a shopping complex of 150 shops in a portion of Phoolbagh park at Kanpur. The Division Bench while dealing with the question that fell for its consideration observed thus:

"...At this stage, it does not appear that any survey or study was carried out before a decision was taken to provide an underground shopping complex of 150 shops, on the impact of a shopping complex on the existing state of traffic congestion in the area. The presence of 150 shops is liable to attract a large number of vehicles of persons who visit the shopping complex. Whether this situation would at all alleviate the problem of traffic congestion outside Phoolbagh is a moot point. In our view, it was necessary for KDA to have carried out a thorough study in regard to whether the construction of a shopping complex, albeit in the basement would resolve the basic issue of traffic congestion."

(emphasis supplied)

14. Then the Division Bench after considering the judgments of the Supreme Court in **Bangalore Medical Trust, G.N. Khajuria and M.I. Builders (supra)** in one of the concluding paragraphs held thus:

"The submission is that only an area ad-measuring 1.5 acres of the park would be utilized for an underground shopping complex. The fact that "only" 1.5 acres of the total area of the park is to be utilized for the construction of a shopping complex together with an appurtenant car parking facility cannot, in our view, legalise the project. Conceivably, a Master Plan may permit making available a parking facility for the purpose of the visitors to a park or recreation space and this would be an amenity associated with the use of the park itself. But in no circumstances, can a recreational area be converted into shopping complex, whether below or above ground. In M.I. Builders (supra), the Supreme Court held that a terrace garden above an underground shopping complex is no substitute to a park. An area reserved in the Master Plan as a park must be used as a park. The Court cannot countenance devious attempts by public bodies to usurp the dwindling green areas that remain. Above all, the project in question, allowing as many as 150 shops in the basement, was conceived without a due and proper application of mind to the impact on congestion and density of population in an already over crowded area. In this view of the matter, we are of the view that it would not be appropriate to allow the historical park situated in the city of Kanpur and associated with important events of the freedom struggle, to be frittered away."

(emphasis supplied)

15. From perusal of the judgement dated 12.9.2014 passed in PIL No. 42083 of 2014, it is clear that the Division Bench had granted liberty to KDA to conduct a fresh survey on the likely need for a car parking facility and then to conceive of a project involving the provision of a parking facility as an amenity appurtenant to the park. In view of the observations made in the judgement dated 12.9.2014, the respondents claim that they conducted survey and after due and proper enquiry conceived of a project involving the provision of a parking facility only as an amenity appurtenant to the park. In other words, KDA dropped the proposal for construction of a shopping complex of 150 shops in the upper basement in a portion of Phoolbagh at Kanpur. It was categorically submitted on behalf of the respondents that they would not cut a single tree for construction of the underground car parking and would also not disturb the surface (ground level), and that after construction gets over, they would develop and maintain better garden than what exists as of today, in particular at the spot where they propose to construct the underground car parking lot. It was also submitted that after the construction is over and a garden is developed, one would not even realize that there is an underground car parking lot beneath the park/garden.

16. The project that has been cleared in the 112th meeting of KDA Board dated 14.10.2014, envisages construction of an underground car parking facility for 650 cars and the portion above the car parking lot, shall be restored back to its original position to be used as park/garden. It is well settled that any use, development or construction must necessarily abide by the provisions of Master Plan and the Zoning Regulations. The Master Plan which has been prepared under the Act, 1973 has statutory force. Once the Master Plan is notified, it has binding force and effect.

17. It appears that KDA, while proposing to construct underground car parking facility and shopping complex, did not carry out any study on the impact of the proposed shopping complex on the preservation of a historical park as a green area and further on the impact of a shopping complex on the existing state of traffic congestion in the area. It was noticed that the presence of 150 shops would attract a large number of vehicles of the visitors to the shopping complex. Whether that situation would at all alleviate the problem of traffic congestion outside Phoolbagh was not taken into consideration by the respondents. In this backdrop, the Division Bench in the earlier PIL had observed that "it was necessary for KDA to have carried out a thorough study in regard to whether the construction of a shopping complex, albeit in the basement, would resolve the basic issue of traffic congestion." There was nothing on record to indicate that any study was carried out on the impact of proposed shopping complex. Having so observed, the earlier PIL was disposed of with liberty to KDA, as mentioned above.

18. It is true, and in any case cannot be disputed that the public interest in the reservation and preservation of open spaces for parks and playgrounds cannot be sacrificed for any purpose whatsoever. Any such act would be contrary to the legislative intent and inconsistent with the statutory requirements. Furthermore, it would be in direct conflict with the constitutional mandate to ensure that any state action is inspired by the basic values of individual freedom and dignity and addressed to the attainment of a quality of life which makes the guaranteed rights a reality for all the citizens, as observed by the Supreme Court in **Bangalore Medical Trust (supra)**. Absence of

open space and public park, in present day when urbanisation is on increase, rural exodus is on large scale and congested areas are coming up rapidly, may give rise to health hazard. Therefore, in any case open space and parks cannot be allowed to be destroyed, either by constructing shopping complex or even for parking for that matter. What is necessary to see, in the present case, is whether construction of underground parking would either destroy the park or reduce the area of park more than 5% of the total area for providing ingress and egress to underground parking lot.

19. Our attention was specifically drawn to the observations made by the Supreme Court in **M.I. Builders (supra)** to contend that Phoolbagh is of historical importance and construction of underground parking would create grave to the environment ecology of the park, the surrounding area and the city, adversely affecting the health of the citizens. It was submitted that after the underground parking is allowed to be constructed, trees cannot be planted and the development of park above the underground parking lot would be more like a terrace park and in any case, it cannot be termed as a park. It would be relevant to notice the observations made by the Supreme Court in **M.I. Builders (supra)** wherein the decision taken by the Lucknow Nagar Mahapalika, permitting a builder to construct an underground shopping complex in the Jhandewala Park situated in Aminabad market Lucknow was under challenge. The Supreme Court was dealing with the judgment of a learned Single Judge, who held the decision to be unlawful and a mandamus was issued to the Lucknow Nagar Mahapalika to restore back the park to its original position. The relevant observations in paragraph 51 read thus:

"51. Jhandewala Park, the park in question, has been in existence for a great number of years. It is situated in the heart of Aminabad, a bustling commercial-cum-residential locality in the city of Lucknow. The park is of historical importance. Because of the construction of underground shopping complex and parking it may still have the appearance of a park with grass grown and path laid but it has lost the ingredients of a park inasmuch as no plantation now can be grown. Trees cannot be planted and rather while making underground construction many trees have been cut. Now it is more like a terrace park. Qualitatively it may still be a park but it is certainly a park of different nature. By construction of underground shopping complex irreversible changes have been made. It was submitted that the park was acquired by the State Government in the year 1913 and was given to the Mahapalika for its management. This has not been controverted. **Under Section 114 of the Act it is the obligatory duty of the Mahapalika to maintain public places, parks and plant trees. By allowing underground construction Mahapalika has deprived itself of its obligatory duties to maintain the park which cannot be permitted. But then one of the obligatory functions of the Mahapalika under Section 114 is also to construct and maintain parking lots. To that extent some area of the park could be used for the purpose of constructing underground parking lot.** But that can only be done after proper study has been made of the locality, including density of the population living in the area, the floating population and other certain relevant considerations. This study was never done. Mahapalika is the trustee for the proper management of the park. When true nature of the park, as it existed, is destroyed it would be violative of the doctrine of public trust as expounded by this Court in Span Resort Case (1997 (1) SCC 388). Public Trust doctrine is part of Indian law. In that case the respondent who had constructed a motel located at the bank of river Beas interfered with the natural flow of the

river. This Court said that the issue presented in that case illustrated "the classic struggle between those members of the public who would preserve our rivers, forests, parks and open lands in their pristine purity and those charged with administrative responsibilities who, under the pressures of the changing needs of an increasingly complex society, find it necessary to encroach to some extent upon open lands heretofore considered inviolate to change"

(emphasis supplied)

20. From perusal of the above observations made by the Supreme Court, it is clear that one of the obligatory functions of the Nagar Mahapalika under Section 114 of the Uttar Pradesh Municipal Corporation Adhiniyam, 1959 (in short Adhiniyam of 1959) is to construct and maintain parking lot. Having regard thereto, the Supreme Court observed that some area of the park could be used for the purpose of constructing underground parking lot. But that can only be done after proper study has been made of the locality, including density of the population living in the area, the floating population and other certain relevant considerations.

21. In that case, the Supreme Court was considering the challenge to the construction of an underground shopping complex and in view thereof, it was also held that the Master Plan could not have envisaged Jhandewala Park being used as a site for commercial purposes, considering the density and congestion in the area.

22. It is not in dispute that Kanpur is one of the most populated cities not only in India but in the world. It faces traffic congestion problem day in and day out. It is also not in dispute that the area around Phoolbagh park is marked by heavy traffic congestion since a crowded market place is situated in close proximity of the park. Traffic congestion causes inconvenience not only to the residents of area and the persons visiting markets situated in close proximity of the park, but also to the visitors to the park. It is also not in dispute that the visitors to the park and even to the market place situated in close proximity of the park do not have parking facility and they find it extremely difficult to park their vehicles, and situation there force them to park their vehicles on crowded road and lanes, which further causes traffic congestion and also air pollution. It was contended on behalf of the petitioners that though the area of Phoolbagh was originally 40 acres, what remains as of today as park, is an area of about 18 acres. Out of this area of park, KDA proposes to use 1.5 acres for an underground parking facility. After the judgment of this Court in the earlier PIL, we are informed, KDA decided not to reduce the area of park at all and provide an underground car parking facility without disturbing the surface (ground level) of the park and to provide a modern exhaust facility without creating any pollution in the park.

23. In our opinion, parking lot, irrespective of the fact whether, it is at ground level or underground, for a park, as per the Master Plan, would be an amenity associated with the use of the park itself as observed by the Supreme Court in **M.I. Builders (supra)**, after making reference to Section 114 of the Adhiniyam of 1959. Construction of underground parking to some extent is permissible in law. What is required is only that such decision has to be taken after proper study of the locality, including the density of the population living in the area, the floating population and other certain relevant considerations, such as traffic congestion. Dropping of the original proposal

for construction of an underground shopping complex is an outcome of the study/survey conducted by KDA for car parking facility in the area as an amenity appurtenant to the park. We have, with the assistance of learned senior counsel for KDA, gone through the survey report dated 24.9.2015. The report is exhaustive. Lot of photographs are also placed on record, which show the physical condition of the area around the park. The report and the photographs placed on record are sufficient to convince that the parking facility is necessary and it could be only underground. The Supreme Court in **M.I. Builders (supra)** has undoubtedly observed that a terrace garden above an underground shopping complex is no substitute to a park but that was in the light of the nature of project under consideration, namely underground shopping complex. In the very same judgment, as noticed earlier, the Supreme Court also observed that some area of the park could be used for the purposes of constructing underground parking lot having regard to surrounding areas where the people suffer every day due to traffic congestion. The only alternative left to KDA is to provide underground parking lot without causing any disturbance to the park on the surface.

24. In our opinion, the observations made by this Court in the order dated 29.7.2015 were prima facie observations and they cannot be taken as final opinion on the questions raised in the writ petition. Section 13 of the Act, 1973 also would not come in our way to take the view, that we are taking in the instant PIL. From sub-section (1) of Section 13, it is manifest that the Authority may make only those amendments which do not affect important alteration in the character of the plan. It means the respondents do not have an absolute right of amending the Master Plan or the zonal development plan. The basic characteristic of such a plan cannot be altered by the Authority. Only that amendment is permissible under Section 13(1) which does not affect the basic character of the plan. Open space lying for park in the plan forms a basic feature of the plan and that cannot be amended. A plan cannot be amended so as to denude the plan of such a basic feature. Section 13 (1) can in no circumstances be interpreted so as to clothe KDA to utilise the open space reserved for a park either to construct buildings or use it in any other manner, which is foreign to the concept of a park. (See **D.D. Vyas and others vs. Ghaziabad Development Authority, Ghaziabad**, 1992 Legal Eagle (ALD) 131). In the present case, the basic characteristic of Master Plan has not been altered and, therefore, the question of even amendment of the Master Plan also did not arise.

25. Project of underground parking, the manner in which KDA proposes to develop, as observed earlier, in our opinion, would not alter the Master Plan or the zonal development plan. On the contrary, the provision of a parking facility that KDA proposes to provide by constructing underground parking lot, is an amenity appurtenant to the park. It is the obligatory duty of Mahapalika to maintain public places, parks and plant trees. It is also one of the obligatory functions of the Mahapalika under this provision, to construct and maintain parking lot and to that extent some area of park could be used for the purpose of constructing underground parking lot. In our opinion, the characteristic of park, as defined by clause (b) of Section 2 of the Parks Act, would not be changed or defaced, by construction of the underground parking facility in Phoolbagh.

26. In the result, the petition is **dismissed** with no order as to costs.

27. Before parting, in the larger interest of the people in Kanpur, we issue the following directions to KDA:

(i) KDA for construction of the underground parking facility, as proposed, shall not cut a single tree;

(ii) KDA after construction of the underground parking facility shall develop the park and to have appearance of a park, provide lawn, flower beds, walking track/jogging track, etc. In short, under any circumstances, KDA should see to it that after construction of the underground car parking facility, the park above the parking lot, shall not lose its character as a park;

(iii) KDA shall provide exhaust facilities, for the underground parking facility, in such a way that it shall not, in any case, cause any air pollution in the park;

(iv) KDA shall reserve minimum half of the parking space in the underground parking lot for the vehicles of visitors to the park; and

(v) KDA even in future shall not use any portion of the park for any purpose other than for a park as defined under Section 2 (b) of the Parks Act.

(2016) 8 ILRA 12
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.08.2016

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.

Matters Under Article 227 No.- 2023 Of 2016
 &
 Connected With Other Cases

Sri Panchayati Akhara Mahanirvani Vaidik Sanatan Bharti	...Petitioner
Versus	
Ram Prakash Pathak & Anr.	...Respondents

Counsel for Petitioner:
 Brijesh Chandra Naik

Counsel for Respondents:
 S.C., Udai Chandani
Held

Compliance of Section 17 of the Provincial Small Causes Courts Act, 1887 is mandatory for maintaining an application under Order IX Rule 13 CPC for setting aside an ex-parte decree. The applicant must **either deposit the decretal amount or furnish security at the time of filing the application** (or within the prescribed limitation period).

Non-compliance of Section 17 is fatal, and in such case, the application under Order IX Rule 13 CPC is not maintainable.

If Section 17 is not complied with, **there is no valid presentation of the application**, and the Court lacks jurisdiction to entertain it.

Delay in complying with Section 17 cannot be condoned, as:

No such power exists in the Act, and

Section 5 of the Limitation Act does not apply.

Deposit/security must be within 30 days from knowledge of decree (as per Article 123 Limitation Act), failing which the application fails.

The purpose of Section 17 is to:

Protect the decree-holder/landlord, and

Prevent misuse by tenants delaying proceedings.

Courts **cannot assume jurisdiction unless mandatory conditions of Section 17 are fulfilled**.

Orders allowing delayed compliance or liberal interpretation **contrary to Section 17 are without jurisdiction** and liable to be set aside.

Consequently, **orders of S.C.C. Court and Revisional Court allowing delayed compliance were quashed**, and petitions were allowed.

CASE LAW CITED

Kedarnath v. Mohan Lal Kesarwani & Ors
Raj Kumar Makhija & Ors. v. M/s S.K. & Co. & Ors.

Roshan Lal & Ors. v. Rishi Pal Singh & Ors.
Kusum Devi v. Ram Ji Verma
Prem Chandra Mishra v. II ADJ, Etah
Prabhu Dayal v. District Judge, Saharanpur
Suresh Chand v. VII ADJ, Muzaffarnagar

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.)

1. The petition under Article 227 of the Constitution of India namely Civil Misc. Petition No.2023 of 2016 (Shri Panchayati Akhara Mahanirvani Vaidik Sanatan Bhartiya Dharmik Sanskriti Sansthan v. Ram Prakash Pathak & Anr.) has been filed challenging the judgment and order dated 1.2.2016 passed by the Additional District Judge, Court No.8, Varanasi in SCC Revision No.17 of 2015 (Ram Prakash Pathak v. Nagendra Upadhyay & Anr.) filed by the respondent No.1 whereby the Court below has set aside the order dated 30.5.2015 passed on the Application Paper No.4 Ga under Order IX Rule 13 C.P.C and remanded the matter back to the trial court to decide the said Application on merits after giving due opportunity of hearing to the parties concerned.

2. In the connected Writ Petition No.58290 of 2014 (Shri Panchayati A.M.V.S.B.D.S. Sansthan v. A.D.J. Varanasi & 3 Ors.), the order dated 17.7.2013 passed by the Judge, Small Causes Court namely the Civil Judge, Varanasi in Misc. Case No.83 of 2012 (Ram Prakash Pathak v. Nagendra Upadhyay) on application under Section 17 of the Provincial Small Causes Court Act, 1887 (hereinafter referred to as 'the Act, 1887) and the order passed by the Revisional Court dated 15.9.2014 in S.C.C. Revision No.21 of 2013 (Panchayat Akhara v. Ram Prakash Pathak & Anr.) are under challenge.

3. Learned counsel for the petitioner has submitted that the Application Paper No.4 Ga filed for setting aside the ex-parte decree dated 9.12.2011 was not accompanied by an Application under Section 17 of the Act, 1887. The Application under Order IX Rule 13 C.P.C. was filed by the tenant-respondent No.3 on 6.8.2012 with the assertion that he came to know about the ex-parte decree dated 9.12.2011 only on 26.7.2012 when he met respondent No.1 namely Nagendra Upadhyay at Varanasi.

4. It is stated that the application Paper No.13 Ga under Section 17 of the Act, 1887 for furnishing security was moved subsequently on 12.9.2012 i.e. after a gap of one month and six days. The petitioner filed objection Paper No.17 Ga contesting the said application on the ground that it was required to be moved prior to filing of the application under Order IX Rule 13 C.P.C for recall of the ex-parte decree or at least along with the said application. The Court below had no jurisdiction to extend time for depositing the decretal money or furnishing security in lieu thereof, on a delayed application moved under Section 17 of the Act, 1887 by the tenant-judgment debtor.

5. The Judge Small Causes Court allowed the Application Paper No.13 Ga filed under Section 17 of the Act, 1887 on the wrong premises that only rider to entertain the application under Order IX Rule 13 C.P.C. is that it cannot be heard or decided in case of non-compliance of Section

17(1) of the Act i.e. in case of non-furnishing of security or deposit of decreetal money, however, there is no bar in entertaining an Application under Section 17 of the Act, 1887, if filed, before presentation i.e. hearing on the application under Order IX Rule 13 C.P.C.

6. The Revisional Court in the order dated 15.9.2014 also took the same view and held that since the Application under Order IX Rule 13 C.P.C. has not been presented for hearing till filing of the application under Section 17 of the Act, 1887 and as such there was no legal impediment in entertaining the said application. The order passed by the S.C.C. Court in allowing the tenant-applicant to furnish the security on the application Paper No.13 Ga dated 12.9.2012 was affirmed.

7. On the other hand, the application Paper No.4 Ga under Order IX Rule 13 C.P.C. for setting aside ex-parte decree was rejected vide order dated 30.5.2015 on the ground that the tenant-applicant did not comply with the mandatory requirements of Section 17 of the Act, 1887. The application for furnishing security was moved after more than 30 days of moving application under Order IX Rule 13 C.P.C. for recall of ex-parte decree. The provisions of Section 5 of the Limitation Act have no application to condone the delay in making deposits under Section 17 of the Act, 1887. Thus, the delay in filing the application under Section 17 of the Act, 1887 was fatal.

8. In S.C.C. No. 17 of 2015 the Court below allowed the Revision by order dated 1.2.2016 setting aside the order dated 30.5.2015 on the ground that the application under Section 17 of the Act, 1887 was already allowed on 17.7.2013 and the request of the applicant to furnish security in lieu of the decreetal money has already been accepted. Further, it is noted that the application Paper No.14 Ga under Section 5 of the Limitation Act has been allowed vide order dated 2.3.2015 at the cost of Rs.300/- and the delay in filing the application under Order IX Rule 13 C.P.C. for recall of ex-parte decree has been condoned. The matter was remanded back to the Court below to decide the application Paper No.4 Ga under Order IX Rule 13 C.P.C. on merits.

9. Challenging these orders dated 17.7.2013, 15.9.2014 on the application 13 Ga & of dated 1.2.2016 passed on application 4 Ga, the submission of the learned counsel for the petitioner is that the compliance of Section 17 of the Act, 1887 is mandatory. The period provided under Article 123 of the Limitation Act to set aside the ex-parte decree is 30 days from the date of decree or from the date when the applicant had knowledge of the decree, in a case where summons or notice was not duly served.

10. In the instant case, the applicant got knowledge of the decree as per his own case at least on 26.7.2012. The application under Order IX Rule 13 C.P.C. was moved on 6.8.2012 without giving any explanation for delay. The application Paper No.14 Ga under Section 5 of Limitation Act was filed on 14.8.2012 with the prayer to condone the delay in filing application under Order IX Rule 13 C.P.C. However, prior to filing of application under Order IX Rule 13 C.P.C., neither the decreetal money was deposited nor an application was moved under Section 17 of the Act, 1887 to furnish the security in lieu of the decreetal money. The provisions of Section 17 of the Act, 1887 are mandatory as has been held by the Apex Court in the case of **Kedarnath v. Mohan Lal Kesarwani & Ors**¹.

11. So far as the view taken by the Revisional Court for setting aside the order dated 30.5.2015 of rejection of application Paper No.4 Ga under Order IX Rule 13 C.P.C. is concerned, the contention is that the Revisional Court had erred in observing that since the application under Section 5 of the Limitation Act had been allowed on 2.3.2015 after imposing cost upon the applicant, there was no reason before the Court below to reject the application for recall of the ex-parte decree.

12. The submission is that any amount deposited after expiry of 30 days from the date of knowledge of the ex-parte decree cannot be accepted by the Court below. There is no provision under Section 17 of the Act, 1887 conferring power upon the Court to condone the delay for complying the condition to deposit the decretal money. For maintaining the application under Order IX Rule 13 C.P.C., substantial compliance of provisions of Section 17 of the Act, 1887 is mandatory.

13. Reliance is placed upon the Division Bench judgment of this Court in **Raj Kumar Makhija & Others v. M/s. S.K. And Co. & Others.** ². Learned counsel for the petitioner has also placed reliance upon the judgments of this Court in **Roshan Lal & Ors. v. Rishi Pal Singh & Ors.** ³ and in **Kusum Devi (Smt.) v. Ram Ji Verma** ⁴.

14. On the other hand, learned counsel for the respondent No. (1) namely Ram Prakash Pathak placing reliance upon the judgment of this Court in the cases of **Prem Chandra Mishra v. II Additional District Judge, Etah & Ors.** ⁵, **Prabhu Dayal v. The District Judge Saharanpur and Ors.** ⁶ and the decision in **Suresh Chand v. VIIth Additional District Judge, Muzaffarnagar & Ors.** ⁷, submits that looking to the summary nature of jurisdiction exercised by the Small Causes Court Act, the Court has to construe Section 17 of the Act, 1887 liberally to condone the delay so as to make the substantial compliance of the said provision otherwise it would be too harsh to non-suit the applicant. In the interest of justice, the insistence of the Court should be for decision on merits after opportunity and contest rather than ex-parte.

15. Referring to the observations made by this Court in **Suresh Chand** (supra), it is stated that Section 17 of the Act, 1887 being procedural in nature has to be interpreted in such a way that it may advance justice and facilitate to meet its end.

16. The object of Section 17 of the Act, 1887 is to ensure that the decree holder/landlord is not harassed at the hands of unscrupulous applicant/tenant who has avoided receipt of summons or the proceedings before the trial court and moved application for setting aside the ex-parte decree at the later stage on the pretext that they were not aware of the decree.

17. In the present case, the respondent No.1 moved an application under Section 17 of the Act, 1887 with due diligence, before, the application under Order IX Rule 13 C.P.C. was presented/came up for hearing before the Court below. The interest of the landlord has been duly protected by the Court below by allowing the applicant-tenant to furnish security in lieu of the decretal money. After application under Section 17 of the Act, 1887 was allowed on 17.7.2013 and the order was affirmed in Revision, there was no occasion before the trial Court to reject the application Paper No.4 Ga under Order IX Rule 13 C.P.C by a subsequent order dated 30.5.2015.

18. The Revisional Court had rectified the mistake by passing order dated 1.2.2016 and rightly directed the trial court to decide the application under Order IX Rule 13 C.P.C. on merits.

19. Having heard learned counsel for the parties and perused the record.

20. There is no dispute about the fact of filing of the application under Section 17 of the Act, 1887 subsequently by the tenant. The application for recall of the ex-parte decree was filed on the ground that the summon or notice was never received by the applicant as he was not residing in Varanasi.

21. In the application for recall of ex-parte decree, the applicant states that he came to know about the ex-parte decree only on 26.7.2011 and thereafter on the legal advice of his counsel, he moved an application on 6.8.2012 for recall of the ex-parte decree dated 9.12.2011 and further moved an application dated 14.8.2012 for condoning the delay in moving the said application. However, no application under Section 17 of the Act, 1887 was filed till 12.9.2012 when for the first time, the applicant-tenant pleaded that he was ready to furnish security in lieu of the decreetal money from March 2008 till September 2012.

22. The Judge Small Causes Court allowed this application on 17.7.2013 on the premise that the request to furnish the security could be accepted till the date of disposal of the application under Order IX Rule 13 C.P.C. It has failed to consider that under Article 123 of the Limitation Act, 1963, the application to set aside ex-parte decree has to be moved within a period of 30 days from the knowledge of the decree. The delay, if any, in presentation of application under Order IX Rule 13 C.P.C. has to be explained in the application itself.

23. Moreover, as per proviso to Section 17 of the Act, 1887 the decreetal money has to be deposited by the applicant at the time of presentation of application for setting aside the ex-parte decree or in alternative the application can be moved for furnishing security for the performance of the decree. That means the applicant who is seeking an order to set aside the ex-parte decree has to deposit the decreetal money due from him in the Court within 30 days from the knowledge of the decree or move an application under the proviso to Section 17 of the Act, 1887 to furnish security for the performance of the decree.

24. It is a settled law that the provisions of Section 17 of the Act, 1887 are mandatory and non-compliance thereof would be fatal for the applicant who seeks for setting aside of the ex-parte decree (Reference to "Kedar Nath" (supra)). It is also settled that there is no provision under Section 17 of the Act, 1887 conferring power on the Court to condone the delay in compliance thereof. The provisions of Section 5 of the Limitation Act have no application and any delay in compliance of the proviso to Section 17 of the Act, 1887 cannot be condoned by the Court (Reference to "Raj Kumar Makhija" (supra)). The applicant has no choice. In order to maintain the application for setting aside the ex-parte decree, the applicant has to fulfill any of the alternative conditions provided in the proviso to Section 17 of the Act, 1887.

25. In case such a condition is not fulfilled, there cannot be any valid presentation of the application for setting aside the ex-parte decree. If there is no valid presentation, the Court cannot assume jurisdiction. The question of entertaining application under Order IX Rule 13 C.P.C. for setting aside the ex-parte decree goes to the root of assuming the jurisdiction by the Court. The Court cannot assume

jurisdiction inasmuch as in absence of compliance of such condition, there is no application in the eye of law. The object behind Section 17(1) of the Act is to protect the interest of the landlord from further harassment and to secure/ensure payment of rent and to put the unscrupulous tenant to term to deposit the rent due against him before giving the opportunity of asking for consideration of application for setting aside the ex-parte decree.

26. In the instant case, admittedly the tenant did not move the application under proviso to Section 17 of the Act, 1887 for furnishing of security for a period of more than 30 days from the knowledge of the ex-parte decree and moreover the application under Order IX Rule 13 C.P.C. was not accompanied by a deposit in the Court of the amount due from the applicant under the decree. There is no compliance of any of the conditions provided in the proviso to Section 17 of the Act, 1887 at all before moving the application under Order IX Rule 13 C.P.C. much less the substantial compliance by the applicant-tenant.

27. The reliance placed by the learned counsel for the petitioner upon the judgments of this Court in **Prem Chandra Mishra** (supra), **Suresh Chand** (supra) & **Prabhu Dayal** (supra) is misplaced inasmuch as the said cases are distinguishable on the facts and circumstances of the present case.

28. In view thereof, the order dated 1.2.2016 passed by the Revisional Court namely the Additional District Judge, Court No.8, Varanasi in S.C.C. Revision no.17 of 2015 cannot be sustained in the eye of law. The order passed by the S.C.C. Court dated 17.7.2013 on application 13 Ga passed by the Revisional Court is wholly without jurisdiction. The order dated 15.9.2014 passed by the Revisional Court in S.C.C. Revision No.21 of 2013, accordingly, cannot be sustained.

29. Consequently, the order dated 17.7.2013 passed by the Judge Small Causes Court in Misc. Case No.83 of 2012 (Ram Prakash Pathak v. Nagendra Upadhyay), the order dated 15.9.2014 passed by the Additional District Judge, Court No.9, Varanasi in S.C.C. Revision No.21 of 2013 (Panchayat Akhara v. Ram Prakash Pathak & Anr.) and the order dated 1.2.2016 passed in S.C.C. Revision no.17 of 2015 are hereby set aside. The order dated 27.5.2016 in Misc Case No.83 of 2012 is also liable to be set aside.

30. The order dated 2.3.2015 passed on application under Section 5 of the Limitation Act is of no consequence.

31. All three connected petitions namely the Matter under Article 227 No.2023 of 2016 (Shri Panchayati Akhara Mahanirvani Vaidik Sanatan Bhartiya Dharmik Sanskriti Sansthan v. Ram Prakash Pathak & Anr.), the Writ Petition No.58290 of 2014 Shri Panchayati A.M.V.S.B.D.S. Sansthan v. A.D.J. Varanasi & 3 Ors.), & Matter Under Article 227 No.5539 of 2016 (Shri Panchayati Akhara Mahanirvani V.S.B.D.S.S. v. Ram Prakash Pathak & Anr.) are, consequently, **allowed**.

32. No order as to cost.

33. The consequences of this order will follow.

(2016) 8 ILRA 18
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.08.2016

BEFORE

THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Application U/S 482 No.- 25129 Of 2016

Subhash Mittal

...Applicant
Versus

State Of U.P. & Anr.

...Opposite Parties

Counsel for Applicant:

Virendra Singh

Counsel for Opposite Parties:

G.A.

Held

In proceedings under **Section 138 of the Negotiable Instruments Act**, the primary consideration is whether:

the cheque was issued in discharge of a **legally enforceable debt or liability**, and it was **dishonoured**.

Issues like whether the complainant is a licensed money lender are **irrelevant** in such proceedings.

At the stage of summoning, the court only needs to see whether **prima facie case** exists; detailed examination of facts is not required.

Minor irregularities regarding **service of notice or timing of complaint** do not vitiate proceedings if:

prima facie compliance appears, and no prejudice is caused to the accused.

Questions regarding actual service of notice are **matters of trial**.

The plea that cheque was **lost and intimation was given to bank/police** is a **defence issue**, requiring evidence, and cannot be adjudicated in proceedings under Section 482 CrPC.

Dishonour of cheque due to **"stop payment" instructions** by the drawer **still attracts Section 138 N.I. Act**, as it implies non-availability of funds for honoring the cheque.

Inherent jurisdiction under **Section 482 CrPC** cannot be exercised when:

the trial court has acted on prima facie material, and disputed facts require evidence.

Since no illegality or impropriety was found in the summoning order, the application for quashing was **dismissed**.

CASE LAW CITED

None

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. In Complaint Case No. 541/IX/2015 (Ram Chandra Sharma Vs. Subhash Mittal) the Court of Judicial Magistrate, Chhata, District Mathura had passed order dated 11.6.2016 by which applicant was summoned for prosecution of offence under section 138 N.I. Act. The summoning order as well as proceeding of said complaint case has been challenged by applicant through present application.

2. Heard counsel for the applicant and AGA and perused the record.

2. Counsel for the applicant contended that in complaint it is mentioned that complainant had given amount of cheque as loan, but he has no licence for profession of money lending. His further contention was that date of service of legal notice after dishonor of cheque was not proved, therefore there is no evidence that complaint was filed after lapse of period of 15 days after service of notice, which is illegality. His another submission was that the applicant's cheques were lost about which police and bank were informed and payment of those cheques were stopped under direction of applicant. In such matter provision of section 138 N.I. Act are not attracted. On the basis of these contentions, it was argued on behalf of applicant that proceedings of trial court should be quashed.

3. So far the contention of no evidence of complainant being money lender is concerned, it is totally unacceptable in proceedings under section 138 of N.I. Act. In such proceeding only this has to be seen as to whether cheque relating to any debt or liability was given to complainant it was dishonoured or not. In present matter there has been prosecution case that for discharge of his liability of loan applicant had handed over the cheque in question to complainant which was dishonoured.

4. So far alleged irregularity about service of notice and filing of complaint is concerned, this contention is also unacceptable. The trial court had observed in impugned order that after dishonour of cheque the complainant has sent registered notice dated 20.3.2015 to applicant and thereafter filed complainant on 7.4.2015. Although, it is not specifically mentioned in this order that after lapse of 15 days' period of service of registered legal notice the complaint was filed, but it is apparent that after about 18 days of sending registered notice, complaint was filed, and it was prima facie found sufficient by trial court at the time of passing the impugned order. In any case, due to this fact no prejudice was caused to applicant. Although it is also contended that legal notice was not served, but this is a fact that will have to properly scrutinized at the proper time during trial by trial court.

5. The another contention of counsel for the applicant is that before institution of the complaint, the bank and police were informed about loss of cheques. This fact may be correct, but whether it has been done in bona fide manner or with malafide intention, is a matter of evidence that can be appreciated only when evidence in that regard are adduced by both the sides.

6. The last argument of counsel for the applicant was that cheque was not dishonoured for any other reason but was dishonoured because payment was stopped by complainant side, therefore prosecution u/s 138 N.I. Act cannot be carried out in this matter. In this regard, provision of Section 138 of N.I. Act specifically provides that if cheque is dishonoured or returned by bank unpaid either because of amount of money extending to the credit of that account is insufficient to honour the cheque or other reason mentioned in this section, the prosecution may be carried out. The direction of drawer of cheque to bank for not honouring the cheque, in fact, amounts to the fact that amount of money for payment to drawee in relation to that cheque was not sufficient in bank.

7. The summoning order is passed on the basis of prima facie evidence. In present matter trial court has found that cheque relating to bank account of the applicant, when presented in Bank, was dishonoured under direction of applicant and thereafter on service of legal notice within time the amount of cheque was not paid. Prima facie there appears no illegality or impropriety in the proceeding being carried out by trial court that may require exercise of inherent jurisdiction of this court. Therefore, this application is dismissed.

(2016) 8 ILRA 21
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.08.2016

BEFORE

THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Application U/S 482 No.- 25226 Of 2016

Dwarika Prasad	...Applicant
	Versus
State Of U.P. & Ors.	...Opposite Parties

Counsel for Applicant:
Vinod Singh

Counsel for Opposite Parties:
G.A.
Held

At the stage of considering a complaint under **Sections 200 and 202 CrPC**, the Magistrate must be satisfied that a **prima facie case** exists for summoning the accused.

The Magistrate is **not bound to accept all evidence at face value**; he can assess whether the evidence is **reliable or believable** before issuing process.

If upon evaluation of evidence the Magistrate finds the complaint **doubtful or not credible**, he is justified in dismissing it under **Section 203 CrPC**.

The revisional court and High Court (under **Section 482 CrPC**) **cannot reappraise evidence** merely because another view is possible.

Interference under inherent jurisdiction is warranted **only when findings are perverse or illegal**; not when the trial court has taken a plausible view based on material on record.

Where the trial court, after proper consideration, finds that **no prima facie case is made out**, dismissal of complaint is valid and does not call for interference.

Since the findings of the trial court were not perverse and were based on evaluation of evidence, **no interference was warranted**, and the application was **dismissed**.

CASE LAW CITED

M/s Pepsi Foods Ltd. & Anr. vs. Special Judicial Magistrate & Ors. (1998 SC 128)

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. Heard learned counsel for the applicant, learned AGA and perused the records.

2. The complaint case no. 336 of 2015 (Dwarika Prasad Vs. Sukharm and others) was filed for prosecution of opposite parties under Section 147, 148, 149, 452, 354, 323, 504 and 506 IPC for alleged maltreatment and molestation of wife of complainant by eight

opposite parties including a lady. After accepting evidences under Section 200 and 202 Cr.P.C., the ACJM, Court No.-5 had passed order dated 2.4.2016, by which said complaint was dismissed under Section 203 Cr.P.C.

3. Against said order of trial court, Criminal Revision no. 252 of 2016 (Dwarika Prasad Vs. State of U.P.) was preferred by complainant, which was dismissed by the judgment dated 23.7.2016 of Sessions Judge, Aligarh, by which order dated 2.4.2016 of trial court was confirmed. Against said orders of trial court as well as the revisional court, present application has been moved for exercising inherent jurisdiction and with request to pass order of cognizance and summoning against proposed accused persons/ opposite parties no. 2 to 9 of this application.

4. Learned counsel for the applicant contended that trial court had not considered the evidences of complainant side, especially evidence of victim who had stated about alleged misbehavior committed against her wife wearing of dress and molestation. Therefore, impugned order dated 2.4.2016, which has been passed without properly appreciating evidences of complainant side, was erroneous and is liable to be quashed. He pointed out that this point was not considered by revisional court so order of revisional court is also erroneous.

5. Learned AGA has refuted these contentions and pointed out that on one hand applicant himself is absconding from the legal proceedings initiated against him by criminal court, and on other hand he is attempting to take help of court in present matter. He pointed out that there is no illegality or impropriety in the impugned orders.

6. This is a fact that in support of complaint, evidences under section 200 and 202 Cr.P.C. were adduced including evidence of the alleged victim, but after going through them and considering other facts, the trial court had found the complaint case doubtful and also held that there is no prima facie case established for summoning the proposed accused persons. In the impugned order, trial court had also cited a case of '*M/s. Pepsi Foods Ltd. And other Vs. Special Judicial Magistrate and other 1998, SC 128*' and accordingly passed impugned order for dismissing the complaint under Section 203 Cr.P.C. with finding that prima facie case for summoning the proposed accused is not made out.

7. This contention of applicant side is not incorrect that witnesses of complainant side had given evidences during enquiry under Section 200 and 202 Cr.P.C. in support of the complaint case, but in spite of those evidences, the trial court had not found them believable at its face value.

8. At the time of passing order of cognizance or summoning, the Magistrate is not expected to accept every evidence adduced before it by its words or on its face value, if it is found unreliable or unacceptable to him. For passing such order, the satisfaction of Magistrate should be the basic consideration.

9. In present case trial court had rightly relied on aforesaid judgment of *M/s. Pepsi Foods Ltd.* case and had given finding that from available evidences, *prima facie* case is not made out and complaint version is not believable. Neither revisional court nor this court under inherent jurisdiction are expected to reappraise the evidences only on the ground that on the basis of evidences adduced before the trial court, there may be probability of reaching to one such conclusion which is different from that of conclusion of reached by trial court on basis of finding of fact, especially when the findings of trial court are not found altogether perverse. This is the case in present matter. Therefore, this court does not find any reason to exercise inherent jurisdiction to interfere in this matter.

10. Accordingly, this application is dismissed.

(2016) 8 ILRA 24
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.08.2016

BEFORE

THE HON'BLE ARVIND KUMAR TRIPATHI, J.
THE HON'BLE MUKHTAR AHMAD, J.

Criminal Appeal No.- 2776 Of 1983

Ram Gopal

...Appellant

Versus

State Of U.P.

...Respondent

Counsel for Appellant:

Tej Ram

Counsel for Respondent:

Dga

Held

The prosecution must prove its case beyond reasonable doubt; where the evidence is doubtful or unreliable, the accused is entitled to benefit of doubt.

If the presence of eyewitnesses is doubtful and their version is inconsistent with medical or surrounding circumstances, their testimony cannot be safely relied upon.

Non-examination of material witnesses (e.g., eyewitnesses present at the scene or crucial persons like the scribe of FIR) weakens the prosecution case.

Where the FIR itself becomes doubtful (e.g., scribe not supporting prosecution or stating it was dictated by police), the entire prosecution story becomes suspect.

Delay in recording statements of witnesses and absence of explanation for such delay creates serious doubt about the prosecution version.

Failure to recover alleged weapons of offence and absence of corroborative evidence further weakens the prosecution case.

Where conduct of witnesses appears unnatural (e.g., failure to intervene or save victim), their testimony becomes unreliable.

If the prosecution story is inconsistent with medical evidence or surrounding facts, it cannot be accepted.

In such circumstances, conviction cannot be sustained, and the accused must be acquitted giving benefit of doubt.

Accordingly, the conviction under Section 302/34 IPC was set aside and the appeal was allowed.

CASE LAW CITED

None

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

1) Instant Criminal Appeal has been preferred challenging the impugned order of conviction and sentence dated 26.9.1983 passed by learned VIIth Additional District & Sessions Judge, Bareilly in S.T.No.366/1981 under section 302 read with section 34 of I.P.C. arising out of Case Crime No.389/1981, Police Station Baradari, District Bareilly.

2) The appeal was admitted on 17.11.1983 and the prayer for bail of the appellants was allowed on the same day. As per office report, Ram Gopal, the appellant no.1 has died and the appeal in respect of him stands abated vide order dated 5.1.2016.

3) There is only sole surviving appellant Hasia alias Hansia r/o Kalibari, PS.Baradari, District Bareilly. None appeared on her behalf. Warrant was issued and she was brought before this Court in custody on 11.7.2016. Since she was not in a position to engage any counsel, hence on her request Shri Harish Chandra Tiwari, Advocate was appointed to appear as 'Amicus Curiae' on her behalf.

4) Shri H.C.Tiwari, learned counsel (Amicus Curiae) appeared for the appellant, Shri Virendra Singh Yadav, learned A.G.A. for the State of U.P. We heard the arguments of counsel for the parties and judgement was reserved on 20.7.2016.

5) The brief facts of the prosecution story is that the First Information Report was lodged by Mohan Lal s/o Baburam, Mohalla Siklapur, PS.Baradari, District Bareilly written by one Bhagwat Saran s/o Ram Charan, Mohalla Azamnagar on 21.6.1981 which was registered as Case Crime No.389/1981 under section 307 I.P.C. at 7.30 P.M. The informant Mohan Lal was residing in Mohalla Siklapur, PS.Baradari, Bareilly. His sister Jasoda Devi (deceased) was married to the appellant no.1 Ram Gopal s/o Narain, Mohalla Kali Bari. Thereafter his brother-in-law Ram Gopal married to another lady namely Hasia alias Hansia (appellant no.2). Since then Ram Gopal was in search of opportunity to kill her sister as he wanted to keep only Hansia alone with him in his house. On 21.6.1981 at about 6.00 P.M. his nephew (bhanja) Lalta Prasad s/o of the deceased came to his house and informed that his father was badly beating his mother. Immediately he rushed to the house of his sister Jasoda Devi (deceased) and saw that Jhamman Lal of the same Mohalla and his niece (Bhanji) Harpyari were present at the place of the incident and his brother-in-law, Bahnoi Ramgopal and second wife Hansia were badly beating his sister Jasoda Devi, with iron rod and lathi with an intention to kill her. Due to injuries his sister fell down and was crying. He and Jhamman Lal scolded to Ram Gopal and Hansia, then they went from there leaving his sister in injured condition. He brought his sister Jasoda Devi to the Hospital and got her admitted and after getting her admitted in the Hospital came to the Police Station for lodging of the First Information Report. The request was made to register the report and take legal action. The report was scribed by Bhagwat Saran s/o Ram Saran. The chick report was prepared by constable Puland Singh.

6) After the First Information Report was lodged and registered, the investigating officer came at the place of the incident and went to the hospital. Jasoda Devi was examined by the doctor and according to the injury report Ext.Ka.11 only one lacerated wound 3 cm x 5 cm x bone deep right side forehead, 3.5 cm above eyebrow was noted. X-ray was advised. Rest of of injuries were

deferred as the condition of patient was found very serious. She was admitted in emergency ward and the police was informed. According to opinion, the injuries were caused by blunt object and fresh. During treatment Jasoda Devi expired at 1.45 A.M. in the intervening night of 21/22.6.1981. Postmortem examination was conducted on the body of Jasoda Devi who was aged about 45 years, in District Hospital by Dr.P.K.Bass, Medical Officer, District Hospital. As many as six injuries were noted. Injury No.4 was found dangerous. Injury No.1 was found lacerated wound 2 cm x 1 cm x muscle deep on right side forehead, 3 cm above root of nose, No.2 abraded contusion 1 cm x 1 cm on outer angle of right eyebrow, No.3 Contusion 4 cm x 2 cm on the right side head, 5 cm above right ear, No.4 Contusion 6 cm x 4 cm on the left side, 4 cm above left ear, No.5 Contusion 6 cm x 4 cm on the back of left side of chest 5 cm below scapula, No.6 abrasion 1 cm x 1 cm on the back of left elbow joint Haemotoma present, all below scalp. Left side skull bone pressed fracture in temporal bone. Membrane and brain congested. The cause of death was head injury and coma due to head injury. The postmortem examination report was exhibited as Ext.Ka 17.

7) From place of the incident blood stained and simple piece of cemented floor was taken for sample into two separate containers. Broken bangles were also collected from the place of the incident as Ext Ka.9 and kept in container by the Sub Inspector. Samples were sent to the Forensic Science Laboratory and as per report blood stains were found on the pieces of cemented floors, dothi and petikot. Panchayatnama was prepared. Statement of the witnesses were recorded by the Investigation Officer. After death the case was converted under section 302 I.P.C. and after completing investigation and formalities, charge sheet was submitted by the second Investigating Officer Man Singh Sirohi, PW-12. The charges were framed by the 5th Additional District & Sessions Judge, Bareilly under section 302 I.P.C. on 4.12.1981. The accused appellant denied the charges and pleaded to be tried.

8) The prosecution to prove its case examined as many as 15 witnesses. PW-1 Mohan Lal, the informant, brother of the deceased Jasoda Devi, PW-2 Har Pyari, daughter of the deceased, PW-3 Jawala Singh who prepared panchyatnama in the hospital, Ext.Ka.3-4, The dead body was kept in sealed cover and the same was sent to the mortuary through constable Manohar Lal, PW-6, Ext.Ka.6 requesting him for postmortem examination on the body of the deceased Jasoda Devi and second Investigating Officer Man Singh took up the investigation next day on 22.6.1981, PW-4 Ram Autar Arun, the then Sub Inspector, PS Baradari before whom the First Information Report was lodged and chick report was prepared and he started investigation, PW-5 Sahadat Ali, Formasist who proved the injury report, prepared by Dr.Rajiv Agrawal, PW-6 the then Moharir who carried the dead body to the mortuary, PW-7 Din Das Ward Boy proved the death of Jasoda Devi at 1.45 P.M. in the intervening night 21/22.6.1981, PW-8 Head Moharir Ram Chandra Singh proved chick report and G.D. entry which was prepared by the then constable Puland Singh, PW-9 Dr. P.K. Boss the then Medical Officer, District Hospital who conducted the postmortem examination on the body of the deceased Jasoda Devi, PW-10 Sishupal Singh who was moharir in malkhana, kept the sample and deposited the same, PW-11 constable M.A.Beg, who carried the sample of pieces of cemented floor, bundle of clothes, keel of the deceased, broken bangles and bichhua of the deceased from Malkhana, PS. Baradari and deposited the same in Sadar Malkhana, PW-12 Sub Inspector, Man Singh Sirohi, the second Investigating Officer who took up the

investigation, next day on 22.6.1981 and submitted the charge sheet against the appellants under section 302 I.P.C., PW-13 constable Puland Singh who prepared chick report, PW-14 Om Pal Singh who carried three sealed bundles related with the case and placed before the Chief Medical Officer, PW-15 Dr.Rajiv Agrawal who examined Jasoda Devi when she was brought in injured condition on 21.6.1981.

9) After prosecution closed its evidence the statement of the accused appellants Ram Gopal and Hasia were recorded under section 313 Cr.P.C. They denied the allegations and charges and submitted that they were falsely implicated in the case. Further stated that in fact Har Pyari, PW-2, daughter of the deceased had developed illicit relation with a boy which was not liked by the deceased Jasoda Devi, hence some altercation took place in between them. When she (appellant) tried to intervene, she was also assaulted. Smt.Bhagwati was also present there. Further stated that the appellant Ram Gopal was not present at the time of incident. From defence two witnesses were examined. DW-1 Anil Kumar clerk State Bank of Bikaner and Jaypur to prove that one Om Prakash, one of the alleged witness of panchayatnama was in fact present on duty in the bank where he was class-IV employee. Scribe of the First Information Report namely Bhagwat Saran was examined as DW-2. According to him, his marriage was performed with Bhagwati eight years ago and at the time of marriage his both mother-in-laws Jasoda Devi and Hansia were present and participated in the marriage ceremony. They had cordial relations. After the incident he was in sadar hospital when he was called by Ganeshi Mama, the brother of Mohan Lal. He stated that he wrote the First Information Report on the dictation of the sub inspector, thereafter Ganeshi Mama put his thumb impression on the report, whose name was referred and mentioned as Mohan Lal. Paper and pen were provided by the inspector for writing the report. He also stated that Har Pyari, his sister-in-law PW-2 had illicit relation with one Lalta Prasad and after her statement was recorded in the court, she went to the house of Lalta Prasad and started living with him as wife. She also gave birth to a male child.

10) After hearing the argument of counsel for the parties and going through record, the trial judge held the appellants guilty for committing murder of Jasoda Devi and they were convicted and sentenced for life imprisonment vide impugned judgment dated 26.9.1983. Being aggrieved against which the present appeal was preferred.

11) Shri Harish Chandra Tiwari, learned counsel appearing as Amicus Curiae challenged the impugned judgment on the ground that none of the witnesses of fact examined by the prosecution were present at the place of the incident. PW-1 Mohan Lal was not present at the place of the incident. According to prosecution case he was informed by Lalta Prasad, minor son of Jasoda Devi (deceased), sister of the informant. After getting information he rushed to the place of the incident and as per averment his house was at a distance of 50-60 steps away from the house of the deceased. However, according to his averment and statement of PW-2 Har Pyari, daughter of the deceased, when Ram Gopal, the appellant no.1 (dead) and Hasia, appellant no.2 started beating to the deceased Jasoda Devi then Har Pyari, sent Lalta Prasad (son of the deceased) who was aged about 10-12 years old to inform Mohan Lal, brother of the deceased Jasoda Devi. When he came to know, he reached and saw that the appellants were beating with kick- fist and by saria (iron rod)

and lathi, Ram Gopal was having saria and the appellant assaulted with lathi. In the injury report only one lacerated wound was noted and in the postmortem examination report six injuries were noted. (1) lacerated wound and 2 to 5 contusion which appear to be unnatural that the appellants continued to assault to her, during that period when Lalta Prasad went to the house of informant and thereafter the informant reached at the place of the incident. Lalta Prasad, son of the deceased was not examined by the prosecution.

12) From a perusal of the injury report it is clear that the injured Jasoda Devi was brought by Smt.Bhagwati, elder daughter and she was examined at 6.00 P.M. on 21.6.1981 by Dr.Rajiv Agrawal. Had Mohan Lal, PW-1 and Har Pyari, PW-2 were present, they might have tried to save her and got her admitted in the hospital for medical aid. It also shows that Mohan Lal was also not present at the place of the incident. According to opinion of the doctor injury no.4 was fatal and dangerous to life and due to injury no.4 death was possible which might have been caused by lathi. He also submitted that according to prosecution case Jhamman Lal, brother of the appellant no.1 Ram Gopal was present who was not examined. However, there was no attempt either by PW-1 or by Jhamman Lal to save Smt.Jasoda Devi who was first wife of the appellant no.1 Ram Gopal and the appellant no.2 Hasia is second wife of Ram Gopal. Smt.Jasoda was brought by Smt.Bhagwati and she was got admitted in the hospital at 6.00 P.M. According to PW-7 Dharam Das, Ward Boy, District Hospital and record, she died at 1.45 A.M. in the intervening night of 21/22.6.1981. However, there was no effort to record her statement.

13) Counsel for the appellants further submitted that the statement of Har Pyari was recorded after 21-22 days so there was delay in recording her statement. There was no recovery of lathi and saria. The statement of the witnesses were recorded on 13.7.1981. According to Investigating Officer PW-12 Man Singh, he searched the witnesses for recording their statements.

14) According to defence version and statement of PW-1 Ram Gopal, marriage with Hasia was performed 10-12 years before the incident. On the same day at 9.00 P.M. he was arrested from the hotel which was in the same house. The Distance in between the place of the incident and house of Mohan Lal and Ganesh was about more than one kilometre. However, according to defence case and statement of DW-2 Bhagwat Saran (scribe of the First Information Report) Bhagwati and Har Pyari, PW-2 were present in the house. The appellant Ram Gopal was not present there. PW-2 Har Pyari, daughter of the deceased Jasoda Devi had illicit relation with one boy. She wanted to go along with him which was opposed by the deceased Jasoda devi. Due to that some altercation took place and she was assaulted by PW-2 Har Pyari DW-2, further stated that he wrote the First Information Report on direction of the Sub Inspector and signed on that. He is also son-in-law of Ram Gopal and the deceased Jasoda Devi. His marriage was performed eight years ago and at the time of marriage, both mother-in-laws namely Jasoda Devi and Hasia (appellant no.2) were present. Both performed Kanyadan, hence the existence of the First Information Report itself become doubtful. However, the trial court failed to appreciate the defence version. Though the prosecution failed to prove its case beyond reasonable doubt, the prosecution story was found suspicious, however, the appellants were held guilty, hence the impugned judgment of conviction and sentence is liable to be set aside.

15) Learned Government Advocate submitted that except minor contradiction and negligible discrepancy there is no major contradiction to affect the merit of the case. The witnesses whose statement are reliable, have supported the prosecution case. PW-1 Mohan Lal, informant is brother of the deceased. After getting information through Lalta Prasad, son of the deceased. According to him the distance from his house was about 50-60 steps away from place of the incident and after getting information he rushed to the house of the deceased. She was immediately taken to the hospital and after admitting Jasoda in the hospital Mohan Lal, PW-1 went to lodge the First Information Report. As per evidence and statement of PW-1 and PW-2 the deceased was legally married wife of Ram Gopal, appellant no.1 (since dead) and the appellant no.2 Hasia is second wife. Due to that quarrel used to take place in between the husband and wife and even he used to slap her. Her husband Ram Gopal also used to threat her to kill. On the date of incident i.e. in the evening of 21.6.1991 at about 5.00 P.M. both the appellant Ram Gopal and Hasia stated that the appellants were beating to the deceased Jasoda. The appellants assaulted with kick-fist and saria and lathi. Injury No.4 was found dangerous to life and death was possible due to that injury which was caused by lathi. The appellant no.2 was having lathi and appellant no.1 Ram Gopal assaulted with saria. Merely on the delay in recording the statement the prosecution story cannot be disbelieved because in the present case both the witnesses are reliable witnesses. Their presence are not doubtful. PW-2 is daughter of the deceased and PW-1 Mohan Lal, is brother of the deceased. There was no reason of false implication. The incident took place in the house of the appellants though according to defence case the appellant no.1 was not present in the house but no reliable evidence was placed whether he was present at the time of incident or not? However, defence made the allegation against PW-2 Har Pyari, daughter of the deceased and appellant no.1, that she was having love affairs and illicit relation with a person, on which the deceased raised objection and some quarrel took place in which she was assaulted by PW-2 Har Pyari and Bhagwati, the elder daughter of the deceased. The appellant no.2 Hasia tried to intervene, hence she also received injuries but the fact that Har Pyari was having illicit relation, subsequently she went alongwith him and gave birth to a child, was not proved by the defence. It appears that in defence false story was set up without any reliable evidence to support the same. Learned A.G.A. further contended that though DW-2 Bhagwat Saran, son-in-law of the appellant no.1 has not supported the prosecution case who is scribe of the First Information Report but it appears that due to pressure and influence of his father-in-law he has not supported the version of the First Information Report.

16) So for as Jhamman Lal, brother of the appellant no.1 is concerned, he was present at the place of the incident but being brother of the appellant no.1 if he did not appear as prosecution witness merely on this ground also prosecution story has not to be disbelieved. The prosecution case proved by PW-1 and PW-2 is also corroborated by the medical report.

17) Learned A.G.A. submitted as per version of the DW-1, PW-1 was not Mohan Lal rather he was Ganeshi, elder brother of Mohan Lal but there was no effort or any application on behalf of the defence to prove this fact that PW-1 who appeared as Mohan Lal was in fact not Mohan Lal rather he was Ganeshi, elder brother of Mohan. Merely on this defence version, prosecution story has not to be disbelieved.

18) Hence the appeal being devoid of merit is liable to be dismissed.

19) Considered the submissions of counsels for the parties and perused the records.

20) Admittedly the appellant no.1 Ram Gopal (since dead) was married to the deceased Jasoda Devi. According to prosecution case about two and half years back he remarried with Hasia appellant no.2 and since then he was in search of opportunity to remove and kill Smt.Jasoda and quarrel used to take place in between them. The First Information Report was lodged and registered by Mohan Lal, brother of the deceased Smt.Jasoda Devi. According to version of the First Information Report, on 21.6.1981, informant got information through his Bhanja (Lalta Prasad), son of the deceased Jasoda Devi at about 6.00 P.M. that his father was badly beating to his mother. Immediately he rushed to the house of his sister Jasoda Devi and saw that Jhamman Lal, brother of Ram Gopal (appellant no.1) and niece Har Pyari PW-2 present at the place of the incident and his brother appellant no.1 and his second wife Hasia were beating with iron rod (saria) and lathi. His sister Jasoda Devi had fallen down on the floor and was crying. When Jamman Lal and informant scolded them, then they left the house leaving the injured Jasoda Devi. Thereafter he took her to the hospital and after admitting in the hospital he went to lodge the First Information Report at the Police Station Baradari, District Bareilly which was written by Bhagwat Saran.

21) The prosecution did not examine either Jhamman Lal, brother of Ram Gopal and Bhagwat Saran, scribe of the First Information. Subsequently Bhagwat Saran was examined as defence witness (DW-2) who has not supported the version of the First Information Report. According to him he was married to Bhagwati, elder sister of Har Pyari, PW-2, daughter of the deceased Jasoda Devi and the appellant no.1 eight years ago. There was good relation in between them, even Kanyadan of Bhagwati was performed by both the mother in-laws namely Jasoda Devi and Hasia, (the appellant no.2.). According to him Harpyari has illicit relation with a person. According to defence version of the appellant no.1 Ram Gopal who is father of Har Pyari, PW-2 she had illicit relation with a person with whom she wanted to marry and there was objection raised by her mother Jasoda Devi (deceased).

22) According to DW-2 Bhagwat Saran, scribe of the First Information Report, First Information Report was not dictated by PW-1 rather it was dictated by S.I. (Daroga Ji), hence this story that PW-1 saw the incident appears to be doubtful. There are six injuries noted by the doctor in postmortem examination report and according to the version of the First Information Report and the statement of PW-1, the appellants started beating at about 5.00 P.M. with kick fist and iron rod saria and lathi and when PW-1 got information at 6.00 P.M., then he rushed to the place of the incident. Hence if the versions of PW-1 and PW-2 are correct that Jasoda was beaten by kick fist, saria and iron rod continuously for more than one hour but she had sustained only six injuries, out of which injury no.1 was found dangerous to life which was cause of death and other injuries were simple in nature. The cause of death was due to head injury and coma. Injury No.4 noted as contusion 6 cm x 4 cm on the left side head, 4 cm above left ear, hence it appears that PW-1 reached at the place of the incident subsequently and he did not see who assaulted the deceased Smt.Jasoda Devi. Apart from that, from a perusal of the injury report and statement of Dr.Rajiv

Agrawal, the then Medical Officer, Jasoda Devi was brought by daughter Smt.Bhagwati, wife of DW-2 Bhagwat Saran who is scribe of the First Information Report. The statement that she was taken to the hospital by PW-1 appears to be incorrect. The presence of Bhagwati was not shown in the First Information Report or in the statement at the place of the incident and even she was not examined from the side of the prosecution, who is elder daughter of the deceased. The deceased was got admitted by her in the hospital by Bhagwati, hence it appears that she was present at the place of the incident and hence immediately Jasoda Devi was taken to the hospital and got admitted her in the hospital. According to defence case also Bhagwati was present in the house and as per information given to her husband Bhagwat Saran, quarrel took place in between PW-2 Har Pyari and the deceased Jasoda. The appellant no.1 was not present at the time of incident in the house. He came to know regarding the incident subsequently. It appears that he was not aware that he was named in the First Information Report and the allegation was made against him because in the same night he was apprehended from the hotel by the police. The hotel was being run in the house. The scribe has not supported the prosecution case. The statements of the witnesses were recorded on 13.7.1981 though the incident took place on 21.6.1981.

23) There was no recovery of saria, lathi even the statement of Har Pyari was recorded after 21 days. Smt.Jasoda Devi was got admitted in the hospital at 6.00 P.M. She died at 1.45 A.M. but her statement could not be recorded during this period, even Lalta Prasad, son of the deceased was not examined by the prosecution as witness whose presence was shown at the place of the incident. According to defence, the distance of the house of appellant No.1 was more than one kilometer. Apart from that according to prosecution case Jhamman Lal, brother of the appellant no.1 and Har Pyari-PW-2 were present at the place of the incident, Lalta Prasad, minor son was also present and when Jasoda Devi was being beaten by the appellant, no one tried to save her and such conduct appears to be unnatural.

24) In view of the facts and circumstances and in view of the above noted discussions, the prosecution story which have not been supported even by the scribe of the First Information Report, is doubtful. The prosecution failed to prove its case beyond reasonable doubt.

25) The incident is of the year 1981. The appeal is of the year 1983. In view of the facts and circumstances the sole surviving appellant no.2 Hasia is entitled for the benefit of doubt. Hence the impugned judgement and order of conviction and sentence dated 26.9.1983 passed by learned VIIth Additional District & Sessions Judge, Bareilly in S.T.No.366/1981 under section 302 read with section 34 of I.P.C. arising out of Case Crime No.389/1981, Police Station Baradari, District Bareilly is hereby set aside. The appellant is on bail, hence her bail bonds and sureties are hereby discharged.

26) Accordingly this appeal is hereby allowed. We appreciate the assistance provided by Mr.H.C.Tiwari(Amicus Curiae) and learned A.G.A.

(2016) 8 ILRA 32
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.08.2016

BEFORE

THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Service Single No.- 4838 Of 2016

Mritunjay Pratap Singh
State Of U.P. & Ors.

...Petitioner
Versus
...Respondents

Counsel for Petitioner:
Sharad Pathak

Counsel for Respondents:
C.S.C., Anu Pratap Singh, Durgesh Mishra, Manushreshth Mishra, Pradeep Kumar Singh
Held

Any administrative order which has **civil consequences must comply with principles of natural justice**, particularly *audi alteram partem* (right to hearing).

If an order is passed **without affording opportunity of hearing to the affected party**, it is vitiated and liable to be set aside.

Where pleadings regarding denial of opportunity are **not specifically denied by respondents**, the Court may accept such averments.

A statutory authority exercising power which adversely affects rights is **duty-bound to act fairly and follow natural justice**.

The impugned order rejecting approval of appointment was passed in **breach of natural justice**, hence unsustainable.

Consequently, the impugned order dated 15.02.2016 was **quashed and the matter remitted** to the competent authority for fresh decision after giving opportunity to all concerned parties.

Interim protection: If the petitioner is already working and receiving salary, he shall **continue subject to final decision**.

CASE LAW CITED

State of Orissa v. Dr. (Miss) Binapani Dei, (1967) 2 SCR 625

A.K. Kraipak v. Union of India, AIR 1970 SC 150

Maneka Gandhi v. Union of India, (1978) 1 SCC 248

Swadeshi Cotton Mills v. Union of India, AIR 1981 SC 818

S.L. Kapoor v. Jagmohan, (1980) 4 SCC 379

D.K. Yadav v. J.M.A. Industries Ltd., JT 1993 (3) SC 61

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J.)

1. The petitioner has preferred this writ petition under Article 226 of the Constitution for issuance of a writ of certiorari to quash the order dated 15th February, 2016 passed by District Basic Education Officer i.e. the third respondent whereby he has rejected the approval of the petitioner for the payment of his salary to a class-III post.

2. The essential facts of the case are; Adarsh Intermediate College, Rajgarh, Pratapgarh (for short, the "Institution") is a recognized Intermediate college. It was a Junior High School. Later, it was upgraded to intermediate level on 05.02.2013. But, it receives grant-in-aid out of the State funds only up to Junior High School. It is governed under the provisions of the U.P. Intermediate Education Act, 1921 and the U.P. Junior High School (Payment of Salaries of Teachers and other Employees) Act, 1978.

3. It is stated that a vacancy occurred in the post of clerk in the Institution due to retirement of one Vijay Pratap Mishra on 31.01.2011. The State Government had put a ban on the recruitment of non-teaching staff. In May, 2015 the ban was lifted. The Committee of Management sent a communication to the third respondent seeking his permission for appointment to said vacancy. Pursuant thereto the permission was granted by the third respondent on 07.07.2015. Consequent upon, the Committee of Management of the Institution issued an advertisement under the intimation to the third respondent, in two newspapers, namely, Hindustan and Amar Ujala. It appears that the third respondent nominated an official (Block Education Officer) as an observer in the selection committee. The interview was held on 14th August, 2015. It is stated that the petitioner applied in pursuance of the advertisement and appeared before the selection committee on 14th August, 2015 and was found suitable. The committee of management sent the papers to the third respondent for his approval. By the impugned order dated 15th February, 2016 the third respondent has rejected the approval on the ground that the Block Education Officer, who was nominated by him, has submitted two contradictory reports on 15.08.2015 and 18.08.2015.

4. Having regard to the aforesaid conflicting reports, the third respondent directed another official to make a preliminary enquiry who had also submitted a report. On the basis of the aforesaid three reports, the impugned order came to be passed.

5. A counter affidavit has been filed on behalf of the District Basic Education Officer. The stand taken in the counter affidavit is that the official, who was nominated for the selection committee, had submitted two contradictory reports. In the counter affidavit the details of

conflicting reports have been highlighted and it is stated that in view of those facts the impugned order has been passed by the third respondent.

6. I have heard Sri Sharad Pathak, learned counsel for the petitioner, learned Standing Counsel, Sri D.P. Singh Somvanshi, learned counsel on behalf of Surya Pratap Singh who has filed an application for intervention, and Sri Anu Pratap Singh, learned counsel appearing for the applicant-Mahesh Narain Tiwari who has filed impleadment application.

7. Learned counsel for the petitioner submits that the impugned order has been passed in utter violation of the principles of natural justice as no opportunity was given to the petitioner prior to passing the said order. He has drawn the attention of the Court to the averments made in paragraph nos. 4 & 26 of the writ petition, wherein the petitioner has averred regarding breach of the principles of natural justice.

8. Lastly, learned counsel for the petitioner submits that the papers relating to the recruitment were sent to the office of the third respondent on 18.8.2015 and since the third respondent has not taken the decision within stipulated period in terms of Rule-15 of the U.P. Recognised Basic School (Junior High School) Clerical Cadre Employees and Group-D Employees Recruitment and Service Rules 1984 it would be deemed approval and after the said period the Committee of Management has issued appointment letter to the petitioner.

9. Learned counsel for the intervenor has tried to satisfy the Court that the entire process of selection is vitiated on various grounds.

10. The first question which needs to be considered is whether the petitioner and the Committee of Management were given opportunity before cancelling permission to initiate recruitment process. The petitioner has pleaded that it was a case of no notice or opportunity. In that regard the petitioner has averred in paragraphs 4 and 26 of the writ petition which have not been specifically denied. Paragraph nos. 4 & 26 of the writ petition are extracted herein below:

"4. That the petitioner is aggrieved against the impugned order dated 15.02.2016 passed by the Opp-party No.3 by means of which the Opp-party No. 3 has rejected the application sent by the Opp-party No. 4 for grant of approval of selection and appointment of the petitioner on the post of Clerk in Junior High School of Adarsh Intermediate College, Rajgarh, District Pratapgarh, which College is receiving grant-in-aid from the State Government up to the level of Junior High School. The aforesaid impugned order dated 15.02.2016 apart from having been passed wholly illegally and arbitrarily, has been passed without providing any opportunity of hearing to the petitioner in utter violation to the principles of natural justice. The true copy of the aforesaid impugned order dated 15.02.2016 passed by the Opp-party No. 3 is being annexed herewith as Annexure No. 1 to this writ petition.

26. That despite there being nothing adverse against the petitioner, the impugned order dated 15.02.2016 has been passed by the Opp-party No.3 without affording any opportunity in the

matter either to the Opp-party No. 4 or to the petitioner in gross violation to the principles of natural justice and in that view of the matter the impugned order dated 15.02.2016 passed by the Opp-party No. 3 is liable to be set at naught by this Hon'ble Court."

11. A perusal of the reply, which has been extracted herein below, indicates that there is no specific denial on behalf of the third respondent in regard to affording opportunity to the petitioner. Paragraph No. 14 of the counter is extracted herein below:

"14. That the contents of para No. 24 to 32 of the writ petition filed by the petitioner as stated are not admitted hence denied. In reply thereto, the averments made in preceding paras of the instant are reiterated."

12. It is a trite law that if a statutory authority has power to do any act which will prejudicially affect a person, a duty is cast upon him to conform to norms of the principles of natural justice. An administrative order which involves civil consequences must be made consistently with the principle of audi alteram partem. It needs no elaboration that the decision maker must afford opportunity to a party who is likely to suffer from the order. It is not necessary to multiply the authorities on the aspect. Suffice would it be to refer some of the judgements of the Supreme Court in the case of **State of Orissa v. Dr. (Miss) Binapani Dei and Ors., (1967) 2 SCR 625; A.K. Kraipak & others v. Union of India & others, AIR 1970 SC 150; Msr. Maneka Gandhi v. Union of India and another, (1978) 1 SCC 248; Swadeshi Cotton Mills etc. v. Union of India etc., AIR 1981 SC 818; S.L. Kapoor v. Jagmohan and others, (1980) 4 SCC 379; and D.K. Yadav v. M/s J.M.A. Industries Ltd., JT 1993(3) SC 61.**

13. On a careful consideration of the submissions of the learned counsel on either side and relevant rules to which my attention was drawn, I am of the view that the impugned order dated 15.02.2016 has been passed in total breach of the principles of natural justice. It stands vitiated. It is, accordingly, set aside. The matter is remitted to the third respondent to consider the matter afresh after furnishing opportunity to the petitioner, Committee of Management of the Institution and the applicants who have filed impleadment application and application for intervention, in case they move any application. The said exercise shall be completed expeditiously preferably within four months.

14. In case the petitioner is working and is being paid his salary, he shall continue, his continuance shall abide by the fresh order to be passed by the third respondent.

15. With the aforesaid observations the writ petition stands allowed.

16. No order as to costs.

(2016) 8 ILRA 36
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.08.2016

BEFORE

THE HON'BLE RAJAN ROY, J.

Service Single No.- 5158 Of 2015
 &
 Connected With Other Cases

Abhishek Kumar Singh & Ors.	...Petitioners
	Versus
State Of U.P. & Ors.	...Respondents

Counsel for Petitioners:

Vidhu Bhushan Kalia, Ankit Pande, Birendra Pratap Singh, Laxmi Kant Pathak, Rajat Rajan Singh, Ravi Pratap Singh

Counsel for Respondents:

C.S.C., Abhishek Bose, Amit Bose, Dr L P Mishra, P.D.Verma, Pushkar Baghel, Vijay Kumar

Held

The writ petitions are **maintainable**; participation in the selection does not bar challenge where **illegality lies in the manner of selection**, not in the prescribed rules.

Rounding off of marks in the preliminary examination is **illegal**, as:

No provision exists in the **Service Rules, 2008** or Instructions Manual.

It allowed **ineligible candidates (<50%)** to participate further.

Statutory eligibility criteria must be **strictly adhered to**.

Horizontal reservation was wrongly applied:

Candidates selected under horizontal categories (women, ex-servicemen, etc.) were **wrongly placed en masse in the unreserved category**.

This violates **Section 3(3) of the U.P. Act, 1993**.

Horizontal reservation must be **category-wise (compartmentalized)**.

Calling **more than 3 times candidates** for Group Discussion:

Violates **Rule 15(f) of the 2008 Rules**.

Excess candidates must be **excluded**.

Use of whitener in OMR sheets:

Cannot be a ground for disqualification (as per Supreme Court).

Such candidates are **validly considered**.

Reserved category candidates on merit:

Can be selected against **unreserved posts** under Section 3(6).

State must periodically **review adequacy of representation**.

The **selection process is vitiated** due to:

Illegal rounding off,

Wrong application of horizontal reservation,

Violation of Rules in shortlisting.

Government Order dated 25.03.1994 is valid (intra vires):

Relaxation in age/fees does not affect merit-based selection.

Does not violate Articles 14 or 16.

The entire selection from the stage of **main written result onwards is quashed.**

Direction:

Re-evaluation and fresh selection to be conducted **strictly as per law.**

To be completed within **4 months.**

CASE LAW CITED

Om Prakash Shukla v. Akhilesh Kumar Shukla

Chandra Prakash Tiwari v. Shakuntala Shukla

H.C. Pradeep Kumar Rai v. Dinesh Kumar Pandey

Raj Kumar v. Shakti Raj

Madan Lal v. State of J&K

(Delivered by Hon'ble Rajan Roy, J.)

1. This is a bunch of writ petitions involving similar facts and issues relating to a challenge to the select list dated 25.06.2015 pertaining to selection to the post of Sub Inspector Civil Police and Platoon Commander held in pursuance to an advertisement issued on 19.05.2011 and also a challenge to paragraph 4 of the Government order dated 24.03.1994.

2. For convenience writ petition no. 5158 (SS) of 2015 has been treated as the leading writ petition and the facts mentioned hereinafter are based on its records.

3. Learned Advocate General initially contended that hearing of the matter be deferred on account of the reference made by a Division Bench of this Court in **Writ-A No. 40695 of 2005 (Ajay Kumar vs. State of U.P. And others)** as to what should be the mechanism for application of horizontal reservation in respect of various categories provided therein namely women, dependents of freedom fighter /physically handicapped etc. in the State of U.P. noticing a conflict in the ratio of **Rajeev Kumar vs State of U.P.** reported in **(2010) 7 SCC 708**. As this pleas was negated by a Coordinate Bench while deciding the case of **Writ-A 37599 of 2015 (Ashish Kumar Pandey and others vs. State of U.P. and others)** which has been upheld in Special Appeal and the mechanism for horizontal reservation is already mentioned in rule 3(3) of the Act, 1993 and clause 2.5 of the Instructions Manual as also the Government orders on the subject, including women reservation, and as the grounds of challenge in these petitions go beyond the question of application of horizontal reservation, therefore, this Court does not find any reason to defer the hearing of these writ petitions.

4. The selection in question was regulated by the Rules known as U.P. Sub-Inspector and Inspector (Civil Police) Service Rules, 2008 (hereinafter referred to as the 'Service Rules of 2008). As per the said Rules the selection was to comprise of a Physical Standard test [Rule 15(c)]; Preliminary Written test [(Rule 15(d)]; Physical Efficiency Test [Rule 15(e)], Main written examination [Rule 15 (f); Group Discussion (Rule 15(g); Tentative Select List [Rule 15(h)];

Medical Test [Rule 15(i)]; and Character verification [Rule15(j)]. Thereafter the appointment orders were to be issued. The physical standard test, preliminary written test, physical efficiency test, were to be of a qualifying nature and their marks were not to be added in the final merit.

5. Preliminary written test was to comprise of 200 marks. The candidate was required to secure 50% marks in the said test in order to be successful and for being called for the Physical Efficiency Test. In the physical efficiency test the male candidates were required to complete a run of 4.8 kilometers in 35 minutes female candidates were required to complete a run of 2.4 kilometers in 20 minutes. The main written examination was to comprise of 400 marks in various subjects and minimum fifty percent marks in each subject was necessary for being eligible for consideration for further selection. Having regard to the need for securing due representation of the candidates belonging to the Scheduled Castes, Scheduled Tribes and others under Rule 6, the Board was to prepare a list of successful candidates on the basis of marks obtained by them in the main written examination. The number of candidates selected in the main written examination as aforesaid were to appear in Group discussion to the extent of three times of the number of vacancies. The marks obtained by each candidate in main examination were to be added to the marks obtained by him in the Group discussion and on the basis of total marks obtained by each candidate as aforesaid, keeping in view the reservation policy, a tentative select list of each category of candidates in respect of vacancies was to be prepared and sent to the head of the department with recommendation, subject to medical test and verification of Testimonials/character, who was to undertake further action.

6. In the instant case the advertisement for the aforesaid selection was issued on 19.05.2011. The preliminary test was held on 11.12.2011. Its result was declared on 01.12.2013. The physical efficiency test was held between 05.02.2014 to 17.02.2014. On 14.09.2014 the main examination was held. Its result was declared on 23.04.2014 in which the petitioners were declared successful. Thereafter group discussion was held on different dates and the select list was issued wherein the names of the petitioners did not figure.

7. One writ petition was filed at Allahabad by **Ashish Kumar Pandey and others (supra)** challenging the same selection on the ground of erroneous application of horizontal reservation, wherein an interim order was passed staying the selection which was subsequently modified. The said writ petition was allowed on 16.03.2016 and the selection in question was quashed on the aforesaid ground. The opposite parties were directed to re-determine the merit list in terms of the direction issued therein. The aforesaid judgment was put to challenge by the State in Special Appeal No. 310 of 2015 wherein judgment was reserved. Subsequently it has been pronounced and the judgment of Hon'ble Single Judge has been upheld except to the extent, certain observations made therein unrelated to merits of the controversy, have been expunged. This development has taken place after the judgment was reserved in this case. As, in this writ petition the selection has been challenged on a number of grounds including those which were not raised in the aforesaid proceedings at Allahabad, therefore, it is necessary to decide these petitions on merits.

8. The total number of posts of Sub Inspector Civil police which were advertised for selection were 3698 out of which 777 were reserved for Scheduled caste, 74 were reserved for Scheduled Tribe, 998 were reserved for other backward class category and 1849 were for open/unreserved/general category. Total number of posts of Platoon Commander for selection were 312 out of which 66 were reserved for Scheduled caste, 6 were reserved for Scheduled tribe, 84 were reserved for other backward class category and 156 were for open/unreserved/general category. Thus the total number of posts advertised were 4010 out of which 843 were reserved for Scheduled caste, 80 for Scheduled tribe, 1082 for other backward class category and 2005 were for open/unreserved/general category.

9. Horizontal reservation for dependents of freedom fighter and ex-servicemen was 2% and 5% respectively. Under the Government orders such reservation for women was 20%.

10. The compartmentalized breakup of horizontal reservation provided for, in each social category, as worked out by the Board was as under:-

Open Category:

1. Women	370
2. Dependent of Freedom Fighter	37
3. Ex-Servicemen	92

OBC Category:

1. Women.	200
2. Dependent of Freedom Fighter	20
3. Ex-Servicemen	50

Scheduled Caste Category:

1. Women	155
2. Dependent of Freedom Fighter	16
3. Ex-Servicemen	39

Scheduled Tribe Category:

1. Women	15
2. Dependent of Freedom Fighter	1
3. Ex-Servicemen	5

11. The cut off marks of the respective categories at the final selection i.e. OC/OBC/SC/ST was as follows:-

1. Open category	- 328.5
2. OBC category	-316.0833
3. Scheduled Caste	-271.5
4. Scheduled Tribe	-235.4167.

12. 19 women candidates (9-General Category and 10-OBC) having obtained marks above the cut off marks for the open category were selected on open merit. Out of a total quota of 740 posts for women only 261 candidates could be selected, therefore, they were to be adjusted horizontally under the women quota. Likewise, candidates belonging to dependent of freedom fighter and ex-servicemen were to be adjusted horizontally.

13. As against 740 posts/vacancies reserved for women only 261 female successful candidates were available. As, except one all of them were, according to opposite parties, meritorious enough for appointment in the unreserved category and the 370 seats meant for the said category all of them were placed in the said category. Out of 200 seats for dependents of ex-servicemen based on horizontal reservation only 17 were available. Out of 200 posts 100 such posts fell for reserved category candidates whereas remaining 100 for unreserved category. As all 17 were meritorious enough to be appointed in General category, therefore, they were put in the said category. Similarly 37 dependents of Freedom Fighter were successful in the Sub-Inspector merit list against total seats of 80 (40 for unreserved and 40 for Scheduled Caste/Scheduled Tribe & Other Backward Class category), therefore, as all these were meritorious enough to be placed in unreserved category they were placed accordingly in the said category. Thus, all the candidates selected on the basis of horizontal reservation were adjusted against unreserved/open/general category and equal number of general candidates were ousted as a consequence thereof from the said category.

14. This Court on 04.11.2015 had recorded the points/questions which fell for consideration in these writ petitions, they are as under:-

1. Locus standi of the petitioners to maintain this writ petition challenging the criteria of recruitment after having participated in the selection process, specially the challenge to the government order dated 25.3.1994.

2. The permissibility of rounding off the percentage of marks for the purpose of eligibility for the main written examination, based on the marks secured in the preliminary examination, in the light of the pronouncement of the Supreme Court reported in (2011) 8 SCC 108.

3. Applicability of horizontal reservation for women dependents of Freedom Fighters and Ex-servicemen in the selection.

4. *The calling of more than three times candidates for the purposes of group-discussion in alleged contravention of U.P. Sub-Inspector and Inspector (Civil Police) Service Rules 2008 as well as the instructions issued in this regard, for the O.B.C. Category.*

5. *The alleged inclusion of candidates who had used Whitener in the O.M.R. Sheets, allegedly in contravention of the judgment of this court in the Case of Saket Kumar & ors. v. State of U.P.*

6. *The number of O.B.C. and other reserved category candidates who were called for recruitment under the unreserved category based on their merit, bereft of reservation, and its effect on the application of reservation, to the recruitment in the light of the dictum of a Constitution Bench of the supreme court in the case of R.K. Sabbarwal v. State of Punjab, 1995 SCC (2) 745.*

7. *Whether any prejudice is being caused to the petitioners assuming the aforesaid infractions, apart from the alleged illegalities.*

8. *Subject to the locus standi of petitioners, as referred above, the validity of the G.O. Dated 25.3.1994 and the application of the judgment of the Supreme Court rendered in the case of Jitendra Kumar v. State of U.P., 2010 3 SCC 119.*

15. The parties have exchanged their pleadings which have been perused. They have also filed written arguments which have also been perused. The parties were heard at length. Interveners and those seeking impleadment have also been heard through their counsel. As the stand of applicants seeking intervention or impleadment is the same as that of the official opposite parties, therefore, all such applications are disposed of with such right of hearing.

Point No. 1:

Locus standi of the petitioners to maintain this writ petition challenging the criteria of recruitment after having participated in the selection process, specially the challenge to the government order dated 25.3.1994.

16. The contention of the respondents herein is that the petitioners having participated in the selection in question unsuccessfully cannot turn around and challenge the same in view of the law declared by the Supreme Court in the case of ***Om Prakash Shukla vs. Akhilesh Kumar Shukla*** reported in 1986 (suppl) SCC 285; ***Chandra Prakash Tiwari vs. Shakuntala Shukla*** reported in (2002) 6 SCC 127; ***H.C. Pradeep Kumar Rai and others vs. Dinesh Kumar Pandey and others, (Civil Appeal No. 6549 of 2014)*** nor can they challenge the Government order dated 25.03.1994 as the same was in existence and was applicable to the recruitment in question prior to their appearing in the same but was not challenged by them earlier. In this regard they also relied upon the judgment of the Supreme Court in the case of ***Jitendra Kumar Singh and another vs. State of U.P.***

and others reported in **(2010) 3 SCC 119** as far as validity of paragraph 4 of the said Government order was concerned.

17. The petitioners on the other hand contend that considering the grounds on which the select list is being challenged, as, they relate to the manner in which the selection had been held in violation of the relevant Service Rules namely; U.P. Sub Inspectors and Inspectors (Civil Police) Service Rules, 2008 and the terms and conditions of recruitment contained in the Instructions Manual, as also other statutory provisions applicable to the selection, even a participant can challenge the same.

18. Having heard the parties and perused the record, the court finds that the petitioners have not challenged the criteria of selection as mentioned in the Service Rules, 2008 nor the terms and conditions of recruitment mentioned therein or in the Instructions Manual or in the advertisement. The petitioners have challenged the manner in which the selection has been held allegedly in violation of the said Service Rules, 2008, Instructions Manual as also the law declared by the Courts.

19. The decisions relied upon by the respondents to assail the maintainability of these writ petitions to assert absence of locus standi of the petitioners in this regard apply in cases where participants raise a challenge to a rule, criteria or procedure known to them prior to appearing in such selection and where the selection, based thereon, is challenged. This is not the case here. To illustrate, the petitioners inter-alia are aggrieved by the manner in which horizontal reservation has been applied while preparing the select list contrary to the Service Rules, 2008, clause 3.3(3) of the Instructions Manual and the law laid down by the courts. They are aggrieved by the application of rounding off marks without there being any provision for the same in the Service Rules, 2008 or in the Instructions Manual. They are aggrieved by selection of unqualified and ineligible persons contrary to the Rules. They are aggrieved by calling of more than three-times candidates for the purpose of Group-discussion in violation of Rule 15(f) of the Service Rules, 2008 and Clause 2.7 of the Instructions Manual. They are aggrieved by lack of transparency and fairness in the selection. They have also challenged the correctness of answers to questions. They have alleged violation of Articles 14 and 16 of the Constitution as well as Service Rules, 2008 etc. Many of the illegalities are alleged to have come to their knowledge only after the result of the selection was declared such as, those relating to application of horizontal reservation, rounding off the marks, manner of preparation of selection list etc.

20. These are the grounds on which even a participant to a selection can challenge the same and there is no question of estoppel or acquiescence as there is no challenge to the procedure or criteria already prescribed. The challenge in fact is to the manner in which the selection has been held in violation of settled criteria or procedure.

21. In this regard reference may be made to the judgment of the Supreme Court in the case of **Raj Kumar and another vs. Shakti Raj and others** reported in **(1997) 9 SCC 527** wherein after considering the earlier decision of the Supreme Court in the case of **Madan Lal vs. State of Jammu**

& Kashmir reported in **(1985) 3 SCC 486** and other decisions referred therein including some of those relied by the respondents, the Supreme Court observed that the Government had committed glaring illegalities in the procedure to get the candidates for examination under 1955 Rules, so also in the method of selection and exercise of power in taking out from the purview of the Board and also conduct of selection in accordance with the Rules, therefore, the principle of estoppel by conduct and acquiescence had no application to the facts in the said case.

22. As far as the challenge to the Government order dated 25.03.1994 is concerned the maintainability of the writ petition at the behest of petitioners in this respect shall be considered while considering point no.8.

23. For the reasons aforesaid point no.1 (excluding challenge to Govt. order dated 25.03.1994) is decided in favour of petitioners and against the respondents.

Point No.2

The permissibility of rounding off the percentage of marks for the purpose of eligibility for the main written examination, based on the marks secured in the preliminary examination, in the light of the pronouncement of the Supreme Court reported in (2011) 8 SCC 108.

24. In this regard contention of the petitioners was that under Rule 15(f) of the Service Rules, 2008 and clause 2.5 of the Instructions Manual 50% minimum marks were prescribed as a benchmark for being successful in the preliminary written examination and there was no provision for rounding off such marks, therefore, the Board exceeded its authority in doing so and acted in violation of statutory provisions.

25. The contention of the official respondents on the other hand was that there was no provision in the Rules to the contrary thereby prohibiting such rounding off, secondly, as has been mentioned in the written arguments, a minimum of eighteen-times candidates vis-a-vis number of vacancies were to be selected on the basis of the preliminary written examination whereas without rounding off, the said number was only about nine-times, therefore, considering the aforesaid, the Board vide its resolution dated 28.12.2012 and 15.01.2013 decided to round off the marks to two decimal points and based on such rounding off declared the candidates successful. This decision was not taken before holding of the selection but after holding the said examination when it was found that total successful candidates were only nine times of the vacancies, whereas, required minimum was eighteen-times of vacancies. It was also contended that in the case of some of the petitioners also, the marks were rounded off. The petitioners never raised this objection when the result of the said examination was declared. The said examination was only of a preliminary qualifying nature. Benefit of rounding off marks was extended to all the candidates unanimously and not to only few. No prejudice was caused to the petitioners.

26. The recruitment Board admittedly resorted to rounding off the marks obtained in the pre-qualifying examination. The question is whether such rounding off was permissible and is it sustainable in law.

27. As already mentioned the terms of recruitment were contained in the Service Rules, 2008 and the Instructions Manual, a copy of which is annexed as part-II of **Annexure No.2** to the writ petition. Rule 15(d) of the Service Rules, 2008 reads as under:-

"15(d). Preliminary Written Test:-

The candidates who are declared successful in the Physical Standard Test under Clause (c) shall be required to appear an objective type/Preliminary Written Test of qualifying nature. This test shall carry 200 marks.

It shall comprise three sections, namely General Knowledge (Current Affairs, History, Geography, Constitution of India, Freedom Struggle etc.) of 100 marks, Numerical Ability Test of 50 marks and Reasoning of 50 marks. The candidates who secure a minimum fifty percent marks in the said test shall be declared successful."

28. In view of the above Rule, out of 200 marks prescribed for preliminary written examination, a candidate had to secure minimum 50% marks in order to be successful and to be eligible for appearing at the next stage of selection i.e. Physical Efficiency Test.

Clause 2.5 of the Instructions Manual reads as under:-

"प्रारंभिक लिखित परीक्षा - प्रारंभिक लिखित परीक्षा अहकारी होगी न्यूनतम ५० प्रतिशत अंक प्राप्त करने वाले अभ्यर्थी ही इस परीक्षा में सफल घोषित किये जाएंगे 1इन सफल अभ्यर्थियों में से प्राप्तांकों की श्रेष्ठता के आधार पर रिक्तियों की संख्या के अधिकतम 18 गुना अभ्यर्थी ही शारीरिक दक्षता परीक्षा में सम्मिलित होने के लिए अर्ह्य होंगे1 प्रारंभिक लिखित परीक्षा का पाठ्यक्रम (निर्देश पुस्तिका बिंदु ४.१) निर्देश पुस्तिका में अंकित है1

यह परीक्षा वस्तुनिष्ठ प्रकार की २०० अंकों की होगी जिसमें निम्नलिखित तीन खंड होंगे1

(१) सामान्य ज्ञान - १०० अंक

(२) संख्यात्मक योग्यता परीक्षा - ५० अंक

(३) तार्किक परीक्षा - ५० अंक "

29. Clause 2.5 of the Instructions Manual also speaks of a minimum 50% marks being the cut off for qualifying the preliminary written examination. It also states that a maximum number of successful candidate to the extent of eighteen times the number of vacancies alone shall be eligible

for appearing in the physical efficiency test based on merit obtained in the preliminary examination.

30. On a bare reading of the aforesaid provisions it is evident that rule 15(f) and clause 2.5 of the Instructions Manual prescribe a minimum of 50% marks, out of 200, as the benchmark. The provisions of the Rules and the Instructions Manual in this regard are unambiguous. The Service Rules, 2008 having been made under Section 46 (3) read with Section 2 of the Police Act, 1861, ergo, they have statutory character and are binding upon the respondents also. The rules do not contain any provision of rounding off the marks. They do not confer any power on the recruitment Board to round off the marks nor does the Instruction Manual.

31. In view of the aforesaid factual scenario the decision of the Board to round off the marks is apparently in the teeth of the statutory provisions and is not sustainable in law. Reference may be made in this regard to the decisions of the Supreme Court in the case of **Orrisa Public Service Commission vs. Roopashree Chowdhary** reported in (2011) 8 SCC 108 and **Registrar, Rajeev Gandhi University of Health Sciences, Bangalore vs. G. Hemlatha** reported in (2012) 8 SCC 568 and the **West Bengal Joint Entrance Examination Board & others vs. Sarit Chakraborty** reported in J.T. 2015(2) SC 220 which support the view being taken by the court herein. In **Roopashri Chowdhary (supra)**, after distinguishing the earlier judgments pertaining to rounding off on the ground that those decisions related to rounding off of posts which obviously could not exist in a fraction, their Lordships in paragraph 10 and 13 of the report held that when statutory rule itself prescribed the minimum marks to be obtained there cannot be a question of relaxing or rounding off in the absence of any rule permitting the same. In the instant case the respondents have not referred to any rule permitting such relaxation or rounding off.

32. In **G. Hemlatha (supra)** the examination in question was of a qualifying nature, as in this case, and their Lordships in paragraph 12 of the judgment held as under:

"No provision of any statute or any rules framed thereunder have been shown to us, which permit rounding-off of eligibility criteria prescribed for the qualifying examination for admission to the PG course in M.Sc. (Nursing). When the eligibility criteria is prescribed in a qualifying examination, it must be strictly adhered to. Any dilution or tampering with it will work injustice on other candidates. The Division Bench of the High Court erred in holding that the learned Single Judge was right in rounding-off 54.71% to 55% so as to make Respondent 1 eligible for admission to the PG course. Such rounding-off is impermissible."

33. In view of above, the contention of respondents that the examination was only of a qualifying nature and the petitioners, all of whom had qualified, they were not prejudiced in any manner, is misconceived. what is the relevant is the im-permissibility of such action in law. The opposite parties have missed the woods for the trees. As a consequence of rounding off by the Board in the teeth of statutory rules ineligible persons were allowed to appear in the selection, many of whom are said to have been selected finally, as is mentioned in the rejoinder affidavit of the petitioners dated 13.12.2015, Annexure No. R.A.1 thereto. As observed in **G. Hemlatha**

(*supra*) any dilution or tampering with respect to eligibility criteria/cut of marks will work injustice on other candidates. When an eligibility criteria is prescribed it must be strictly adhered. The Board acted in excess of its jurisdiction.

34. The justification for such action as put forward in the counter affidavit and the written arguments of the respondents is quite misleading and false as there is no such requirement either in rule 15(d) or in clause 2.5 of the Instruction Manual that a minimum of candidates eighteen-times the vacancies are required for further consideration, based on the preliminary written examination. The word used in Clause 2.5 is 'maximum' of eighteen-times and not 'minimum', that too, from those selected on the basis of the cut off percentage of marks of 50%, not otherwise. Thus, the successful candidates who were nine-times the number of vacancies were sufficient as per Rule 15(d) read with clause 2.5 of the Instructions Manual and there was no valid justification for rounding off marks, based on such reasoning.

35. The prescription of minimum marks in Rule 15(d) of the Service Rules, 2008 and clause 2.5 of the Instructions Manual clearly prohibited rounding off, therefore, assertion to the contrary is again misleading and false.

36. As far as rounding of the marks of some of the petitioners is concerned, all of them had secured minimum 50% of the marks and the total number of successful candidates being less than eighteen times (9 times) the vacancies, all of them were entitled to appear in the next selection, therefore, the rounding off, in their case, was superfluous and inconsequential. Rounding off marks in the case of others who had secured less than 50% marks allowed ineligible person to appear at the next stage of selection contrary to Rules thereby vitiating the selection. Those who had secured less than 50% marks in the Preliminary Written Test are liable to be excluded from consideration for selection/appointment.

Point No.3

Applicability of horizontal reservation for women, dependents of Freedom Fighters and Ex-servicemen in the selection.

37. In this regard the petitioners contention was that instead of applying horizontal reservation category-wise (unreserved category, scheduled caste, scheduled tribes and other backward classes) the respondents put all the candidates selected on the basis of horizontal reservation in the unreserved category. None of them were placed in the reserved categories, which was clearly in violation of Section 3(3) of the U.P. Public Services (Reservation of Dependents of Freedom Fighter, Physically handicapped and Ex-Servicemen) Act, 1993 as also Articles 14 and 16(1) of the Constitution of India and the law declared by the Supreme Court in the case of **Indira Shahney vs. Union of India and others** reported in **AIR 1993 (3) 427** (paragraphs 430,513,514,733 and 742) and para 3.3 of the Instructions Manual.

38. In this regard they have also stated that this issue, pertaining to this very selection, has already been considered by a Coordinate Bench of this Court in **Writ-A No. 37599 of 2015 (Ashish Kumar Pandey and others vs. State of U.P. And others)** and connected writ petitions wherein, the manner in which horizontal reservation was applied in the selection in question, has been held to be illegal and the selection has been quashed on this ground alone. In the said case it has also been held that women reservation which is also a horizontal reservation had also been applied illegally. As noted earlier, the judgment in **Ashish Kumar Pandey (supra)** has been upheld by the Division Bench on the issue aforesaid.

39. On the other hand respondents' contention is that the application of horizontal reservation to the selection in question does not suffer from any illegality. Unreserved category seats for horizontal reservation were required to be first saturated before filling seats of scheduled caste, scheduled tribes and other backward classes, as, if this was not done, then the candidates of scheduled caste, scheduled tribes and other backward classes obtaining higher marks than unreserved category candidates claiming horizontal reservation may not be selected, as had happened in Constable Recruitment of 2013. The merit list prepared for horizontal reservation applies to the unreserved category also, as much as it applies to the other categories. As in the matter of vertical reservation, so also in the case of horizontal reservation, meritorious candidates, even if, belonging to reserved category are entitled to be included in the merit list of unreserved category if they fulfill the benchmark. The respondents have placed reliance upon the judgment of the Supreme Court in the case of **Anil Kumar Gupta vs. State of U.P.** reported in **(1995) 5 SCC 173**, especially on paragraphs 18 and 20 thereof. It was also contended that open competition category i.e. unreserved category, even in the matter of horizontal reservation, is not meant for upper caste alone but all candidates who have applied are to be considered in this category, therefore, it includes scheduled caste, scheduled tribes and other backward classes candidates also. In this regard the respondents placed reliance on paragraph 20 of the judgment in the case of **Anil Kumar Gupta (supra)** as also the judgment of the Supreme Court in the case of **R.K. Subbarwal vs. State of Punjab** reported in **(1995) 2 SCC 745**

40. It was contended that first of all the candidates successful on the basis of horizontal reservation were put in unreserved category and as their percentage was less than the maximum permissible limit under the said category, therefore, they were all included in the select list of unreserved category and the occasion to shift them or adjust them under other categories did not arise. It was denied that women, ex-servicemen etc. had been placed in the unreserved category/open category en-mass. Out of 740 posts reserved for women, 370 fell in the open/unreserved category, 165 in scheduled castes category, 15 in scheduled tribes and 200 in other backward classes category. According to them the State filled up only 260 vacancies under women quota out of 370 available vacancies in open/unreserved category. It was also contended that horizontal reservation, after Division Bench judgment in the case of **Rajeev Kumar** again which **[Special Leave Petition (Civil) No. 32344 of 2014]** which was dismissed by the Supreme Court in the year 2015, is compartmentalized application of horizontal reservation and not an over all reservation. The application of horizontal reservation does not lead to 50% limit in vertical reservation being exceeded.

41. This question has already been considered by a Coordinate Bench in Ashish Pandey's case (supra) decided on 16.03.2016 wherein application of horizontal reservation has already been held to be in contravention of the Act, 1993, Government order dated 26.02.1999(Women reservation) and 09.01.2007, as also the pronouncements of the Supreme Court and this Court. Based thereon the selection in question has already been quashed with a direction to the State to re-draw the select list in the light of the observations/directions contained therein. Against the said judgment a Special Appeal had been preferred by the State which has been dismissed, as noted earlier.

42. As already stated above, the terms of recruitment in question were to be regulated by the Service Rules, 2008. Rule 6 thereof, inter-alia, provides that horizontal reservation shall be in accordance with the Act, 1993 as amended from time to time and the orders of the Government at the time of recruitment in force. Rule 29 provides that nothing in this rule shall effect reservation and other concessions required to be provided for the candidates belonging to scheduled castes, scheduled tribes and other special categories of person in accordance with the orders of the Government issued from time to time in this regard. Section 3 of the Act, 1993 reads as under:-

"3. Reservation of vacancies in favour of physically handicapped etc.

[(1) There shall be reserved at the stage of direct recruitment.--

(i) in public services and post two per cent of vacancies for dependents of freedom fighter and one per cent of vacancies for ex-servicemen;

(ii) in such public services and posts as the State Government may, by notification, identify one per cent of vacancies each for the persons suffering from.--

(a) blindness or low vision;

(b) hearing impairment; and

(c) loco-motor disability or cerebral palsy]

(2) Omitted 31.07.1997.

(3) The persons selected against the vacancies reserved under sub-section (1) shall be placed in the appropriate categories to which they belong. For example, if a selected person belongs to Scheduled Castes category he will be placed in that quota by making necessary adjustments; if he belongs to other Backward Classes of citizens category, he will be placed in that quota by making necessary adjustments. If he belongs to Scheduled Tribes category, he will be placed in that quota by making necessary adjustment; if he belongs to (other Backward Classes of Citizens), category, he will be placed in that quota by making necessary adjustment.

Similarly, if he belongs to open competition category he will be placed in that category by making necessary adjustments.

(4) Omitted 31.07.1997.

(5) Where, due to non-availability of suitable candidates any of the vacancies reserved under sub-section (1) remains unfilled it shall be carried over to the next recruitment."

43. Sub section 3 of Section 3 of the Act, 1993 clearly indicates that horizontal (special) reservation shall be made for the aforesaid three categories of candidates namely dependents of freedom fighter, physically disabled and Ex-servicemen category, by placing them in the appropriate categories to which they belong i.e. other backward classes category, scheduled castes and scheduled tribe and open competition category (General category).

44. As far as women reservation is concerned, the same is governed by the Government orders dated 26.02.1999 and Government order dated 09.01.2007. Women reservation is also horizontal/special reservation.

45. In the case of ***Public Service Commission vs. Mamta Bisht and others*** reported in ***AIR 2010 SC 2613*** the Supreme Court repelled the contention that a women candidate belonging to Uttaranchal, as she had secured higher marks than the last women candidates in the unreserved/open competition category, was entitled to be placed in the latter category, even though she had been selected by horizontal reservation for Uttaranchal women. It also observed that the High Court erred in allowing the writ petition only on the ground that horizontal reservation is also to be applied as vertical reservation in favour of reserved category candidate. It reiterated the law laid down in ***Rejesh Kumar Daria vs Rajasthan Public Service Commission*** reported in ***AIR 2010 SC 3127*** wherein it was observed as under:-

"Para.(13).".....*The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Article 16(4) are "vertical reservations". Special reservations in favour of physically handicapped, women, etc., under Articles 16(1) or 15(3) are "horizontal reservations". Where a vertical reservation is made in favour of a Backward Class under Article 16(4), the candidates belonging to such Backward Class, may compete for non- reserved posts and if they are appointed to the non-reserved posts on their own merit, their number will not be counted against the quota reserved for respective Backward Class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said that the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under open competition category. (Vide Indra Sawhney(AIR 1993 SC 477: 1992 aIRSCW 3682); R.K. Sabharwal v. State of Punjab (AIR 1995 SC 1371: 1995 AIR SCW1371); Union of India v. Virpal Singh Chauhan (AIR 1996 SC 448:1995 AIR SCW 4309) and Ritesh R. Sah vs. Dr. Y.L. Yamul, (AIR1996 SC 1378:1996 AIR SCW 986). **But the aforesaid principle applicable to vertical (social) reservations will not***

apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for Scheduled Castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of "Scheduled Caste women". If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of Scheduled Caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women."

46. Considering the aforesaid enunciation of law by the Supreme Court a Coordinate Bench of this Court in the case of **Ashish Kumar Pandey** held as under:-

"It was, therefore, mandated that upon adjustment/accommodation if the special category candidate belonging to OBC category scored higher marks than his/her counterpart adjusted in open category, **cannot be shifted to open category. Shifting would tantamount to vertical reservation which is impermissible and alien to the concept of horizontal reservation. Horizontal reservation cut across vertical reservation, therefore, there is no concept of 'merit' while making adjustment/accommodation.**"

47. The decision in **Ashish Pandey's case (supra)** has been affirmed by a Division Bench of this Court in Special Appeal, relevant extract of its judgment is quoted hereinbelow:-

"While applying the principle of Horizontal Reservation, category has a role to play as at the point of time when Horizontal Reservation is to be pressed, then based on merit candidates in question are to be adjusted in their respective category and the male candidates, who are at the bottom of the list as per the merit, will have to make place for women candidate. A candidate, who has proceeded to make an application for the purposes of Horizontal Reservation under the OBC/SC/ST category, cannot be permitted to change his/her category, whereas in Vertical Reservation once you are selected, on merit, such a change is permissible by operation of law and in view of this, once such is the factual situation that is so emerging that all the candidates once they have specified their category in reference of Special Reservation, then they have to be adjusted in their respective categories and the reserve category candidate cannot ask for placement against open category by claiming that they have higher merit, inasmuch as, only in the matter of Vertical Reservation, merit has a role to play wherein the list is finalized but at the point of time when for providing Horizontal Reservation adjustment is to be made, then various adjustments is required to be done as per the formula that has been approved and ratified by the Apex Court that in the matter of horizontal reservation, adjustment would be made by making appropriate placement in appropriate categories. Apex Court was conscious of this fact, that such a provision may be subjected to misuse and accordingly, position was sought to be clarified by giving examples and then providing that if horizontal reservation is not satisfied, the requisite number of special

reservation candidate has to be taken and accommodated/adjusted against their respective social reservation categories. Sub-section (3) of Section 3 of U.P. Act No.4 of 1993 provides for horizontal reservation to be applied accordingly, Application of horizontal reservation in this prescribed manner maintains the merit of special reservation quota candidate alongwith their representation in service, in view of this, the Learned Single Judge is absolutely right at the point of time when he has proceeded to criticise the State Government for taking such a stand and for adhering to a procedure that was not at all prescribed in law and thus crossing the limit of reservation of 50%, in view of this, the order passed by Learned Single Judge does not deserve interference on this aspect of the matter. "

48. In view of dictum of the Supreme court in the case of **Mamta Bishth (supra)** and the Coordinate Bench judgment as delivered by the Division Bench referred to hereinabove, apparently the respondents have wrongly applied horizontal reservation in the selection in question. They have applied it in the same manner as vertical reservation by shifting the reserved category candidates selected on the basis of horizontal reservation to open category which is impermissible.

49. Section 3(3) of Act, 1993 and clause 2.5(ii) very categorically provide that each candidate selected on the basis of horizontal/special reservation is to be placed in the category of vertical reservation to which he belongs i.e. open/unreserved category, OBC, SC, ST. In the instant case it was not open to the Board to place all such candidates en mass in one category i.e. open/unreserved category, ignoring their respective categories, as, the principle of merit as applicable in vertical reservation is not applicable to horizontal reservation as held in **Mamta Bishth case (supra)**. It was also impermissible in view of sub-Section 3 of Section 3 of the Act, 1993.

50. Thus, in nut shell the Supreme Court in **Mamta Bisht (supra)** held that the principle of adjustment of candidates belonging to category of OBC, SC, ST selected on their own merit to the open/unreserved category shall not apply to horizontal reservation. Therefore, dependents of freedom fighter, ex-servicemen, physically disabled belonging to OBC, SC, ST selected on their own merit within the vertical reservation, will not be counted in the open/unreserved category for purpose of special/horizontal reservation but will be counted against their category of horizontal reservation. In view of this dictum the very edifice of the argument advanced by the respondents on this issue as has been noted hereinabove, falls to the ground.

51. Reference may also be made in this regard to the case of **Indira Sawhney etc.etc. vs. Union of India and others** reported in **AIR 1993(1) SC 477**, paragraph 95 of the judgment which reads as under:-

"There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservation in favour of Scheduled Castes, Scheduled Tribes and other backward classes (under Article 16(4)) may be called vertical reservations whereas reservations in favour of physically handicapped (under clause (1) of Article 16) can be referred to as horizontal reservations. Horizontal reservations cut across the

vertical reservations-what is called inter-locking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to S.C. Category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (O.C.) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains-and should remain-the same. This is how these reservations are worked out in several States and there is no reason not to continue that procedure."

52. As far as reliance placed by the respondents on the judgment of the Supreme Court in the case of **Anil Kumar Gupta (supra)** is concerned specially paragraph 18 thereof, a perusal of the said para reveals that the observation that "proper and correct course is to first fill up open category quota of 50% on the basis of merit (vertical reservation) then fill up candidates of social reserved quota, scheduled caste, scheduled tribes and other backward classes (vertical reservation), thereafter to find out how many candidates belonging to special reservation have been selected on the above basis and if quota fixed for horizontal reservation is already satisfied, **in case it is over all horizontal reservation**, no further question arises, but, if it is not so satisfied the requisite number of special reserved candidates shall have to be taken and adjusted/accommodated against their respective social reserved category by deleting corresponding number of candidates therefrom. If **however, it is a case of compartmentalized horizontal reservation** the process of verification and adjustment/accommodation as stated above should be applied separately to each reservation," it is the latter part of the above quoted para which applies in this case and not the former, as, horizontal reservation in this case, is to be applied compartmentally.

53. In **Anil Kumar Gupta (supra)** also while interpreting the circular dated 17.10.1994 the Supreme court held as under:-

"Providing special reservation, Court observed that the revised notification "contributed partly to the unfortunate situation where the entire special reservation quota has been allocated and adjusted almost exclusively against the OC quota" therefore, the Court admonished the respondents observing "the respondent will be advised to keep in mind the admonition administered by this Court and ensure that the special reservation (horizontal reservations) are kept at the minimum".

54. Thus, candidates selected on the basis of horizontal reservation could not be adjusted entirely in the open category. The Supreme Court admonished the concerned for contributing to the situation where entire special/horizontal reservation quota had been adjusted/accommodated almost exclusively against the open quota. Thus, the said judgment far from helping the respondents' case it helps the petitioners case. The respondents have clearly erred in applying horizontal reservation. They have to apply horizontal reservation in the light of the observations/directions contained in this judgment and in **Ashish Pandey (supra)**.

Point No.4

The calling of more than three times candidates for the purposes of group-discussion in alleged contravention of U.P. Sub-Inspector and Inspector (Civil Police) Service Rules 2008 as well as the instructions issued in this regard, for the O.B.C. Category.

55. As per rule 15 (f) of the Rules 2008 number of candidates (three-times the number of vacancies) were to be selected in the main written examination for the purpose of being called for Group Discussion. The total number of vacancies being 4010 a total number of 12030 candidates were required to be selected in the main written examination, for Group Discussion. It is indisputable that as against this figure of 12030 a total number of 14243 candidates i.e. 2213 candidates in excess, were declared successful and called for Group Discussion. This, according to petitioners, was in violation of rule 15(f) of the Rules, 2008. It is also contended by them that at least 191 out of the excess candidates were ultimately selected which was again *de-hors* the Rules.

56. The explanation given by the opposite parties for this transgression is that if only three-times the number of candidates vis-a-vis available vacancies were called then the last candidate of OBC category who had secured 294.6667 marks would not have been called for Group Discussion, though, marks secured by last unreserved category was only 208.25 meaning thereby even having secured higher marks, the OBC category candidates would not have been called which would have been unreasonable specially as reserved categories are also entitled to compete for open category posts. It is denied by the opposite parties that any of the excess candidates has ultimately been selected in the final select list. The opposite parties have relied upon the judgment of the Supreme court in the case of Pradeep Kumar vs. Dinesh Kumar (Special appeal No. 6549 of 2003) The opposite parties have furnished the following table giving factual details of marks at the main written examination stage:-

S.No.	Category	No. of vacancies	The required three time no.	no. of available candidates	Cut-off marks of last available candidate as per three times the required vacancies	The marks of last such candidate seselected
1	Unreserved (Gen)	2005	6015	5039	208-25	208-25
2	O.B.C. Category	1082	3246	7959	294-6667	211-00
3	S.C. Category	843	2529	1220	208-00	208-00
4	S.T. Category	80	240	25	226-4167	226-4167

	Total	4010	12030	14243		
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57. It is also contended by the petitioners that the policy of reservation is not applicable at this stage of selection based on main written examination under rule 15(f). It is applicable only at the stage of preparation of tentative select list under rule 15(h) of the Rules 2008.

Rule 15(f) reads as under:-

"15(f) Main Written Examination.- *The candidates who are declared successful in the Physical Efficiency Test under clause (e) shall be required to appear in the main written examination which shall carry 400 marks in the following subjects-*

	Subject	Maximum Marks
1.	General Hindi Hindi Essay	75 marks 25 marks
2.	Basic Law and Constitution	100 marks (objective type)
3.	Numerical and Mental Ability Test	100 marks (objective type)
4.	Mental Aptitude Test/I.Q.Test/Reasoning	100 marks (objective Type)

Note- The procedure for conducting written examination shall be such as prescribed in Appendix-3.

The candidate who fails to obtain minimum fifty percent marks in each subject shall not be eligible for recruitment. The Board shall, having regard to the need for securing due representation of the candidates belonging to the Scheduled Castes, Scheduled Tribes and others under Rule 6, prepare a list of successful candidates on the basis of marks obtained by them in the Main Written Examination, the entire list along with marks obtained per subject along with answer key would be displayed on the Board's website immediately. The number of candidates to be selected in the main written examination shall be three times the number of vacancies."

58. A perusal of rule 15(f) shows that Board is required to prepare a list of successful candidates on the basis of marks obtained by them in the main written examination "having regard to the need for securing due representation of the candidates belonging to SC/ST and others under rule 6". Rule 6 of the Rules 2008 inter-alia provides for reservation for the candidates belonging to SC/ST/OBC. Thus, the contention of the petitioner that reservation will apply only at the stage of preparation of 'tentative select list' under section 15(h) and not at the stage of preparing the select list based on the main written examination, is incorrect. On a bare perusal of rule 15(f) it is evident that the policy of reservation is also to be applied at the stage of preparing the select list based on the main written examination.

59. Section 3(6) of the U.P. Public Service (Reservation for SC/ST/OBC) Act, 1994 which provides that if a person belonging to any of the categories mentioned in sub section (1) got

selected on the basis of merits in open competition as general candidate he shall not be adjusted against the vacancies reserved for such category (vertical reservation) under sub section (1), will also apply at this stage. Sub section (1) provides various categories of reservation for SC/ST/OBC as also the percentage of such reservation which is 21%, 2% and 27% respectively.

60. The issue as to at which stage Section 3(6) will apply came up for consideration before a Division Bench of this Court in ***Special Appeal No. 310 of 2015 (U.P. Power Corporation Ltd. And another vs. Nitin Kumar and others)***. In the said case at the stage of written examination the recruiting commission prepared the select list category wise meaning thereby one who had applied in reserved category was put in the select list of that category, irrespective of the fact that based on his merit he was qualified to be in unreserved/open category in view of Section 3(6). Thus, the OBC category candidates who had secured higher marks than the lower marks secured by the last candidate from unreserved category, were not selected. Being aggrieved the OBC category candidate filed a writ petition which was allowed by a Single Judge Bench of this Court. The Single Judge opined that such candidates were entitled to compete against unreserved vacancies/posts solely by virtue of their higher merits and their consideration could not be confined to the category to which they belong. The OBC candidate who had secured lower marks than such candidates would have to be adjusted against the seats reserved for such category. In appeal the Division Bench affirmed the judgment of Single Judge. It relied upon another Division Bench Judgment in ***Sanjeev Kumar Singh vs. State of U.P.*** reported in ***2007(2) ADJ 150*** which was followed by another Division Bench in ***Shiv Prakash Yadav vs. State of U.P.*** reported in ***2008 AWC 1391***. It also relied upon the decision of the Supreme Court in the case of ***Andhra Pradesh Public Service Commission vs. Balaji Badhavath*** reported in ***(2006) 4 SCC 550***. The Division Bench in ***Nitin Kumar (supra)*** held as under:-

"Section 3(6) is a statutory recognition of the principle that if a candidate belonging to a reserved category is selected on the basis of merit in open competition with general candidates, such a candidate is to be adjusted not against the vacancies reserved for the reserved category to which the candidate belongs but against the unreserved seats. This proceeds on the foundation that where a candidate is meritorious enough to be placed within the zone of selected candidates independent of any claim of reservation and purely on the basis of the merit of the candidate, the candidate ought not to be relegated to a seat against the reserved category. The simple reason for this principle is that reservation is a process by which a certain number of posts or seats is carved out for stipulated categories such as OBC, Scheduled Castes and Scheduled Tribes. Unreserved seats do not constitute a reservation for candidates belonging to categories other than the reserved categories. An unreserved post or seat is one in which every individual irrespective of the category to which the person belongs can compete in open merit. Hence, the principle which is embodied in Section 3 (6) is not confined in its application only at the stage when the final select list is to be drawn up. If the submission of the appellants were to be accepted, that would result in seriously absurd consequences. As the learned Single Judge noted, in the present case itself, the petitioners who belong to the OBC category had in fact secured higher marks in the written test than the last short-listed candidate from the unreserved category. However, they were sought to be excluded from short-listing for the unreserved posts only on the

ground that as a candidate who had declared himself or herself to be of a reserved category, that candidate would have to be excluded from shortlisting from the unreserved category even if on the basis of the position in merit, such a candidate would otherwise fall in the list of short-listed candidates in the open or unreserved category. Such a consequence would not be permissible in law."

61. Thus it was held that Section 3(6) applied at the stage of written examination (shortlisting) also.

62. A similar view was taken by a Coordinate Bench of this Court in the case **Narendra Pratap Singh & others vs. Director General of Police U.P. & others reported in [2002 (3) UPLBEC 2304]**, which was a case relating to Police Recruitment. It was also held that the benefit of Section 3(6) of the Act, 1994 would be available even to those who had availed concession or relaxation under Section 3(8) or had applied under the reserved category. **Narendra Pratap Singh (supra)** stands affirmed by the Supreme Court in **Jitendra Kumar (supra)**.

63. Viewed on the anvil of the aforesaid exposition of Section 3(6) of Act, 1994 as also the Instructions Manual the Court finds that the standard of evaluation for the SC/OBC in the physical standard test, preliminary written test, physical efficiency test, main examination and Group discussion were all along the same. However, the rules also indicate that as far as scheduled tribe(ST) candidates were concerned a lesser standard was prescribed for them in physical standard test vis-a-vis others, as, against the minimum physical standard height for male candidates belongs to General, OBC and SC, it was 168 Cms. whereas only 160 Cms. was prescribed for ST. Likewise in the measurement of chest as against 79 Cms for the former, 77 Cms and 82 Cms. were prescribed for ST. Likewise the same differential standard was prescribed in respect of female candidates of ST. Even though, physical standard test was of only qualifying nature but the fact is that ST candidates were treated differently than other categories therefore, they were not entitled to the benefit of Section 3(6) of the Act, 1994 but there is no doubt that SC and OBC candidates were considered on the same parameters as general candidates. This is evident from rule 15(c), (d), (e), (f) and (g) read with Appendix I, II, and III, therefore, based on the aforesaid analogy the SC and OBC who had secured higher marks than the last candidate of general category candidates were liable to be considered and included in the select list of said category and not the reserved category. The SC and OBC candidates who had secured lesser marks than them were liable to be included in the select list of SC/OBC category.

64. The use of the word three-times of number of vacancies in rule 15(f) of the Rules, 2008 by itself does not mean that reservation or section 3(6) was not to be applied at that stage. It does not prohibit the break-up of vacancies category-wise and calculating candidates three times such vacancies accordingly, subject to application of Section 3(6) as aforesaid. Had this been done there would have been no occasion to select candidates in excess of three times the number of vacancies and sufficient number of candidates would have been available for all the categories. It is trite that there is no reservation for general category and all candidates are entitled to compete against posts of general category as far as vertical reservation is concerned. This issue has also been dealt with

extensively while considering point no. 8 relying upon the judgment of the Supreme Court in the ***Jitendra Kumar (supra)***.

65. In view of the above discussion calling of candidates in excess of three-time the vacancies for the purpose of Group Discussion was violative of Rule 15(h) and the explanation offered by the opposite parties in this regard is unacceptable. Those in excess of the maximum permissible limits referred above, after the fresh exercise as aforesaid, are to be ousted from further consideration for selection.

66. In the event as a result of the aforesaid it was found that considerable number of members of the reserved category were being selected against general seats/post or all the general category posts were being occupied by reserved category it would be a cause to review the application of the reservation policy as observed by the Supreme Court in the case of ***R.K. Subbarwal vs State of Punjab*** reported in (1995) 2 SCC 745 wherein the constitution Bench inter-alia observed that "the fact that considerable number of members of a Backward Class have been appointed/promoted against general seats in the State Services may be a relevant factor for the State Government to review the question of continuing reservation for the said class".

Point no.4 is decided accordingly.

Issue No.5:

The alleged inclusion of candidates who had used Whitener in the O.M.R. Sheets, allegedly in contravention of the judgment of this court in the Case of Saket Kumar & ors. v. State of U.P.

67. This issue has been concluded by the decision of the Supreme Court dated 19.01.2016 rendered in Civil Appeal No. 587-588 of 2016 whereby the judgment of a Coordinate Bench of this Court ousting those who had used whitener/blade from the select list, which had been affirmed by the Division Bench, has been impliedly set aside with the observation that the advisory note given by the Selection Board cannot be treated as a rule to declare such candidate who have used whitener/blade in the relevant block in the OMR/Answer sheet as ineligible for evaluating their answer sheets, and finding this proposition to be in conformity with the Recruitment rules disposed of the appeals in terms of the statement of the learned Advocate General representing the respondent-State of U.P. on the basis of instructions received from the Principal Secretary Home and the legal submissions referred by him in the judgment.

68. Needless to say that such candidates who used whitener/blade would be eligible for consideration in terms of the judgment of the Supreme Court and there is nothing left to be considered by this Court except that the petitioners have raised the grievance that 158 candidates over and above 810 mentioned before the Supreme Court find place in the select list. It has been answered by the respondent by stating that these 158 candidates had secured less than 50% marks in the main written examination and they have not been called for Group-discussion. Out of those

who had used whitener only 810 candidates qualified in Group discussion and were declared finally selected in March 2015. Thus, this issue is covered by the judgment of the Supreme Court which the State is bound to adhere. It is decided accordingly.

Issue No.6:

The number of O.B.C. and other reserved category candidates who were called for recruitment under the unreserved category based on their merit, bereft of reservation, and its effect on the application of reservation, to the recruitment in the light of the dictum of a Constitution Bench of the supreme court in the case of R.K. Sabbarwal v. State of Punjab, 1995 SCC (2) 745.

69. On this issue the petitioners have relied upon Section 3(6) of the Reservation Act, 1994 and stated that when a candidate applies for recruitment for selection on specific post he has to mention the category. The said category confers various privileges upon the candidate which disturbs the "level playing field" of selection. According to them 598 OBC and 47 Scheduled caste candidates have been selected against unreserved or general category. There is an obligation upon the State to ascertain that whether there is adequate representation of reserve categories on the points in question or not. If it finds that they are already adequately represented there is no need for applying reservation but no such enquiry has been conducted to show that reserve category candidates were not adequately represented in the normal course of things.

70. In this regard it has been submitted by the opposite parties that in the selection in question only 723 reserve category candidates were selected against unreserved post on their own merits for the post of Sub Inspector Civil Police whereas 20 O.B.C. Category candidates have qualified accordingly for the post of Platoon Commander. With regard to Scheduled Caste category about 56 candidates have been selected on the basis of merit against unreserved post of Sub Inspector Civil Police and one candidate of the post of Platoon Commander has been selected in open competition. They have referred to the judgment of ***R.K. Sabbarwal (supra)*** to contend that reserve category candidate selected against unreserved post on merit are not to be counted against reserved post. They have also referred to the case of ***Anurag Patel vs. Union Public Service Commission*** reported in (2005) 9 SCC 742 and ***Jitendra Kumar Singh and another vs. State of U.P. & others*** reported in (2010) 3 SCC 119 as also the Division Bench judgment in ***Special Appeal No. 310 of 2015 (U.P. Power Corporation Ltd. vs. Nitin Kumar and others)***.

71. There can be no dispute about the proposition of law laid down in the aforesaid cases and the assertion of the petitioners to the contrary is misconceived. This aspect of the matter has already been considered at length while discussing point Nos. 4 and 8, therefore, the same need not be reiterated. However, the Court finds the State has not disclosed the data pertaining to representation of OBC, SC, ST in the cadre of Sup Inspector Civil Police and Platoon Commander nor as to how many of the reserve category were appointed on their own merit. Reference, may be made in this regard to ***R.K. Subbarwal (supra)*** wherein it has been held in paragraph 4 that "....the fact that considerable number of a Backward Class have been appointed/promoted against general

seats in the State Services may be a relevant factor for the State Government to review the question of continuing reservation for the said class.....". Had the aforesaid data been disclosed this Court would have been in a position to consider the applicability of reservation to recruitment/appointment in the cadre in the light of **R.K. Subbarwal (supra)**. Nevertheless the State is under an obligation to keep the aforesaid enunciation of law in mind and if it finds that a particular category of reserve category is adequately represented in the cadre or adequate number of candidates of such category are being selected against unreserved seats on their own merit, including those who are being so selected after being granted concession and relaxation as contemplated in Section 3(8), then, it will be obligatory for the State to review the application of reservation policy in the light of the aforesaid proposition of law. The State shall keep this in mind.

Point No. 7:

Whether any prejudice is being caused to the petitioners assuming the aforesaid infractions, apart from the alleged illegalities.

72. As far as this issue is concerned as this court has already held the selection to be vitiated on account of the manner in which horizontal reservation has been erroneously applied, the candidates in excess of three-times the number of vacancies were called for Group discussion in violation of Rule 15(f) marks were illegally rounded off in violation of Rule 15(d), thereby allowing ineligible persons to participate in the main written examination, the prejudice caused to all the participants in the selection including the petitioners hardly needs to be emphasized, especially as the petitioners had appeared in the main written examination but were unsuccessful at this stage. The explanation offered by the parties in the written submission do not persuade the court to take any other view of the matter.

Point No.8:

Subject to the locus standi of petitioners, as referred above, the validity of the G.O. Dated 25.3.1994 and the application of the judgment of the Supreme Court rendered in the case of Jitendra Kumar v. State of U.P., 2010 3 SCC 119.

73. As far as locus of the petitioners to maintain this writ petition challenging the vires of the Government order dated 25.03.1994 is concerned no doubt the said Government order existed prior to petitioners appearing in the selection and remaining unsuccessful but the ground of challenge is violative of the Fundamental Rights under Article 16(1) read with Article 14 of the Constitution. The fundamental right of equality of opportunity in public employment is available to an individual whereas Article 16(4) by itself does not confer any Right of reservation. It is only an enabling provisions permitting certain benefits subject to satisfaction of certain prerequisites. As there can be no application of principle of estoppel and acquiescence with regard to enforcement of fundamental rights, therefore, it is difficult to hold that the vires cannot be challenged by the petitioners. To what extent interference is to be made, if at all, is a separate matter. In this regard reference may be made of the case of **Raj Kumar and others vs. Shakti Raj and others** reported in

(1997) 2 SCC 527. Reference may also be made to the Division Bench of this Court in the case of **Rajesh Kumar Srivastava and others vs. State of U.P. And others** reported in (2009) 2 AWC (suppl.) 239 wherein the exceptions to the normal rule prohibiting the unsuccessful candidates from challenging a selection has been discussed.

74. On this issue the contention of learned counsel for the petitioners is that once the benefit of age relaxation and concession, as contemplated in sub section 8 of Section 3 of Reservation Act, 1994 are availed and if one has applied as a reserved category candidate then he cannot be considered for appointment against an un-reserved post as, it would be contrary to the dictum of the Supreme Court in **Indira Sawhney(supra)** case, wherein, it was inter-alia observed that concession, exemption and other measures issued by Railway Administration and noticed by the Supreme Court in its earlier decisions are the instances of supplementary, incidental and ancillary provisions made with a view to make the main provision of reservation effective. According to them, it was contrary to the aims and object of the Reservation Act. According to them, relaxation in age is also a kind of reservation, therefore, once a person avails the benefit of reservation of any kind, he cannot be selected/appointed under the unreserved category. Any action contrary to it is violative of Articles 14 and 16 of the Constitution. Reliance placed by the opposite parties on the judgment of Supreme Court in the case of **Jitendra Kumar Singh (supra)** is misconceived as the said judgment was based on the Government order dated 25.03.1994, the vires of which was not under challenge before the Supreme Court. Now the vires has been challenged in this writ petition, therefore, the said judgment would not apply. The petitioners relied upon the judgments of Kerala High Court in the case of **Deepa E.V. vs. Union of India reported in 2015 SCC on line Ker. 21264**; Rajasthan High Court **in the case of Dharamvir Kumawat vs. State of Rajasthan (2014) online Raj. 6368**, Gujrat High Court **in the case of Gujrat Public Service Commission through Secretary vs. Parmar Nilesh Rajendra Kumar and others (LPA No.1480 of 2013)** which have been rendered after considering the judgment of the Supreme Court in the case of **Jitendra Kumar Singh (supra)**.

75. On the other hand the respondents have placed reliance upon the judgment of **Jitendra Kumar Singh (supra)** to contend that this issue is squarely covered by the decisions of the Supreme Court, therefore, there is no occasion to reconsider the same.

76. On a careful perusal of the case of **Jitendra Kumar Singh (supra)** this Court finds that the said proceedings arose out of the proceedings in Writ Petition No. 25238 of 2011 **Narendra Pratap Singh (supra)** and two other similar proceedings. **Narendra Pratap Singh's** case was also a matter of police recruitment in the State of U.P. One of the questions which fell for consideration was application of Section 3(6) of Reservation Act, 1994 which permits the selection of reserved category candidates against an un-reserve post, on the basis of merit. The question which fell for consideration was, whether reserve category candidates who had availed the concession and relaxation under sub section 8 of Section 3 of Reservation Act, 1994 would also be entitled for the benefit of Section 3(6).

77. In paragraph 15 of the judgment in **Narendra Pratap Singh (supra)** the Coordinate Bench of this Court opined that from the Scheme of the Act 1994 it does not appear that reserve category candidates who had been granted relaxation or concession in age or fee are not entitled for the benefit provided in sub section 6 of Section 3 of the Act, 1994. By grant of relaxation and concession to reserve category candidate the general category candidates are not prejudiced in any manner in competing with such reserve category candidates. The Court opined that standard of selection of all category was the same, hence, benefit of Section 3, sub-section (6) cannot be denied to reserve category candidates. If different standard, had been applied to different categories then, of-course, they would not be entitled to the said benefit.

78. Two other Coordinate Benches followed the decision in **Narendra Pratap Singh (supra)** and ultimately atleast three Special Appeals were filed. The appellate judgment which is a common judgment is reported in **[2007(2) ADJ 150 (DB (Sanjeev Kumar Singh & others vs. State of U.P. An others))]**. The Division Bench of this Court framed various issues including the issue involved herein. The Division Bench affirmed the judgment of **Narendra Pratap Singh (supra)** after considering the provisions of the reservation Act, 1994. The matter went up to the Supreme Court and was decided in **Jitendera Kumar Singh (supra)**. The Supreme Court affirmed the decision of the Division Bench as also the Single Judge of this Court on the question involved herein.

79. On a careful perusal of the case of **Jitendera Kumar Singh (supra)**, the court finds that it is not entirely based on the Government order dated 25.03.1994 as has been alleged. It is not only based on general principles of law but also on the Scheme of the Act 1994. This would be evident from reading of paragraphs 11,13,15,17,18,19,44,45,46,48,49,50,51,65 to 68, 70 and 71.

80. In para 71 it has been observed that it was of considered opinion that "*concession falling within Section 8 of the Act, 1994 cannot be said to be relaxation in standard prescribed for qualifying in the written examination. Section 8 clearly provides that the State Government may provide for concession in respect of fees in the competitive examination or interview and relaxation in upper age limit*".

81. In paragraph 72 after examining the contents of the Government order dated 25.03.1994, the vires of which has been put to challenge herein, it went on to observe that "*from the above it becomes quite apparent that the relaxation in age-limit is merely to enable the reserved category candidate to compete with the general category candidate, all other things being equal. The State has not treated the relaxation in age and fee as relaxation in standard for selection, based on the merit of the candidate in the selection test i.e. main written test followed by interview. Therefore, such relaxations cannot deprive a reserved category candidate of the right to be considered as a general category candidate on the basis of merit in the competitive examination. Sub-section (2) of Section 8 further provides that Government orders in force on the commencement of the Act in respect of the concessions and relaxations including relaxation in upper age-limit which are not inconsistent with the Act continue to be applicable till they are modified or revoked.*"

82. In paragraph 73 of the judgment the Supreme Court has observed that ***"the vires of Section 3(6) or Section 8 have not been challenged before us."*** The same is the case in this writ petition.

83. In paragraph 74 of the judgment the Supreme Court also went on to observe that relaxation in age is not only given to members of the Scheduled Castes, Scheduled Tribes, and OBCs, but also to the dependents of freedom fighters and ex-servicemen.

84. In paragraph 75 it opined that ***"relaxation in age does not in any manner upset the 'level playing field'". It is not possible to accept the submission of the learned counsel for the appellants that relaxation in age or the concession in fee would in any manner be infringement of Article 16(1) of the Constitution of India. These concessions are provisions pertaining to the eligibility of candidate to appear in the competitive examination. At the time when the concessions are availed, the open competition has not commenced. It commenced when all the candidates who fulfill the eligibility conditions namely, qualifications, age, preliminary written test and physical test are permitted to sit in the main written examination. With age relaxation and the fee concession, the reserved candidates are merely brought within the zone of consideration, so that they can participate in the open competition on merit. Once the candidate participates in the written examination, it is immaterial as to which category, the candidate belongs. All the candidates to be declared eligible had participated in the preliminary test as also in the physical test. It is only thereafter that successful candidates have been permitted to participate in the open competition"***.

85. In paragraph 76 of the judgment it considered the arguments of Mr. Rao that Section 3(6) ensures that there is a level playing field in open competition, however, Section 8 lowers the level playing field, by providing concession in respect of fees for any competitive examination or interview and relaxation in upper age-limit and observed that ***"We are unable to accept the aforesaid submission. Section 3(6) is clear and unambiguous. It clearly provides that a reserved category candidate who gets selected on the basis of merit in open competition with general category candidates shall not be adjusted against the reserved vacancies. Sections 3(1), 3(6) and Section 8 are interconnected. Expression "open competition" in Section 3(6) clearly provides that all eligible candidates have to be assessed on the same criteria"***.

86. Furthermore in paragraph 77 their Lordships of Supreme Court went on to refer that ***"all the candidates irrespective of the category they belong to have been subjected to the uniform selection criteria" and also went on to observe that "Such being the position, we are unable to accept the submissions of the learned counsel for the appellant-petitioners that the reserved category candidates having availed relaxation of age are disqualified to be adjusted against the open category seats. It was perhaps to avoid any future confusion that the State of Uttar Pradesh issued directions on 25.03.1994 to ensure compliance with the various provisions of the Act."*** The last words clinch the issue. It is beyond any pale of doubt that the ratio of the judgment is not based on the Government order dated 25.03.1994.

87. The Supreme Court held that the Government order was in consonance with the provisions of the Act, 1994. Moreover, while arriving at the conclusion, the Supreme Court has taken into consideration the relevant paragraph of the judgment of **Indira Sawhney's case** which has been relied by the petitioners in this writ petition. Reference of the same has been made in paragraph 50 wherein paragraph 743 of the case of **Indira Sawhney (supra)** has been quoted and it has been observed that *"In our opinion, these observations are a complete answer to the submissions made by Mr. Rao and Dr. Dhavan on behalf of the petitioners"*

88. In view of the above it cannot be said that the Government order dated 25.03.1994 is ultra vires the Scheme of the Act 1994 or Article 16(1) of the Constitution or the dictum in the case of **Indira Sawhney (supra)**. The reserve category candidates who have availed the benefit of concession and relaxation under Section 3(8) are entitled to compete against general posts under Section 3(6). As stated by the Supreme Court the Government order dated 25.03.1994 is in consonance with the provisions of the Act, 1994 and not in derogation thereof. Nor is it violative of Article 16(1) or 14 of the Constitution. This has been the consistent view of this High Court, as is evident from **Narendra Pratap Singh's case (supra)**, its affirmation by the Division Bench in **Sanjeev Kumar Singh (supra)** and ultimately by the Supreme Court in **Jitendra Kumar (supra)**, therefore, the fact that other High Courts have taken a different view is of no relevance. Reference may also be made to the Division Bench judgment of this Court in the case of Nitin Kumar (supra) which has already been considered while discussing point no.4. Thus, paragraph-4 of the Government order dated 25.03.1994 is held to be intra-vires. This issue, except the locus part, is decided against the petitioners.

89. In addition to aforesaid the Court finds that as per Note-I to Rule 15(g) of the Rules, 2008 Vedio-grapy of Group-discussion and preparation of C.D. in this regard is prescribed, therefore, this should be strictly adhered to while holding the Group-discussion afresh.

90. As far as the challenge raised by the petitioners to certain questions/answers i.e. nos. 2,12,16 and 26 is concerned, the contention with regard to question no.16 is incorrect. Article 28(2) refers to educational institutions which is administered by the State but has been established under any endowment or trust which requires that religious instructions shall be imparted in such institution. Option (C) refers to institution receiving aid from the State which is not referable to Article 28(2). Option (D) is the correct answer. See Article 28(1).

91. There is an error in the foundation of question no.26 but it is not fatal as cities can easily be related to countries.

92. As far as contention regarding answer to question no.12 is concerned the answer determined by the experts i.e. option no.(A), is correct as the right to self defence is available under Section 97 I.P.C. and Section 100 delineates the extent of the right.

93. Question No.2 was regarding situations in which a Presidential Ordinance can be promulgated. The answer options were (A) when one House is in session, (B) when both Houses

are in session, (C) when neither House is in session i.e. both Houses are not in session (D) when situation referred in (A) or (C) exists.

94. The contention of learned counsel for petitioners was that under Article 123 of the Constitution, the Presidential Ordinance could be issued even if only one house of the Parliament is in session, or when both Houses are not in session, thus, option (D) was correct but according to Board option (C) was the correct answer. As per Article 79 the Parliament comprises of President and the two houses namely, Lok Sabha and Rajya Sabha. As per Article 107 of the Constitution except for money and financial bills which can only originate in Lok Sabha, other bills can originate in either of the houses, but, in order to become Law/Act they have to be passed by both the houses of the Parliament, subject of course to Article 108 and 109 (Clause-2 of Article 107).

Article 123 of the Constitution reads as under:-

"Article 123:- Power of President to promulgate Ordinances during recess of Parliament.-(1) If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require.

(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such Ordinance-

(a) shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and

(b) may be withdrawn at any time by the President.

Explanation.- Where the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

(3) If and so far as an Ordinance under this article makes it provision which Parliament would not under this Constitution be competent to enact, it shall be void.

(4) [omitted w.e.f. 20.06.1979]"

95. The words if at anytime "except when both Houses of Parliament are in session," imply that promulgation of the Ordinance is permissible when both Houses are not in session. An eventuality such as the above can arise in two ways one where Lok Sabha and Rajya Sabha both, are not in session, two, when only one house is in session, as, in such a scenario also both Houses are not in session in the sense only one is in session. The latter situation is also germane to Article

123 as the object is to bestow powers of legislative nature on the President to meet situations of immediacy where law cannot be enacted by Parliament and only one House in session does not facilitate consideration/passing of the bill as it is required to be considered/passed by both the Houses so as to become an Act, subject of course to article 108 and 109. Even for application of Article 109 both houses have to be in session as even for rejection by Council of States it has to be in session. While determining the answers/options to question no.2 the concerned failed to appreciate the aforesaid aspect.

96. A situation where both the houses are not in session also includes a scenario where only one house is in session because of which the law cannot be enacted as it has to be considered/passed by both the Houses, subject to Article 109 as already noted earlier and in such an eventuality promulgation of a Presidential Ordinance would be constitutionally permissible. This is in consonance with the object sought to be achieved by Article 123 of the Constitution of India.

97. The view taken hereinabove, is fortified by the discussions in the Constituent Assembly on the issue of legislative powers of the President proposed in the draft Constitution relating to Article 102 (now Article 123 of the Constitution of India)-Part V of Chapter III of the Constituent Assembly debates, Book No.3 Vol. No. VIII published by the Lok Sabha Secretariat, fifth print, 2009. Relevant extracts are as under:-

"Shri H. V. Kamath : Mr. President, Sir, I request permission at the outset to move this amendment in two parts. By some accident they have been lumped together in the Secretariat as one amendment.

Mr. President : Yes.

Shri H. V. Kamath : Sir, I move:

"That in clause (1) of article 102, for the words 'when both Houses', the words when one or both Houses' be substituted."

If we turn to article 69 of the Constitution, and read clause (2) thereof, we find that the President may from time to time summon the Houses or either House of Parliament. So it is not unlikely that at a particular time both Houses may not be in session but only one House may be in session. Therefore I would restrict the power of the President only to such occasions when no House will be in session. According to this article the President is empowered to promulgate ordinances when both Houses are not in session. As I have already stated, referring to article 69, an occasion may arise when one House will be in session. Therefore to make this clear, we will have to say "except when both Houses or one of the Houses of Parliament are in session."

In response to the aforesaid amendment proposed by Sri Kamath Hon'ble **Dr. B.R. Ambedkar** responded as under:-

"The amendment suggested by my friend, Mr. Kamath, i.e., 1793, seems to me rather purposeless. Suppose one House is in session and the other is not. If a situation as I have suggested arises,

then the provisions of article 102 are necessary because according to this Constitution no law can be passed by a single House. Both Houses must participate in the legislation. Therefore the presence of one House really does not satisfy the situation at all".

In response **Sri Kamath** stated as under:-

"Does it mean that when one House only is in session, say, the House of the People, the President will still have this power?"

Dr. B.R. Ambedkar responded as under:-

"Yes, the power can be exercised because the framework for passing law in the ordinary process does not exist."

Whereupon **Sri Kamath** concluded by saying as under:-

"Shameful, I should say."

98. After the aforesaid discussion on the amendment, which is relevant for the purposes of this case, the amendment proposed by **Sri Kamath** was negated as under:-

"The question is:

"That in clause (1) of article 102, for the words 'when both Houses', the words 'when one or both Houses' and for the words 'such Ordinances', the words 'such Ordinance or Ordinances' be substituted respectively."

The amendment was negated."

99. The amendment proposed by Sri Kamath was that the power to issue a Presidential Ordinance should be restricted to such occasions when no House will be in session, meaning thereby, if, one House is in session even then such power shall not be exercised, but, this was negated in view of the observations of the Dr. B.R. Ambedkar as quoted hereinabove, wherein, he categorically observed that the amendment was purposeless for the reason suppose one House is in session and the other is not, then the provisions of Article 102 are necessary because according to this Constitution no law can be passed by a single House. Both Houses must participate in the legislation, therefore, presence of one House really does not satisfy the situation at all.

100. The aforesaid discussion concludes the issue.

101. Thus, there is merit in the contention of the petitioners. The Board shall revisit this issue and take remedial action in accordance with past practice in consonance with law.

102. It was also contended on behalf of the petitioners that certain candidates who had qualified the main examination did not appear in Group-discussion yet they were declared successful finally which could not have been done in view of Rule 15(1)(g) which says that such candidate shall be required to appear in the Group-discussion. In this regard emphasis was laid on the use of word 'shall' and also on the object behind prescribing a Group-discussion. While the argument appeared to be attractive at first blush, but, when considered in the light of the Rules, the Court finds that the word 'shall' be required to appear only means that Recruiting Authority is required to call the petitioners to appear but it does not mean that if they actually do not appear in Group-discussion they would be disqualified, as, no such consequence is prescribed in the Rules. Moreover under Rule 15(1)(g) the Group-discussion is of only 20 marks. The main written examination which is of 400 marks. The marks obtained in the main written examination are to be added to the marks obtained in the Group discussion. Even if a candidate scores 'zero' marks in the Group-discussion, but, qualifies on the basis of over all aggregate of the two exams, then, there is nothing in the Rules which may persuade the Court to hold that he can not be declared successful. The Rule is not under challenge. Having said so, this Court is of the opinion that considering the importance of Group-discussion and object behind it as is evident from Rule 15(1)(g) it would be worthwhile that this aspect of the matter is re-visited by the Rule making authority but this shall not in any manner hinder the holding of selection as is being ordered herein, but, shall be kept in mind for future selections.

103. In view of the above discussion, the selection in question from the stage of declaration of result of the main written examination including the impugned select list is not sustainable and is quashed. The concerned opposite parties are directed to prepare the result of main written examination and declare the same afresh keeping in mind the observations made hereinabove. Based thereon the selection shall proceed and shall be finalized in accordance with the Rules and observations made in the body of this judgment as also in the case of **Ashish Kumar Pandey (supra)** which has been affirmed by the Division Bench in Special appeal. This exercise shall be completed within a period of four months from the date of submission of a certified copy of this judgment to the concerned opposite parties.

104. Consequential action of sending the selected candidates for training and their appointment shall follow as per law.

105. This Court on 02.09.2016 passed an interim order to the effect that pursuant to the impugned notification dated 25.06.2015 issued by the Additional Secretary, Recruitment/Examination Controller, U.P. Police Recruitment and Promotion Board Lucknow, no appointment letter shall be issued to any of the selected candidates without leave of the Court. The stay order passed in this case was neither modified nor vacated. The Court was informed that some candidates are undergoing training. If it is so, then consequent to the fresh selection as ordered hereinabove, if any of the candidates who are presently undergoing training get selected again, then, their training shall be continued from the stage where it was left, however, the appointment and other service benefit shall be available to such candidates only from the date they are made available to other selected candidates and not otherwise.

106. All the writ petitions are partly allowed.

(2016) 8 ILRA 68
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.08.2016

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Appeal No.- 6798 Of 2007

Mohd. Ashraf & Ors.

...Appellants

Versus

State Of U.P.

...Respondent

Counsel for Appellants:

Kavita Tomar, A.C. Srivastava, Ajay Kumar Misra, Azhar Hussain, Indra Kumar, Jai Raj Singh Tomar, Mansoor Ahmad, Rajesh Pathik, Rakesh Kumar Singh, T.C.Kaushal

Counsel for Respondent:

Govt. Advocate

Held

The Court held that the prosecution failed to establish a complete and unbroken chain of circumstantial evidence, as required in cases based solely on such evidence. Key links like credible "last seen" evidence, valid recovery of dead body and articles, and proof of motive were found doubtful and legally unsustainable due to serious lapses such as defective recovery memos, absence of independent witnesses, and inconsistencies in witness testimony. The Court emphasized that where multiple hypotheses arise and the chain is incomplete, benefit of doubt must go to the accused. Accordingly, the conviction was set aside and the appellants were acquitted.

CASE LAW CITED

None

(Delivered by Hon'ble Bala Krishna Narayana, J.
&
Hon'ble Arvind Kumar Mishra-I, J.)

1. The arguments of this case concluded on 24.08.2016. Following order was passed by us on that date:

"Heard Sri Ambrish Kumar, Sri Gopeshwar Sahai Bisaria, learned counsel for the appellants, Shri A.N. Mulla, Sri Saghir Ahmad, learned AGA for the State and Smt. Manju Thakur, Syed Hasan Shaukat Abid, State Law Officer.

We will give reasons later but we make the operative order now.

The appeal is allowed. Impugned judgment and order dated 29.09.2007 passed by Dr. A.K. Singh, Additional Sessions Judge/ Fast Track Court No. 1, Kanpur Nagar in Session Trial No. 552 of 2005 (State Vs. Mohd Ashraf and others) convicting the appellant under Sections 302/34, 201/34, 392, 412 IPC., are hereby set aside. The appellants are acquitted of all the charges framed against them. Appellant are in jail. They shall be released forthwith unless and until they are wanted in any other case.

There shall be no order as to cost."

Here are the reasons:-

2. This appeal has been preferred by the three appellants Mohd. Ashraf, Mohd. Aslam and Sanu @ Billa Deen against the judgment and order of conviction dated 29.09.2007 passed by Additional Sessions Judge, Fast Track Court No.1, Kanpur Nagar, in Sessions Trial No.552 of 2005, under Sections 302, 201, 392, 412 IPC arising out of Case Crime No.90 of 2005, Police Station Rail Bazar, District Kanpur Nagar, whereby all the three appellants have been sentenced to imprisonment for life under Section 302/34 IPC coupled with fine Rs.5000/-, default stipulation prescribes six months' additional imprisonment, three years rigorous imprisonment coupled with fine Rs.5000/- under Section 201/34 IPC , default stipulation prescribes six months' additional imprisonment, three years rigorous imprisonment coupled with fine Rs.5000/- under Section 392 IPC, default stipulates six months' additional imprisonment and two years rigorous imprisonment coupled with fine Rs.2000/- under Section 412 IPC, default stipulation directs three months' additional imprisonment. All the aforesaid sentences to run concurrently.

3. We have heard Sri Ambrish Kumar, learned counsel for the appellants, Sri Gopeshwar Sahai Bisaria, learned amicus curiae for appellant Sanu @ Billa Deen and Sri Saghir Ahmad, learned AGA for the State and perused the record of the appeal.

4. Facts leading to this appeal as emanate from record appear to be; that a written report was lodged on 01.04.2005 at 8.30 a.m. at police station Rail Bazar, district Kanpur Nagar by informant Nafees Ahmad son of Abdul Aziz, resident of village Sarsaul, Police Station Mahrajpur, district Kanpur Nagar against aforesaid three appellants for committing murder of his son Mohammad Aneesh (deceased) and causing disappearance of evidence for offence of murder. It was alleged in the first information report that the informant's son Mohammad Aneesh aged about 21 years was working as Collection Agent in Sahara Company. On 07.03.2005, his son Mohammad Aneesh and his younger brother Sami Ahmad came to Taat Mill Crossing after receiving Rs.70,000/- pertaining to business transaction from Santosh Carrier located at Nayaganj, Kanpur Nagar, where they met with the appellants namely, Mohd. Ashraf, Mohd. Aslam (both sons of Rais Ahmad, R/o 6-D Sujatganj, police station Rail Bazar, Kanpur Nagar) and their friend Shanu @ Billa Deen son of Asfaq Khan, R/o Imamganj, Police station Mahrajganj, district Raebareilly. Appellant Mohd. Aslam was also employed as Collection Agent in Sahara Company and he is son of his brother-in-law (Saddhu), therefore, they started talking about money transaction. In the meanwhile, informant's brother Sami Ahmad had some personal work, therefore, he went away

from there. Thereafter, informant's son Mohammad Aneesh kept on talking to the aforesaid accused persons at that very place and since then his son (Mohammad Aneesh) did not return home. The informant asked many times about whereabouts of his son from the aforesaid appellants but they remained evasive and did not give any information. Now, the informant is confident that the appellants have committed murder of his son for greed of money and have concealed his corpse somewhere else, motorcycle Boxer UP-78 AK 4657, Mobile Phone- Motorola Set bearing No.9415730857 and Rs.70,000/-. This incident is alleged to have taken place on 07.03.2005 at about 4.30 p.m. at Taat Mill Crossing (Xing), which has been witnessed by informant's brother Sami Ahmad. The information is being given and legal action be taken. This written report is Exhibit Ka-1.

5. Contents of the written report were taken down in Check FIR on 01.04.2005 at 8.30 a.m. at Case Crime No.90 of 2005, under Sections 302, 201 IPC at police station Rail Bazar, District Kanpur Nagar. Check FIR is Exhibit Ka-14. On the basis of entry made in Check FIR, the case was registered against the appellants in the concerned general diary, rapat no.16 on 01.04.2005 at 8.30 a.m. under Sections 302, 201 IPC at police station Rail Bazar, district Kanpur Nagar. The relevant GD entry is Exhibit Ka-15.

6. Investigation ensued and the Investigating Officer, S.I. Parshuram Tripathi PW-5 took over investigation of the case. He started investigation and recorded statements of informant Nafees Ahmad and Shami Ahmad (PW-1 and PW-2) and on tip off information, arrested the aforesaid three appellants on the very same day i.e. 01.04.2005 at 2.00 p.m. and recovered Rs.12,720 from Mohd. Ashraf, Rs.11740/- from Mohd. Aslam and Rs. 12810/- from Shanu @ Billa Din. He also recovered mobile set, one watch and one purse etc. from their possession. The confession of the appellants in regard to the alleged crime was also recorded at the time of their arrest whereby they confessed to have committed murder of deceased Aneesh after taking him inside the closed Taat Mill and they have done him to death by assaulting him with bricks and looted Rs.70,000/- and distributed the same among them. The motorcycle of deceased Aneesh was parked at Cycle Stand, Railway Station. They have also stated that the dead body is lying in the closed Taat Mill. Memo of arrest and recovery was prepared by the Investigating Officer, which is Exhibit Ka-2. Thereafter, Investigating Officer also recovered Boxer Motorcycle UP 78-AK 4657 from Cycle/Scooter Stand and prepared recovery memo of the same, which is Exhibit Ka-26. Thereafter Investigating Officer proceeded to the closed Taat Mill-place where the dead body of the deceased was allegedly lying - and recovered dead body of the deceased Aneesh along with other things like bricks, blood stained Clay Roll and simple clay roll, one torn pass-book of Punjab National Bank, one driving licence of Sonu c/o Ashfaq Khan. This recovery memo dated 1.4.2005 was dictated to HCP Radhey Shyam Mishra by the Investigating Officer, which is Exhibit Ka-27.

7. We also gather from record that inquest report was prepared on the spot in the aforesaid Taat Mill on 01.04.2005, which is Exhibit Ka-3. Preparation for inquest report commenced at 14.50 hours and completed at 16:35 hours. In the opinion of inquest witnesses and the Investigating Officer, it was thought proper to send the dead body for post-mortem examination for ascertaining real cause of death of the deceased Aneesh. In this regard, relevant papers were prepared like

photonash, challan dead body, police form-13, letter to R.I., letter to Chief Medical Officer etc. The dead body of Mohd. Aneesh was sent to mortuary, Kanpur Nagar for autopsy. Dr. R.K. Srivastava conducted the autopsy on the dead body of Mohd. Aneesh on 02.04.2005 at 11.00 a.m, wherein he found the following ante-mortem injuries on his body:

1. Lacerated wound 3 cm x 2 cm x bone deep, 9 cm above right ear.
2. Multiple lacerated wound.
3. Multiple lacerated wound measuring 6 cm x 4 cm x bone deep, 1 cm below injury no.1 right side of head, longest wound measuring 4 cm x 2 cm to the smallest wound measuring 1 cm x 1 cm.
4. Abraded contusion 4 cm x 3 cm x bone deep on the left side of head 7 cm below and above left end of mouth. Parietal bone fractured.
8. In the opinion of doctor, cause of death was coma as a result of ante-mortem injury. Duration of death was stated to be four weeks.
9. The Investigating Officer also prepared site plan of various places which is Exhibit Ka-17 where the deceased Mohd. Aneesh met with the appellants and talked to them. Exhibit Ka-18 is the site plan where the appellants were arrested by the Investigating Officer near Railway Line Crossing at Sujat Ganj on 01.04.2005. Exhibit Ka-19 is the place of recovery of dead body. Exhibit Ka-20 is the site plan of motorcycle stand from where Motorcycle of deceased UP- 78 AK 4657 was recovered. The Investigating Officer Parshuram Tripathi PW-5 has proved all the aforesaid papers and number of material exhibits were also proved which the trial court has referred in its judgment, therefore, the same need not be repeated at this stage.
10. After completing investigation, the Investigating Officer filed charge-sheet against aforesaid appellants, which is Exhibit Ka-28. Thereafter case of the appellants was committed to the court of sessions, from where it was made over to the concerned trial court. The learned trial Judge after hearing the prosecution and the appellants on the point of charge, framed charge under Sections 302/34, 201/34, 392 and 412 IPC.
11. The prosecution was asked to adduce its testimony in order to prove its case. The prosecution produced in all five witnesses. Nafeesh Ahmad PW-1 is the first informant and father of the deceased. Samir Ahmad PW-2 is the brother of first informant and uncle of deceased Mohd. Aneesh. He is witness of fact of last seen. Constable Chandrabali Verma PW-3 has made entry in relevant Check FIR and concerned GD. Dr. R.K. Srivastava PW-4 has conducted autopsy on the dead body of deceased Mohd. Aneesh. S.I. Parshuram Tripathi PW-5 is the Investigating Officer. He has detailed various steps, which he took for completing the Investigation. He has also filed charge-sheet, Exhibit Ka-28.

12. Thereafter evidence for the prosecution was closed and statement of accused persons was recorded under Section 313 Cr.P.C., wherein Mohd. Ashraf has stated that he being brother of co-accused Mohd. Aslam has been falsely implicated in this case and nothing incriminating was recovered at his pointing out.

13. Similarly, Mohd. Aslam has stated that he is Area Field Manager in Sahara India. The deceased Mohd. Aneesh was his Assistant. He could not deposit collection money in the company, whereupon he in company with his officials went to the father of the deceased, Nafees Ahmad for inquiry and returned after getting documents. Due to this, the first informant was abhorrent towards him.

14. Shanu @ Billa Deen has stated that he is not acquainted with the aforesaid two co-accused persons. He is a Tempo Driver. Police personnel exploited his services and wanted him to do begar. When he asked money for diesel, the police personnel refused to give any money and falsely implicated him in this case after forcibly taking possession of his mobile phone and driving license.

15. The defence in turn has adduced ocular testimony of Akhilesh Upadhyay DW-1 and Heeru DW-2. These two defence witnesses have proved Exhibit Kha-1, Kha-2 and Kha-3.

16. Thereafter the case was posted for hearing. Learned trial court after hearing both the parties on merit passed judgment of conviction dated 29.09.2007 and sentenced the present appellants as aforesaid.

17. Consequently, this appeal.

18. It has been vehemently contended by the learned counsel for the appellants that this case is an example of police high handedness and false accusations by the first informant. The entire case is admittedly based on circumstantial evidence. There is no eye-witness account of alleged offence of murder and loot. Things have happened in a dramatic way and the chain and sequence of circumstances appear placed in great disarray, which cannot be satisfactorily explained by the prosecution. The entire chain of circumstances and evidence forthcoming is highly doubtful, shaky and gives rise to a number of speculations regarding commission of crime by other persons.

19. In a case based on circumstantial evidence, it is obligatory on the part of the prosecution to prove and establish vital links in the chain of circumstances so as to exclude every hypothesis of innocence of the accused person and to conclusively point out guilt of accused that in all eventualities, it was the accused and the accused alone, who committed the offence to the exclusion of others. Things in this case factually as well as legally- have been ordained by the first informant in collusion with Samir Ahmad PW-2 and the concerned police personnel. Therefore, the prosecution case becomes more and more exposed to untold uncertainties.

20. The recovery process is highly doubtful and the same is not sustainable in the eye of law and cannot be read against the appellants. Recovery of dead body has not been made by the police in presence of the appellants and the same is not at the pointing out of the appellants. No note of any sort or worthy recovery memo like Exhibit Ka-27, proved the same. Mere inquest report was prepared, which will not prove recovery of dead body at the pointing out of the appellants. The recovery memo Exhibit Ka-26 and Ka-27 are without signatures of the appellants and there is no reference that copies of these memos were ever given to the appellants. In absence of establishment of fact of recovery of concerned motorcycle UP-78 AK 4657 and the dead body (all the descriptions contained in such so called recovery memos Exhibit Ka-26 and Ka-27), no legal effect pursuant thereto occurs touching on any sort of involvement of the appellants in the alleged act of murder of Anees.

21. The prosecution has failed utterly to prove the vital links of the chain in form of evidence and circumstances. For the sake of argument and assuming it to be that the deceased Mohd. Aneesh was last seen in company of the appellants on 07.03.2005 but there is no further evidence regarding fact that the deceased proceeded in company with the appellants from Taat Mill Crossing to the closed Taat Mill premises and went inside the mill and came out of the mill without being accompanied by the deceased. There is no whisper or evidence that the appellants were ever seen inside the closed Taat Mill.

22. It is noticeable that the son of informant was missing since 07.03.2005 and he was making hectic search for his son. He had been informed by his brother Shami Ahmad PW-2 that the deceased was left by him with the appellants in front of Saloni Cold Drink Shop near Taat Mill Crossing. Although no report whatsoever was tried to be lodged with any authority or police and no information whatsoever was ever given to any authority but the FIR was lodged only on 01.04.2005 at 8.30 A.M. and the very same day, on tip off information, the appellants were arrested at 2:00 P.M. Thereafter recovery of Rs.37,270/- was jointly made from their possession.

23. On the basis of confessional statement, Motorcycle UP 70 AK 4657 and dead body of Mohd. Aneesh were recovered but the recovery memo of alleged motorcycle and dead body Exhibit Ka-26 and Ka-27, respectively do not bear signatures of the appellants and there was no time mentioned in such memos as to when these recoveries were effected. Chain of circumstances was never complete. The motive assigned for the commission of the crime is neither genuine nor established. Possibility of offence of murder and loot being committed by others than the appellants cannot be ruled out. Appellant Sanu @ Billa Deen was never acquainted with the appellants and he had nothing to do with the case. He was a Tempo Driver and police falsely involved him in this case because he refused to do *begar* for them. The prosecution case is full of infirmities and the charge made against the appellants has not been proved beyond reasonable doubt.

24. Per contra, learned AGA has replied that admittedly it is a case based on circumstantial evidence but the vital links of the chain of evidence and circumstances are complete. Evidence of last seen has been well proved. Recovery of motorcycle, dead body and other articles have been well proved. Recovery of Rs.37,270/- from the possession of the appellants gave thrust to offence

of loot and murder. The recovery of dead body was made only after recording confessional statement of the appellants.

25. Learned AGA has further added that motive for committing the crime is self evident. Firstly the Loot of money and; secondly the deceased Mohd. Aneesh had previously molested sister of Mohd. Aslam and Mohd. Ashraf, which was retaliated by committing murder of deceased Mohd. Aneesh. There is no inordinate delay in lodging the FIR because the first informant kept on searching for his son for 22-23 days. When the appellants refused to disclose whereabouts of his son then only he lodged the FIR on 01.04.2005. Thus, the delay in lodging the FIR is reasonably explained. Laches committed by the Investigating Officer while preparing various memos are not vital and the same alone will not throw away the case of the prosecution. Charge framed against the appellants has been proved beyond doubt.

26. After considering aforesaid rival submissions made by both sides, core consideration for adjudication of this appeal engages our attention to fact whether this case being a case based on circumstantial evidence all its links of circumstances of chain are complete in itself, which lead aside every hypothesis of innocence of the appellants or establishes fact that accused appellants alone are the perpetrator of the crime, to the exclusion of others?

27. It is admitted to both the parties that the present case is one based on circumstantial evidence. No one has seen commission of offence of murder and loot and fact of causing disappearance of evidence.

28. In this view of the matter, we have to scrutinize carefully vital facts and links of chain of circumstances leading to final determination of the case. Crux of written report, Exhibit Ka-1 reflects that the allegations have been made by the first informant Nafee Ahmad PW-1 - the father of the deceased- that his son Mohd. Aneesh aged about 21 years was Collection Agent in Sahara Company and first informant was running business of selling animal (Goats) and he used to receive money in consideration of sale. His son along with Sami Ahmad, informant's real brother, went to receive Rs.70,000/- for business transaction of goats from Satosh Courier at Naya Ganj, district Kanpur Nagar on 07.03.2005.

29. After receipt of Rs.70,000/-, informant's brother Sami Ahmad and his son deceased Mohd. Aneesh met with the appellants and they were talking among themselves. Mohd. Aslam, one of the appellants was also Commission Agent at Sahara Company, therefore, talks regarding payment were made. In the meanwhile, Sami Ahmad, the uncle of the deceased left the place of occurrence because he had some personal work around 4.30 P.M. Thereafter Mohd. Aneesh did not return home in the evening. On inquiry being made, he was told by his brother Sami Ahmad that deceased Mohd Aneesh was talking with the aforesaid appellants in front of Saloni Cold Drink Shop near Taat Mill Crossing when he left the place of the occurrence for his personal work. After this, the first informant inquired whereabouts of Mohd. Aneesh from the appellants but they avoided question and did not tell anything. The first informant searched for his son but he could not

trace him out, therefore, he lodged first information report with Police Station Rail Bazar after 24 days of disappearance of his son on 01.04.2005.

30. In such a situation, we have before us certain vital circumstances of this case, which need be enumerated at this stage:-

1. The 'last seen' evidence when the deceased was last seen in company with the appellants.

2. The deceased was proceeding in company with the appellants either towards Taat Mill or was ever seen with them inside Taat Mill.

3. Whether the appellants were seen coming out of Taat Mill at the relevant date and time of the occurrence and they were accompanied by the deceased. Recovery of dead body and motorcycle etc. were made at the pointing out of the appellants after their arrest by the police.

4. Cause of motive for committing crime.

31. The aforesaid circumstances in form of vital links of chain of circumstances are proved and established then the chain of circumstances will be complete in itself.

32. Now, we may embark on full-fledged discussions of existing evidence qua facts and circumstances of the case. We may start with motive behind the crime. In so far as description contained in the first information report is concerned, the same has reference for greed for money Rs.70,000/-, for which the appellants committed murder of Mohd. Aneesh. There is no any other whisper. However, in the testimony of prosecution witnesses of fact namely Nafees Ahmad PW-1 and Samir Ahmad PW-2, particularly in the arrest memo of accused appellants dated 01.04.2005, it emerges out that the deceased had outraged modesty of sister of Mohd. Ashraf and Mohd. Aslam, the co-accused, for which they avenged by committing murder of Mohd. Aneesh.

33. We shall reflect on this aspect of motive a little later but before we do so, we have to scrutinize certain other relevant aspects of the case and particularly, arrest of the accused appellants and recovery of dead body. The arrest memo (Exhibit Ka-2) discloses that the first information report was lodged on 01.04.2005 at 8.30 A.M. at Police Station Rail Bazar. When S.O. Parshuram Tripathi along with police personnel reached near Sujat Ganj Railway Crossing then on the tip off information that the accused appellants coming to know about lodging of the FIR, are trying to move somewhere either by bus or by train in order to escape from arrest, the police party was also accompanied by PW-1 and PW-2 who sighted the three accused appellants, who after seeing the police became apprehensive and tried to flee away but they were caught near railway crossing around 2.00 P.M. They disclosed their respective names to the police. When they were told about lodging of the FIR, they apologized and said that deceased was son of their mausi. Some years ago, the deceased molested their sister, due to which they decided to take revenge for the same. On 07.03.2005 they called their friend Sanu @ Billa Deen and made a plan to kill the deceased. They

were present on Taat Mill Crossing at 4.30 P.M. when Mohd. Aneesh along with his uncle Sami Ahmad came over there and began to talk to them. Later on, his uncle left from the scene of occurrence then on the pretext of smoking cigarette, they took the deceased inside already closed Taat Mill and killed him by giving bricks blow and they distributed Rs.70,000/- among themselves, which the deceased was possessing. Motorcycle of deceased was parked at the Railway Station Motorcycle Stand. Mobile Cell Phone of deceased was taken by co-accused Sanu @ Billa Deen. Dead body of deceased was lying inside Taat Mill.

34. Thereafter recovery of Rs.12720/- from possession of Mohd. Ashraf, Rs.11740/- from accused Mohd. Aslam and Rs.12810/- from accused Sanu @ Billa Deen was made. In all Rs.37270/- were recovered from their possession. Besides, one LG Reliance Mobile Phone and one Mobile Cell Phone Motorola Set belonging to deceased Mohd. Aneesh were also recovered. One HMT Kohinoor wrist watch and one Purse were also recovered. The recovery memo was prepared on the spot, as Exhibit Ka-2. This aspect of the case does not seem vital but assumes importance for the reason that Samir Ahmad PW-2, uncle of deceased left the scene of the occurrence at 4.30 P.M. for his personal work and the deceased was in company of the accused appellants but after strenuous cross-examination, specific question being put to PW-2 by the defence that he has not come out with the description of personal work for which he suddenly left the scene of occurrence. Thereafter pursuant to information so extracted from the accused appellants, recovery of motorcycle was made from Railway Motorcycle Stand and memo of the same was prepared, which is Exhibit Ka-26. This recovery memo does not bear any signature of any of the accused appellants nor does it contain any description regarding copy of memo being given to the accused appellants. It has come in the testimony of the Investigating Officer Parshuram Tripahi PW-5 that he did not ask name of the employee, who was manning the motorcycle stand when the recovery was made, he did not inquire about the name of the contractor/owner of the motorcycle stand. We, on careful perusal of recovery memo Exhibit Ka-26, notice that no time of recovery has been mentioned in this memo. For these specific and conspicuous reasons, this recovery memo becomes erroneous and legally not admissible and cannot be read against the appellants.

35. Similarly, recovery memo of dead body, certain other articles allegedly scattered on the place of occurrence, simple clay roll and blood stained clay roll (Exhibit Ka-27) made by the police party is so vague in description that it nowhere describes the manner of recovery of dead body, as to on whose pointing out it was discovered. It merely describes recovery of certain articles near the dead body. It also does not bear signatures of the accused appellants nor does it contain any recital for handing over copy of this recovery memo to the accused appellants. Lastly, it does not refer any time as to when such recovery was effected. Therefore, recovery memos as Exhibit Ka-26 and Exhibit Ka-27, which relate to fact of recovery of dead body and other articles from the spot where the dead body was allegedly recovered inside the Taat Mill becomes legally not admissible against the appellants and in the eye of law, both the Exhibits Ka-26 and Ka-27 are very material in this case and are vital links of chain of circumstances which have not been properly proved.

36. Assuming it to be that it may be lapse of the Investigating Officer that he acted in a casual manner and was unmindful of legal sequences that will flow from his negligent act but had it

been an ordinary recovery, matter would have been ignored by us but under existing facts and circumstances, we have every reason to believe absence of accused persons at the relevant point of time when these recoveries were made. Had it been so that the accused appellants were present on the spot then their signatures on these recovery memos (Exhibit Ka-26 and Ka-27) should and must have been obtained on it. Since non mention of time and non obtaining of signatures hits at the root of the prosecution case in form of missing vital links of recovery of dead body and the articles, it shakes the entire prosecution case to its discredit.

37. In so far as memo of arrest (Exhibit Ka-2) is concerned, we may observe that after lodging of the first information report, the events happened in quick succession at 2:00 P.M., all the three accused persons were arrested from near Sujat Ganj Railway Crossing, which is a busy public place, still no independent person was arranged to be witness to fact of arrest and recovery. It has been suggested that Sujat Ganj Railway Crossing is manned by a Railway employee, then why his services were not utilized by the Investigating Officer. The Investigating Officer avoided the question. The confession made before the police officer regarding commission of murder will not be read against the appellants, as such, on its face value but it has to be read with the entirety of facts and other circumstances which emerged in this case.

38. We may again observe that how casual is the I.O. and how genuine is the recovery of money from possession of the appellants. It has been described in the recovery memo (Exhibit Ka-2) that Rs.12720/- was recovered from Mohd. Ashraf, Rs.11740/- was recovered from Mohd. Aslam and Rs.12810/- from Sanu and Billa Deen. But how and why denomination of currency notes recovered from the possession of the appellants were not mentioned in the recovery memo. In this view of the matter, recovery of money as described in the recovery memo of arrest, Exhibit ka-2 becomes doubtful.

39. Now, we may consider the other vital links and facts of this case so as to arrive at just decision. The star witness of last seen is Sami Ahmad PW-2. He has testified in his examination-in-chief that he along with deceased went to take Rs.70000/- from Sanosh Courier on motorcycle UP 78 AK 4657 (Bajaj Boxerr). On page 47 of the paper book, he testified that Mohd. Aneesh was a collection agent of Sahara India. After receiving Rs.70000/-, they were returning from Naya Ganj, Kanur Nagar and as soon as they arrived at Taat Mill Crossing in front of Saloni Cold Drink Shop where Mohd. Ashraf and Mohd. Aslam, the two sons of brother-in-law of first informant along with one Sanu @ Billa Deen met with them. When they were talking, this witness left their company and department from there on account of some personal work. It was around 4.30 P.M. he returned home but deceased Mohd. Aneesh did not return home whereupon inquiry was made by the first informant, father of deceased from Sami Ahmad PW-2 who told him that he had left the deceased with the accused appellant around 4.30 P.M. in front of Saloni Cold Drink Shop near Taat Mill crossing.

40. Now relevant issue crops up as to what is the testimony, which may shed light on fact or establish that as soon as the deceased was left with the accused appellants in front of Saloni Cold Drink Shop, he remained in company of accused appellants till and upto the time of his death and

no person came in contact with the deceased after 4.30 P.M. on 07.03.2005. There is not an iota of evidence on the point that the deceased was ever seen proceeding towards the Taat Mill with the accused appellants or that he was seen inside the Taat Mill in company with the accused appellants or that the accused appellants were ever seen coming out of Taat Mill without person of the deceased Mohd. Aneesh.

41. On this core essence of incident of murder evidence could have been collected by the Investigating Officer by making sincere effort, if he had contacted the police booth at Taat Mill Crossing, which was made for public help or he could have taken help of guard/check post inside Taat Mill or of certain family members, who had been residing inside Taat Mill in some rooms. This specific testimony appears on page-73 and 74 of the paper book in the statement of the Investigating Officer, S.I. Sri Parshuram Tripathi, therefore, merely because arrest was effectuated by the police, which as discussed above is found to be of dubious nature, will not ipso facto establish other but vital missing links in the chain of circumstances.

42. There is unexplained vacuum on point of continuing and sustained company of deceased with the appellants from 4.30 P.M. onwards on 7.3.2005 and in the absence of such vital link in the chain of circumstances the hypothesis of innocence of appellants alone is fortified because exclusion of possibility that the offence could have been done by others also can not be ruled out. Here it cannot be said that the accused alone are the perpetrators of the crime to the exclusion of others.

43. Perusal of arrest and recovery memo of accused (Exhibit Ka-2) shows that the first informant and his brother Sami Ahmad who knew the accused appellants well from before and also sighted them near Sujat Ganj Railway Crossing, still they were apprehended by the police as if there was no one with the police party to pinpoint the accused and identify them. Their names and addresses were tried to be known after they were apprehended by the I.O. and the police party. Under circumstance this gesture by the police glitters of artificiality and by itself is unnatural. If PW-1 and PW-2 were accompanying police party when the accused persons were apprehended by the police then they could have easily of their own told their names to the police, which the police could have confirmed from them. But nothing like the sort happened but an inquiry was feigningly made regarding identity of the accused appellants in presence of the first informant and his brother on the spot and this way, the Investigating Officer tried unsuccessfully to give colour to his suspected activity. There are certain vital omissions in the first information report as to the spot where the appellants met with deceased. There is no mention of Saloni Cold Drink Shop in front of which the deceased met with the accused persons. It may be observed that no doubt the FIR is not an encyclopaedia and it does not contain every detail in its entirety. However, certain facts, which hold sanguine point may be expected to be referred in report as that would be treated to be natural expression of place which holds center point and the beginning of crime imputed.

44. PW-2 appears to be star witness of the prosecution. However, he has been confronted by the defence in cross-examination on almost all the vital aspects of this case, wherein material contradictions emerge out from his testimony. Regarding fact of taking money from Santosh

Courier on 07.03.2005, no such statement was ever given by him to the Investigating Officer and such confrontation by the defence appears on page 52 of the paper book. He has again been confronted on the same page on point whether the deceased was possessing any mobile cell phone, whereupon he replied in the affirmative. But no such statement was ever given to or recorded by the Investigating Officer under Section 161 Cr.P.C. He has again been queried on point of time on the same page of paper book as to when he started for Santosh Courier from his house. He stated that he had told Daroga Ji the time when he left his home but he cannot assign any reason, if the same does not appear in his statement under Section 161 Cr.P.C. Similarly, he has stated that he had told Daroga ji that he arrived in front of Saloni Cold Drink Shop where Mohd. Ashraf, Mohd. Aslam and Sanu @ Billa Deen met him but if these facts have not been recorded by the Investigating Officer in his statement then he cannot assign any reason for the same.

45. Regarding co-accused Sanu @ Billa Deen, he was queried specifically whether he knew him from before then he stated that he had told Daroga Ji that he knew Sanu @ Billa Deen from before but in case such statement has not been recorded under Section 161 Cr.P.C. by Daroga Ji then he cannot assign any reason. One vital aspect of this case, regarding the description of time and place when he (PW-2) left the deceased in front of Saloni Cold Drink Shop, though he claims to have specifically told the Investigating Officer in his statement, but in case no such statement finds place under Section 161 Cr.P.C. regarding the place and time as to when he left the deceased Mohd. Aneesh (in front of Saloni Cold Drink Shop) then he cannot assign any reason for the same. As per his claim, this witness (PW-2) says that he had given statement to Daroga ji to the extent that he left the scene of occurrence around 4.30 P.M. but no such statement was recorded by the Investigating Officer. This fact is very vital and under circumstances carries weight. Perhaps this factual aspect assumes central point of the entire incident and non-disclosure of such pivotal fact to the Investigating Officer would indicate that testimony of PW-2 is motivated and full of embellishment. Thus, testimony of P.W.2 is woefully wanting in correct details on certain vital and relevant aspects of this case and as such does not inspire confidence and it appears that he (PW-2) is not telling the truth before this Court. This witness is unworthy of credit.

46. One aspect of the case relating to involvement of co-accused Sanu @ Billa Deen attracts our attention. Co-accused Sanu @ Billa Deen has stated in his statement recorded under Section 313 Cr.P.C. that he has been falsely involved in this case because he refused to do begar for the police. He was falsely implicated in this case after his driving license was taken by the police and he was detained at the police station. For the sake of argument, it can be assumed that offence was committed even then it is noticeable that Sanu @ Billa Deen had no motive to commit crime from any angle. He has categorically stated in his statement under Section 313 Cr.P.C. that he has no connection with the other co-accused Mohd. Ashraf and Mohd. Aslam. Even the prosecution has failed to establish reasonably and specifically fact of acquaintance of co-accused Sanu @ Billa Deen with the other co-accused Mohd. Ashraf and Mohd. Aslam, who were cousin brothers of the deceased Mohd. Aneesh. Therefore, statement of co-accused Sanu @ Billa Deen appears to be quite correct under prevailing facts and circumstances of the case and there is every reason to believe his false implication in this case. Moreso, it has come in the testimony of prosecution witnesses that Mohd. Aslam and Mohd. Ashraf had told Daroga ji that deceased Mohd. Aneesh had

molested his sister few years ago, then testimony on record is overwhelming on point that the deceased Mohd. Aneesh met the accused persons all of a sudden and the incident occurred. Can it be said that they were well prepared and they worked out their plan to eliminate the deceased when deceased appeared before them all of a sudden on 7.3.2005. Further noticeable that the accused kept silent for about 4 years after rape was committed on sister of two co-accused persons and swung into retaliation only on 7.3.2005 as if they were under impression that the victim will today meet them at 4.00 or 4.30 P.M. and prior to this they do not find any suitable time and place to settle score with the deceased Mohd. Aneesh. We may observe that the act of molestation of sister of accused Mohd. Ashraf and Mohd. Aslam has not been specifically established in this case.

47. It would be appropriate to scrutinize fact regarding recovery of dead body though we have discussed a lot on the same while making observation on Exhibit Ka-27. Our scrutiny at this stage becomes relevant, for the reason that learned AGA Sri Sagir Ahmad has vehemently replied to our specific query regarding non-preparation of memo of recovery of dead body that preparation of inquest of the dead body of deceased Mohd. Aneesh on the spot inside the Taat Mill virtually proves recovery of dead body itself at the pointing out of accused persons because they had already stated at the time of their arrest at 2 P.M. about fact that they have killed the deceased inside the Taat Mill and they have distributed Rs.70,000/- among themselves, which was possessed by the deceased. But in the entire arrest/recovery memo, Exhibit Ka-2, there is no mention of any particular place where the dead body was concealed, then the point crops up as to how the police party could reach and recover dead body exactly from the spot inside the room within the campus of Taat Mill. The entire recovery memo and all the memos are absolutely silent here. We may have recourse to the inquest report of deceased, Exhibit Ka-3 which also does not refer as to how they (police party) reached upto the specific room in the Taat Mill premises. We notice abysmal silence on this aspect in Exhibit Ka-3.

48. Learned AGA claims that the inquest report Exhibit Ka-3 may be treated to be recovery memo of the dead body. If the contention is accepted by us at this stage then obviously inquest must bear signatures of all the three accused persons just to mark their presence on the spot. But as per testimony on record, and as per contents of the inquest report, Exhibit Ka-3, we do not find any signature of any of the accused persons on this inquest report. This is not covered under category laches committed by the Investigating Officer. Preparation of memo of recovery of dead body is a substantial compliance in this case based on circumstantial evidence. But it is due to establishment of fact of non-existence of presence of the accused persons on the spot that several recovery memos like recovery of motorcycle, recovery of dead body and the place of occurrence as disclosed through Exhibits Ka-26 and Ka-27 becomes doubtful. Therefore, distinction is to be made between laches committed by the Investigating Officer and the laches which are substantial and hitting at the root of the prosecution case. In this way, it is obvious that things have been tried to be accomplished in a dramatic way in utmost hurry. The inquest report by itself can never be treated to be recovery memo of dead body. Such argument though sounds well on its face value but will always be disapproved by one and all for aforesaid reason.

49. The point is that the things have been put in, in universal manner. There is no explanation about the personal work for which PW-2 had to leave the spot where he met with accused around 4.00 P.M. and then left at 4.30 P.M. and it was upto PW-2 to have come out specifically about the piece of personal work with which he was occupied with, but he failed to do that.

50. Here an overall reading of prevailing facts and circumstances give rise to possibility that even Mohd. Aslam (P.W.2) may himself commit murder of deceased Mohd. Aneesh, as human greed has no limitation, which can be effectively executed at any point of time against any person, notwithstanding a close relative. In such peculiar circumstances of this case, how can we hold conclusively that the guilt of the appellants is established as number of missing links in the chains of circumstances are not complete and they leave aside every hypothesis regarding innocence of the appellants. Can we summarize that the links in the chain of circumstances are so complete as to leave aside every hypothesis of the innocence of the appellant and establish that appellants and appellants alone were the perpetrator of the crime after 4.30 P.M. onwards on 7.3.2005. There is no clinching circumstance on record, which may establish that deceased was seen in company with accused appellants either inside the Taat Mill or outside the Taat Mill and there is no evidence on specific factual aspect that after 4.30 P.M. all the three accused persons were seen or sighted by any one near or around Taat Mill and the deceased was accompanying them, therefore, accompaniment of deceased with the appellants after 4.30 P.M. upto the place of occurrence where the dead body was found by the police cannot be established in this case and such a vital link is missing altogether.

51. We are conscious of fact that where conviction is based on circumstantial evidence solely then there should not be any snap or gap in the vital links of the chain of circumstances and in case any snap emerges out in the links of chain, then the accused would be entitled to benefit of doubt.

52. We are also conscious of fact that in cases if some of the circumstances in the chain can be explained by any other reasonable hypothesis, which may give rise to reasonable comprehension that alleged offence can be committed by other persons also when the accused are entitled to be benefit of doubt. Only that circumstantial evidence, which is clinching, consistent leaving aside any other hypothesis regarding commission of crime except innocence of the accused alone would be inspiring confidence. All the circumstances of the case must be, as held in a catena of cases by the Hon'ble Apex Court, that all the links of chain must be complete in cases based on circumstantial evidence.

53. Here, in this case at hand we are constrained to note that not even last seen theory inspires confidence because in case the son of the first informant was missing on 07.03.2005 and the first informant was told about the names of the accused persons and the first informant in fact inquired from them about whereabouts of his son, which on query being raised was found to have been avoided, then a sane and a prudent man would hardly wait for 22-23 days and then only he will lodge first information report alleging therein that now he has become sure that his son has

been killed by these persons. May be that such FIR was lodged by first informant on 01.04.2005 with Police Station Rail Bazar, but in between 07.03.2005 upto 01.04.2005, there must have been some whisper about some information regarding missing/disappearance of his son at least to some responsible authority but that aspect on vital fact is woefully silent and inaction of first informant in between the above two periods give rise to a number of possibilities and probability.

54. In this context, we may note that first informant was conscious of fact that his son is missing after receiving Rs.70,000/-. He was conscious of fact that his son was also possessing one mobile cell phone, but he is silent as to whether the mobile sim was off or on during the aforesaid period of disappearance of his son from 07.03.2005 upto the time on 01.04.2005 and When the dead body of his son was recovered by the police.

55. Here in this case even PW-2, who happens to be the real brother of first informant can be posed as culprit, for many reasons because he also needed money and he had incurred some expenses for treatment of his wife and he has been suggested on page-57 of his testimony as to whether he had borrowed Rs.20-25 thousand, whereupon he denied the suggestion. On the same page, he has been suggested to this extent that he himself killed his nephew in greed for the money. The possibility of involvement of Mohd. Aslam cannot be ruled out and it is established principle in circumstantial jurisprudence that if different hypothesis of guilt is forthcoming from the testimony and circumstances on record, then benefit of doubt goes to the aforesaid accused.

56. In the backdrop of aforesaid discussion, we are fully convinced that the prosecution has not been able to establish all links in the chain of circumstances and chain remained incomplete. Learned trial court while appraising evidence and marshaling facts on record misread the evidence and based its conviction more on whims and imaginations than on evidence on record, leaving aside the guiding principles to be applied in cases based on circumstantial evidence. In case evidence and circumstances of the case allude to alternative way to alternative hypothesis and give rise to possibility that the perpetrator of the crime can be another person also than the accused then benefit of doubt should and must be given to the accused persons.

57. These are the reasons upon which we set aside the impugned judgment and order of conviction dated 29.09.2007 passed by Additional Sessions Judge, Fast Track Court No.1, Kanpur Nagar, in Sessions Trial No.552 of 2005, under Sections 302, 201, 392, 412 IPC arising out of Case Crime No.90 of 2005, Police Station Rail Bazar, District Kanpur Nagar.

58. However, we direct that the appellants will ensure compliance of provisions of Section 437A Cr.P.C. by appearing before the concerned trial court at the earliest.

59. Let a copy of this order/judgment be certified to the court below for necessary information and follow up action.

**(2016) 8 ILRA 83
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.08.2016**

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.

Service Single No.- 17146 Of 2016

Suresh Chandra	...Petitioner
	Versus
State Of U.P. & Ors.	...Respondents

Counsel for Petitioner:

Vivek Raj Singh, Sarvesh Kumar Dubey

Counsel for Respondents:

C.S.C., Ajay Kumar

Held

A deputationist has no right to continue in the borrowing department and can be **repatriated at any time.**

Formation of a **unified cadre (2014 Rules)** does **not change the employer:**

The employer remains the **State Government**, not individual departments.

Directing the petitioner to join **Internal Accounts and Audit Directorate instead of Agriculture Department** is **valid:**

It does **not amount to change of employer.**

Consent or willingness of the employee is not required:

As there is **no change of employer**, and

No **adverse service condition** is shown.

Unification of cadres across departments amounts to valid restructuring:

It is a **reorganization/rearrangement** of posts.

The State has **exclusive power** to:

Create/abolish posts,

Restructure cadres,

Frame service rules under Article 309.

Judicial review in such matters is **limited:**

Interference only if **arbitrary, mala fide, or illegal.**

No such illegality found.

The impugned orders dated **12.05.2016 and 20.06.2016 are valid.**

The writ petition is **dismissed.**

Direction:

If petitioner rejoins, period shall **not be treated as break in service.**

CASE LAW CITED

Jawaharlal Nehru University v. Dr. K.S. Jawatkar
Orissa Electrical Engineers Service Association v. State of Orissa
BALCO Captive Power Plant Mazdoor Sangh v. NTPC
Jawaharlal Nehru University v. Dr. K.S. Jawatkar
Orissa Electrical Engineers Service Association v. State of Orissa
BALCO Captive Power Plant Mazdoor Sangh v. NTPC
Union of India v. Pushpa Rani
P.U. Joshi v. Accountant General

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.)

1. Heard Shri Vivek Raj Singh, learned counsel for the petitioner, Shri Devendra Upadhyaya, learned Additional Chief Standing Counsel appearing for the State-respondents and Shri Ajay Kumar, learned counsel appearing for Specialist/District Basic Education Officer, Gaziabad.

2. These proceedings under Article 226 of the Constitution of India have been instituted by the petitioner challenging the order dated 12.05.2016, passed by the Internal Accounts and Audit Directorate, U.P. Lucknow, whereby his deputation as Assistant Finance and Accounts Officer in the office of Specialist/District Basic Education Officer, Sarva Shiksha Abhiyan, District Project Office, district-Gaziabad has been withdrawn and he has been repatriated and ordered to submit his joining in the Directorate of Internal Accounts and Audit, U.P.

3. The petitioner has also assailed the consequential order dated 20.06.2016 passed by the Additional Project Director, Sarva Shiksha Abhiyan, whereby he has been repatriated to his alleged parent department of Internal Accounts and Audit Directorate, U.P. Lucknow.

4. The petitioner was initially appointed on the post of Assistant Accountant under the order dated 10.11.1999 passed by the Additional Director of Agriculture, U.P. which is contained in annexure no.SA-1 appended to the supplementary affidavit filed by the petitioner dated 26.07.2016. The said initial appointment of the petitioner in the agriculture department was made in terms of the provisions contained in the Service Rules known as Uttar Pradesh Agriculture Department Accounts Non-Gazetted Service Rules, 1982 read with the provisions contained in another set of statutory rules framed under Article 309 of the Constitution of India known as Uttar Pradesh Procedure for Appointment against Group C Posts Outside the Purview of Public Service Commission Rules, 1998. The initial appointment of the petitioner was, thus, made by the State Government in the department of agriculture.

5. On inception of Sarva Shiksha Abhiyan, a project being run by the State Government, certain posts on temporary basis were created including the post of Assistant Finance and Accounts Officer. On several posts including the post of Assistant Finance and Accounts Officer available in Sarva Shiksha Abhiyan, provisions were made for making appointment on the basis of selection on deputation. The petitioner appears to have applied for his appointment on deputation on the post of Assistant Finance and Accounts Officer in Sarva Shiksha Abhiyan and accordingly on his

selection, he was appointed on the said post and was posted at district Bagpat. The said appointment of the petitioner by way of deputation in Sarva Shiksha Abhiyan was made on the permission accorded to the said deputation by the order dated 02.09.2011 passed by the Additional Director of Agriculture (Administration) U.P. The initial order of appointment of the petitioner on the post of Assistant Finance and Accounts Officer in Sarva Shiksha Abhiyan district Bagpat has been annexed as annexure no.3 to the writ petition, which clearly indicates that during the petitioner's appointment on deputation in the borrowing department, namely, Sarva Shiksha Abhiyan, his lien to his parent department i.e. agriculture department shall be maintained. Though the appointment of the petitioner on deputation initially was made for a period of one year, however, his appointment in Sarva Shiksha Abhiyan has continued till the impugned order dated 12.05.2016 and the consequential order dated 20.06.2016 were passed.

6. The basic premise of attack to the impugned action on the part of the respondents as canvassed by the learned counsel for the petitioner, Shri Vivek Raj Singh, is that since the petitioner, who was initially appointed in the agriculture department and his lien was intact in the agriculture department, as such he could not be repatriated on completion or termination of his deputation to any department other than the department of agriculture. He has, thus, submitted that the impugned order dated 12.05.2016, passed by the Director, Internal Accounts and Audit Directorate, U.P., Lucknow, whereby his deputation has not only been recalled but he has also been directed to report for submitting his joining in the Directorate of Internal Accounts and Audit, is unlawful. His submission, in sum and substance, is that the petitioner's parent department, thus, cannot be changed or altered without his willingness or consent having been obtained by the respondents and in the instant case, in fact, by the impugned order dated 12.05.2016, his employer is being changed from the agriculture department of the State of U.P. to the department of Internal Accounts and Audit which is impermissible. He has further stated that since the consequential order repatriating the petitioner from Sarva Shiksha Abhiyan has been passed by the Additional Project Director, Sarva Shiksha Abhiyan consequent upon the order dated 12.05.216, as such it is not only that the order dated 12.05.2016 is illegal but the same in fact makes the order dated 20.06.2016 repatriating the petitioner from Sarva Shiksha Abhiyan also illegal.

7. Strongly refuting the submissions made by the learned counsel for the petitioner, Shri Devendra Upadhyaya, learned Additional Chief Standing Counsel has submitted that, as a matter of fact, a deputationist does not have any right to remain posted in the borrowing department, rather as and when services of deputationist are required by the parent department, he can be recalled to the parent department. He has also stated that the order dated 12.05.2016 has been passed by the Director, Internal Accounts and Audit Directorate, U.P. recalling the petitioner from deputation from Sarva Shiksha Abhiyan and directing him to submit his joining in the Directorate of Internal Accounts and Audit as a consequence of restructuring of different cadres of Assistant Accountants and Accountants in almost 37 departments of the State Government which have been unified to form a single cadre and for the said purpose rules have also been framed by the State Government under Article 309 of the Constitution of India known as U.P. Government Department Subordinate Accounts Cadre (Non-Gazetted) Service Rules, 2014 which have been notified on 07.11.2014. His submission, thus, is that on forming a unified cadre comprising of all the Assistant Accountants and

Accountants working in different department of U.P., including the Assistant Accountants and Accountants working in agriculture department, the State Government has exercised its administrative discretion and prerogative to restructure different cadres by unifying them into one and hence, there is nothing unlawful or illegal which can be complained of by the petitioner.

8. Drawing attention of the Court to the entire exercise undertaken by the State Government preceding notification of 2014 Rules on 07.11.2014, it has been submitted by the learned Additional Chief Standing Counsel that formation of unified cadre comprising of the incumbents holding the post of Assistant Accountants and Accountants in various departments of the State Government has a purpose to achieve which is based on the recommendations made by the Pay Committee in the year 2008 formed for the purposes of making recommendations in the context of the recommendations made by the Sixth Central Pay Commission. He has taken the Court to the 10th representation (Part 6) made by the Pay Committee and has submitted that to achieve the said purpose as mentioned in the aforesaid representation made by the Pay Committee, unification of the cadres has been done and hence, the submission of learned counsel for the petitioner is not tenable.

9. Having considered the submissions made by the learned counsel appearing for the respective parties and having perused various pronouncements relied upon by the learned counsel in support and in opposition of the case of the petitioner, the Court is unable to agree with the contentions and submissions made by the learned counsel appearing for the petitioner for the reasons which are to follow.

10. The crux of the arguments of the learned counsel for the petitioners is two folds. Firstly, he has submitted that, in fact, it is a case where by passing the order dated 12.05.2016 on the ground of formation of a unified cadre, respondents have changed the employer of the petitioner which is not only unreasonable and arbitrary but is also impermissible legally for the reason that before change of employer no willingness or consent from the petitioner was ever sought. His submission is that the petitioner was initially appointed in agriculture department and even after having been sent on deputation to Sarva Shiksha Abhiyan, his lien is maintained in agriculture department and as such notwithstanding there being no illegality in repatriating the petitioner, the impugned order dated 12.05.2016, whereby the petitioner has been directed to submit his joining not in his parent department of agriculture, but in the department of Internal Accounts and Audit, is completely unlawful.

11. Shri Vivek Raj Singh, learned counsel for the petitioner, has secondly, submitted that the alleged exercise which has resulted in formation of a unified cadre comprising of the posts of Assistant Accountants and Accountants in various government departments cannot be termed to be reconstructing, as a matter of fact, a new department has been created by the said exercise. Elaborating his aforesaid argument, it has been contended by Shri Singh that reconstructing of a cadre is permissible within a department and unification of cadres comprising of posts earlier belonging to different government departments cannot be termed to be restructuring for the reason that the State Government cannot be permitted to withdraw all the Assistant Accountants and

Accountants working in different departments and appoint and place them in a newly created department.

12. Considering the first argument raised by the learned counsel for the petitioner, it can only be observed that by forming a unified cadre, namely, Subordinate Accounts Cadre of Non-Gazetted Employees, neither any new department is being created nor the employer of the petitioner and other such Assistant Accountants or Accountants is being changed. Employer of the petitioner is the State Government and even after unification of the cadre it remains the State Government. The distinction being drawn by the learned counsel for the petitioner between the agriculture department and the department of Internal Accounts and Audit to submit the impugned action has resulted in change of employer is highly misplaced and misconceived for the reason that under our Constitutional framework the State is only one entity which functions and discharges its executive duties and powers through various departments created for convenient transaction of its business. The formation of a department for convenient functioning and discharge of duties by the State Government (though in the instant case, even the same has not been done) cannot be said to have resulted in change of employer.

13. As already observed above, in the instant case, the petitioner was appointed initially as a government employee and he will remain employed by the State Government itself for the reason that his status as a government employee will not be changed on unification of the cadres. The petitioner will be governed by the provisions of the Constitution more specifically the provisions contained under Articles 309, 310 and 311 of the Constitution of India. He will keep on enjoying the protection available to him under Article 311 of the Constitution of India which is available to the employees who hold a civil post under State. Similarly, the pleasure doctrine expressed in Article 310 will be applicable to the petitioner even after formation of the unified cadre. This discussion makes it clear that the submission advanced by the learned counsel for the petitioner that by forming a unified cadre, since the petitioner will now be governed by the department of Internal Accounts and Audit, his employer will get changed is misconceived which merits rejection.

14. As far as the submission made by learned counsel for the petitioner that since the petitioner's employer is getting changed by promulgation of 2014 Rules whereby a unified cadre has been formed, it was incumbent upon the State authorities to have asked for his willingness or his consent is concerned, the same is liable to be rejected being highly misconceived for the reason that such willingness or consent under law is required to be sought from an employee in a situation or in a case where either the terms of employment are going to adversely affect the employee or his employer is being changed. In the instant case, as has already observed above, by formation of unified cadre comprising of various posts of Assistant Accountants and Accountants in almost 37 departments of the State Government, employer of such employees, who were earlier holding the said posts in the different departments, is not going to be changed. The petitioner has also completely failed to establish that service conditions of the petitioner are going to affect him adversely by formation of unified cadre. Thus, the said argument of learned counsel for the petitioner is also not tenable.

15. The judgments cited by the learned counsel for the petitioner in the cases of *Jawaharlal Nehru University vs. Dr. K.S. Jawatkar and others*, reported in **[1989 Supp (1) SCC 679]**, *Orissa Electrical Engineers' Service Association vs. State of Orissa and others*, reported in **[(1998) 2 SCC 563]** and *Balco Captive Power Plant Mazdoor Sangh and another vs. National Thermal Power Corporation and others*, reported in **[(2007) 14 SCC 234]** are not applicable here and in fact the same do not come to the rescue of the petitioner for the reason that in all the aforesaid cases Hon'ble Supreme Court has held that willingness or consent is required for absorption of an employee in the services of a subsequent employer and in the aforesaid cases the original employers of the employees were changed, wherein as in the present case there is no change of employer.

16. In the instant case, since employer of the petitioner remains the State Government, the aforesaid judgments cited by the learned counsel for the petitioner are of no avail to him.

17. It has further been argued by the learned counsel for the petitioner that in fact unification of cadre in the manner in which the same has been done by the State Government in the instant case, cannot be termed to be restructuring of cadre. According to him, restructuring of cadre would mean any restructuring within the department and the same would not encompass in its folds borrowing employees working on the post of Assistant Accountants and Accountants in other departments and withdrawing them to form a unified cadre comprising of the post of Assistant Accountants and Accountants. In support of his submission, learned counsel for the petitioner has relied upon a judgment of Hon'ble Supreme Court in the case of *Dhole Govind Saheb Rao and others vs. Union of India and others*, reported in **[(2015) 6 SCC 727]**. Learned counsel for the petitioner has relied on para 9 of the said judgment wherein certain facts have been noted by Hon'ble Supreme Court, however, para 9 of the said judgment does not anywhere lay down a law that in case two cadres belonging to different departments of the same government are merged to form of a single unified solitary cadre, the same would not amount to restructuring. The petitioner has also placed reliance on yet another judgment of Hon'ble Supreme Court in the case of *Union of India and another vs. Lieutenant Colonel P.K. Choudhary and others*, reported in **[(2016) 4 SCC 236]**. Referring to para 4 of the said judgment wherein certain observations have been made by Hon'ble Supreme Court relating to recommendations made by Kargil Review Committee constituted by the Government of India, Post Kargil War, for exploring the ways and means for enhancing the operational preparedness of the Indian Army in its fighting capabilities, it has further been noticed in the said paragraph of aforesaid judgment that the said Committee had conducted deliberations and submitted a report making certain suggestions to take certain measures that were in its opinion necessary for restructuring of officers cadre of the Army. The aforesaid judgment being relied upon by the learned counsel for the petitioner also does not anywhere state that the manner in which in the present case unification of cadres has been done, is impermissible in law.

18. Thus, the aforesaid judgment relied upon by the learned counsel for the petitioner does not have any relevance so far as the issue involved in the present case is concerned.

19. A great emphasis has been led by Shri Vivek Raj Singh, learned counsel for the petitioner to submit that the exercise in question conducted by the State of U.P. in the present case which has resulted in unification of cadre cannot be said to be restructuring of cadre needs to be considered in the light of the meaning of the word 'restructuring'. 'Restructure' as defined in Oxford Concise English Dictionary means to give a new structure, to rebuild or to rearrange. What has been done in the instant case is that the posts of Assistant Accountants and Accountants which were earlier created in different departments of the State Government have been rearranged to build a single cadre, as such unification of the cadre in this case is nothing but restructuring.

20. So far as the word 'cadre' is concerned, the same has been defined in fundamental rule 9(4) of the Financial Handbook Vol.II (Part-II) which means strength of a service or a part of a service sanctioned as a separate unit. The word 'cadre' as defined in Financial Handbook is as under;

"Cadre means the strength of a service or a part of a service sanctioned as a separate unit."

21. The facts of the instant case establish that post of Assistant Accountants and Accountants in different departments of the State Government have been unified to form a single solitary cadre sanctioned as a separate unit by notifying 2014 Rules framed under Article 309 of the Constitution of India on 07.11.2014.

22. On the 10th representation (Part-6) made by the Pay Committee, the matter appears to have been considered by the State Government which passed a Government Order on 10.10.2011 taking into account the recommendations made by the Pay Committee and has, thus, decided to form a unified cadre comprising of the posts of Assistant Accountants and Accountants in different departments of the State Government. The Court need not go into the objects of creation of the unified cadre as the same lies in the exclusive domain of the administrative authorities of the State to adopt a particular policy of having different cadres or a unified cadre comprising of particular posts. The State Government thereafter issued another Government Order dated 28.11.2011 for giving effect to the recommendations made by the Pay Committee in its 10th representation (Part-6). The said Government Order embodies certain decisions of the State Government. The decision taken which are embodied in the Government Order dated 28.11.2011 are; (i) Assistant Accountants and Accountants working in different subordinate cadres of different departments will be selected, appointed and transferred by the Internal Accounts and Audit department and accordingly the selected candidate should be allocated to the different departments. Yet another decision was taken by the State Government that for the purposes of streamlining and strengthening the aforesaid procedure, the Directorate of Internal Accounts and Audit be also strengthened and the name of the said Directorate be changed from the Directorate of Internal Audit to the Directorate of Internal Accounts and Audit. As a matter of fact, it is in pursuance of the aforesaid decision taken by the State Government that the Directorate of Internal Audit which was known by the said name earlier is now known as the Directorate of Internal Accounts and Audit. The said rechristening of the Directorate will firstly not amount to creation of another department and even

if some other department can be said to have been created, since the same lies in the exclusive domain of the administration authorities of the State, no fault in the same can be found to give effect to the decision taken by the State Government on the recommendations made by the Pay Committee Rules under Article 309 have been framed which have been notified on 07.11.2014 and the said rules apply to the posts of Combined Subordinate Accounts Cadre in the Government Departments. Of course, the administrative department in the instant case is the finance department, however, only because of change of administrative department from Agriculture to Finance, it cannot be said that the employer of the petitioner has been changed and thus, the submission made by learned counsel for the petitioner in reference to the willingness and consent cannot be accepted to which is liable to be rejected.

23. As to the authority and power of the Government to restructure a cadre, reference can be had to a judgment of Hon'ble Supreme Court in the case of ***Union of India vs. Pushpa Rani and others***, reported in [(2008) 9 SCC 242] wherein the Apex Court in very clear terms has held that matters relating to creation, abolition of posts, formation and structuring/restructuring of cadres, prescribing the source/mode of recruitment and qualifications, criteria for selection etc. fall within the exclusive domain of the employer. The said observations occur in para 37 of the said judgment in the case of ***Union of India vs. Pushpa Rani and others***, which is extracted hereunder:

"37. Before parting with this aspect of the case, we consider it necessary to reiterate the settled legal position that matters relating to creation and abolition of posts, formation and structuring/restructuring of cadres, prescribing the source/mode of recruitment and qualifications, criteria of selection, evaluation of service records of the employees fall within the exclusive domain of the employer. What steps should be taken for improving efficiency of the administration is also the preserve of the employer. The power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provision or is patently arbitrary or is vitiated due to mala fides. The Court cannot sit in appeal over the judgment of the employer and ordain that a particular post be filled by direct recruitment or promotion or by transfer. The Court has no role in determining the methodology of recruitment or laying down the criteria of selection. It is also not open the Court to make comparative evaluation of the merit of the candidates. The Court cannot suggest the manner in which the employer should structure or restructure the cadres for the purpose of improving efficiency of administration."

24. Similar observations have been made by Hon'ble Supreme Court yet in another case of ***P. U. Joshi and others vs. Accountant General, Ahmedabad and others***, reported in [(2003) 2 SCC 632], wherein it has clearly been held that the issue relating to constitution, pattern, nomenclature of posts and cadres, categories, and their creation/abolition, prescription for qualification and other conditions of service is a policy within the exclusive discretion and jurisdiction of the State, subject, of course, the limitations of restrictions envisaged in the Constitution of India but it is not for the courts to direct the Government to have a method of recruitment or eligibility criteria by substituting its views for that of the State. Para 10 of the aforesaid judgment of Hon'ble Supreme Court in the case of ***P. U. Joshi and others (supra)*** runs as under:

"10. We have carefully considered the submissions made on behalf of both parties. Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of Policy is within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India and it is not for the statutory tribunals, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria or avenues of promotion or impose itself by substituting its views for that of the State. Similarly, it is well open and within the competency of the State to change the rules relating to a service and alter or amend and vary by addition/subtraction the qualifications, eligibility criteria and other conditions of service including avenues of promotion, from time to time, as the administrative exigencies may need or necessitate. Likewise, the State by appropriate rules is entitled to amalgamate departments or bifurcate departments into more and constitute different categories of posts or cadres by undertaking further classification, bifurcation or amalgamation as well as reconstitute and restructure the pattern and cadres/categories of service, as may be required from time to time by abolishing existing cadres/posts and creating new cadres/posts. There is no right in any employee of the State to claim that rules governing conditions of his service should be forever the same as the one when he entered service for all purposes and except for ensuring or safeguarding rights or benefits already earned, acquired or accrued at a particular point of time, a Government servant has no right to challenge the authority of the State to amend, alter and bring into force new rules relating to even an existing service. "

25. In the instant case as well, as observed above, the petitioner has not been able to establish that the unification of the cadre comprising of various posts of Assistant Accountants and Accountants which were earlier available in different departments of the State Government in any manner has infringed any of the constitutional or statutory provisions. Thus, the illegality as is being submitted by the learned counsel for the petitioner in the impugned action on the part of the respondents is not in sight here.

26. For the aforesaid discussions made herein above, the writ petition deserves to be dismissed, which, resultantly, is hereby **dismissed**.

27. It is, however, provided that if the petitioner submits his joining pursuant to the impugned orders dated 12.05.2016 and the consequential order dated 20.06.2016 which have been annexed as annexure nos.1 and 2 respectively to the writ petition, the same shall be accepted by the respondents without treating the period from the date of passing of the impugned orders till he submits his joining as break in service. The petitioner is permitted to submit his joining pursuant to the orders which are under challenge in this writ petition within three weeks from today.

28. There will be no order as to costs.

BEFORE

Misc. Bench No.- 19745 Of 2016

It was emphasized that **statutory committees are independent bodies**, and the Zila Panchayat itself **cannot assume their functions or pre-determine their agenda**.

The procedure prescribed under the **U.P. Zila Parishad (Conduct of Proceedings) Rules, 1962**—particularly the requirement of **proper notice (minimum three days)**—was not followed. The Court reiterated the principle that **if a statute prescribes a manner of doing an act, it must be done in that manner or not at all.**

The simultaneous constitution of committees and immediate approval of projects was held to be **contrary to law and indicative of arbitrariness.**

Relying on settled law, the Court held that **actions taken in undue haste can be arbitrary and invalid.** Consequently:

The **resolutions under Agenda Items 3 and 4 dated 13.07.2016 were annulled**, and The **tender notice dated 08.08.2016 (published on 13.08.2016) was quashed.**

However, the Court granted liberty to the authorities to **reprocess the proposals in accordance with law and prescribed procedure.**

CASE LAW CITED

Zenit Mataplast Pvt. Ltd. v. State of Maharashtra

Sunil Charora v. State of U.P.

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.
&
Hon'ble Dr. Vijay Laxmi, J.)

1. This petition questions the exercise of floating of a tender notice dated 08.08.2016 as published on 13.08.2016 praying for quashing of the same with a further direction for initiating tenders for a sizeable quantity of development work in the Zila Panchayat, district Sitapur through some independent agency as the Zila Panchayat has conducted itself through the present Chairman in an absolutely unfair manner in inviting the tenders for the same as enlisted in the tender notice.

2. The background in which this challenge has arisen saw a precursor of this litigative battle in Writ Petition No.5839 (M/B) of 2016: Sarojini Devi Vs. State of U.P. and others, when the Zila Panchayat had proceeded to issue a tender notice for almost the same work on 23.02.2016. It had been issued by the Zila Panchayat without the same having been processed through the statutory committees/sub-committees that are to be constituted in terms of Section 65 of the Uttar Pradesh Zila Panchayat Act, 1961 and the Rules framed in this regard.

3. On the filing of Writ Petition No.5839 (M/B) of 2016, the tender notices were withdrawn and again a fresh notice dated 13.04.2016 was issued without following the aforesaid process of constituting the committees and then processing the projects and the proposed tenders. The petitioner preferred a second Writ Petition No.9070 (M/B) of 2016 challenging the same wherein orders were passed on 28.04.2016 directing the Zila Panchayat

to proceed with the tenders if necessary but the same would not be finalized till orders are passed in that writ petition. The order passed therein, is extracted hereinunder:-

"Heard Sri Gaurav Mehrotra, learned Counsel for the petitioner.

An identical issue has been raised in Writ Petition No. 5839 (M/B) of 2016, Sarojani Devi versus Sate of U.P. in relation to tender notice dated 23.02.2016. The said tender has been withdrawn by the respondent- Zila Panchayat, Sitapur and now fresh tender notice dated 13.04.2016 has been issued with certain modifications but the arguments on behalf of the petitioner remains the same.

The tender notice according to the petitioner has not been preceded by any deliberations by the statutory committee that is required to process projects before they are finalized and executed by the Zila Panchayat.

Ms. Madhulika Yadav, learned Counsel for the Zila Panchayat, Sitapur submits that the power has been delegated by the Zila Panchayat referable to **Section 57** of the U.P. Kshetriya Panchayats and Zila Panchayats Act, 1961.

Having perused the same, we also find a reference to the schedule. **Prima-facie, on a perusal thereof, we do not find any such powers available with the Zila Panchayat to delegate the powers of such committees, as are involved herein, on the Adhakshya of Zila Panchayat.**

Consequently, in the absence of any such material to demonstrate that the impugned tender notice was preceded by any such process having been adopted, we provide that the tender process may go on **but the same shall not be finalized till orders are passed in this writ petition.**

All the respondents may file their counter affidavits within three weeks. Rejoinder affidavit, if any, may be filed within two weeks thereafter.

List thereafter."

4. The stand that had been taken then was about the delegation of power on the Adhyaksha (Chairman) of the Zila Panchayat in this regard under Section 57 of the 1961 Act. On the passing of the said order the Zila Panchayat again withdrew the tender notice impugned therein and has now resorted to the issuance of a fresh notice after the purported compliance of the formation of the committee and processing the proposals through such committee.

5. What appears to have been done, and which has not been disputed by the learned counsel for the Zila Panchayat, is that the Zila Panchayat itself convened a meeting and circulated an Agenda dated July 13, 2016 informing the members of a meeting to be held on

23.07.2016 for constituting the committees. The same agenda incorporated the meeting of the Planning and Development committee that was to be constituted as well as the business to be discussed and transacted by it.

6. The meeting of the Zila Panchayat was convened on 23.07.2016 and on the very same day, the committees were constituted and these newly constituted committees met on the same day namely, the Planning and Development committee at 02:30 p.m., to consider the spending of an amount received under the 13th Finance Commission on the basis of proposals of members of the Zila Panchayat and the projects to be finalized accordingly. The second agenda was with regard to a meeting at 04:00 p.m. on the same day by the Planning and Development committee to approve such proposals. Thus, according to the agenda itself, the constitution of the committees, the discussion on the projects and proposals and then its approval were all to be simultaneously carried out within a span of one and half hours between 02:30 p.m. and 04:00 p.m. on the same day.

7. The respondents appear to have run through the aforesaid exercise that has given rise to the present writ petition. The petitioner contends that the said exercise has been done in a hurry without any deliberations worth the name in relation to 174 projects as per the tender notice dated 13.08.2016 and other decisions relating to the spending of money received under the 13th Finance Commission. The petitioner alleges that not even half a minute had been devoted to each of the 174 projects between 02:30 p.m. and 04:00 p.m. nor any exercise to assess the financial implications was undertaken and the entire decision making process was abruptly concluded which was a mere paper exercise and a completion of a formality, the patent defects whereof had been pointed out earlier.

8. The petitioner has also alleged that the constitution of the committees are invalid and without the participation of the Zila Panchayat members.

9. We heard the matter on 23.08.2016 and the arguments were advanced by Sri P.K. Khare for the petitioner and Sri O.P. Srivastava, learned Senior Counsel for the Zila Panchayat. We accordingly passed the following order on hearing the learned counsel:-

"Heard Sri P.K. Khare, learned counsel for the petitioner and learned standing counsel for the respondent No.1, 4 and 5. Smt. Madhulika Yadav has filed her power on behalf of the respondent No.2, 3 and Sri Shivam Sharma for the respondent No.5.

This petition questions the proceedings of the respondent Zila Panchayat of issuing tender notice dated 08.08.2016 and 13.08.2016 on the ground that the issuance of the notice is vitiated by an erroneous exercise of constituting the committees as envisaged in terms of Section 65 of the Uttar Pradesh Zila Panchayats Act, 1961 read with the Government order dated 29.07.1999 notifying the committees. Apart from a challenge raised to the constitution of the committees, the method adopted by the Zila Panchayat and its Adhyaksh in proceeding to do so, has also been described as hasty resulting in arbitrariness without the participation of all

the members of the Zila Panchayats. It is also urged that the sub-committees which were yet to be constituted and function under the Rules framed under the Act, even their agenda was circulated without the committees coming into existence and the subject matter being considered by them and, therefore, the very process of such agenda being circulated being vitiated, the subsequent resolutions passed that have been done simultaneously and hurriedly in terms of the said agenda, have to fall through. It is also urged that the information given to the petitioner, vide letter dated 26.07.2016, is an intimation of the predetermined exercise undertaken by the respondents that stands vitiated for the reasons mentioned hereinabove.

It is urged by Sri P.K. Khare, learned counsel for the petitioner that this has been done to somehow or the other execute the work without following the procedure prescribed in law inasmuch as, 174 projects have been notified in the tender notice about which the time to be devoted for the purpose of finalizing the project and issuance of tender, was also surprisingly fixed in the same disputed agenda without any sense of proportion of time to be devoted for the said purpose. Thus, the action of the respondents is also being challenged on serious mala fides as alleged.

Replying to the said submissions raised, Sri O.P. Srivastava, learned Senior Counsel for the Zila Panchayat has submitted that the constitution of the committees are in accordance with law and any dispute with regard to the same can be redressed by approaching the Commissioner under Rule 18 of the 1997 Rules which are applicable to the controversy and not governed by the 1984 Rules.

He further submits that the agenda is in conformity with the Government order dated 29.07.1999 and the entire development work of the Zila Panchayat has been held up on account of the objections raised by the petitioner and such other members who are opposing the majority decision. He also contends that the meeting which was convened even if under the agenda dated 13.07.2016 would not vitiate the same as the decision has been taken by the duly constituted committees in the wake of the projects which are pending. He, therefore, contends that even if there is a noticeable irregularity, the same would not vitiate the process adopted by the committee or its final decision which is in the larger public interest and in the interest of the Zila Panchayat. The allegation of mala fide therefore, should not be countenanced keeping in view the aforesaid larger interest of the Zila panchayat the work whereof, has been held up for quite some time.

Learned standing counsel has also appeared on behalf of the State who has pointed out the Uttar Pradesh Zila Panchayat Rules, 1962.

The issue, therefore is, as to whether the inclusion of item No.3 and 4 in the agenda dated 13.07.2016 is in conformity with law or does it amount to a mala fide act which was unauthorized and was predetermined as alleged by the petitioner. The other issue is of the validity of the constitution of the committees and the Rules applicable in this regard.

Sri O.P. Srivastava prays that the matter be taken up tomorrow.

Put up tomorrow as fresh."

10. Learned counsel for the respondent Sri O.P. Srivastava has urged that there is absolutely no discrepancy and merely because the decision was taken on the same day, the same cannot be said to be unlawful, unauthorized or irregular. He, however, submits that he does not propose to file any counter affidavit on behalf of the respondent Zila Panchayat on going through the records that were made available to him inasmuch as, once the committees have been validly formed, then any dispute with regard to the formation of a committee has to be raised before the Commissioner in terms of Rule 18 of the Uttar Pradesh Zila Panchayats (Formation of Committees) Rules, 1997.

11. He then submits that so far the conduct of the meeting is concerned, once the agenda of the Zila Panchayat contained the proposal for constitution of committees, then a simultaneous consideration for constituting sub-committees and the subject matter to be discussed therein cannot be said to be irregular, more so when the meeting was held by a validly constituted Planning and Development sub-committee. He, therefore, submits that even if it was a simultaneous exercise, then it is neither illegal nor is it irregular and the Zila Panchayat and the committee validly constituted are authorized to do so.

12. He then submits that the work of the Zila Panchayat has been held up for long on account of these obstructions created by those who are in opposition and are in a minority. They are creating obstacles in order to impede the progress of the work of the Zila Panchayat. It is therefore urged that the writ petition be dismissed and the Zila Panchayat be allowed to carry out its work.

13. Replying to the aforesaid submissions of Sri O.P. Srivastava, Sri P.K. Khare for the petitioner has invited the attention of the Court to Sections 63, 64, 65, 66, 67 and 68 of the 1961 Act read with the Uttar Pradesh Kshettra Panchayat and Zila Panchayat Construction Work Rules, 1984, the Uttar Pradesh Zila Panchayats (Formation of Committees) Rules, 1997, the notification dated 29.07.1999 which is Annexure-4 to the writ petition and the Uttar Pradesh Zila Parishad (Conduct of Proceedings) Rules, 1962. He submits that when the Rules provide for the constitution of the sub-committees, then they have to be constituted in that manner and their function has to be independently governed and conducted under the Rules aforesaid. The Zila Panchayat itself cannot assume the authority and jurisdiction of these committees which are independent statutory committees under the 1961 Act itself. He therefore, submits that the Zila Panchayat could not have issued the agenda No.3 and 4 in the notice dated 13.07.2016 and any consequential action taken pursuant thereto, in a hasty manner, cannot be sustained. This was done deliberately to somehow defray the money which has been received under the 13th Financial Commission by favouring contractors and is a device to misappropriate the Zila Panchayat funds by those who are in power. He, therefore, submits that this entire exercise should be struck down and the relief as prayed for, be granted.

14. We have considered the submissions raised and what we find is that so far as the issue of constitution of committees is concerned, there is no direct relief claimed for quashing of the constitution of such committees by the Zila Panchayat in the meeting that was held on 23.07.2016. For this relief any aggrieved person has a remedy to approach the Commissioner under Rule 18 of the 1997 Rules as extracted hereinunder:-

"18. Disputes relating to election.--Any petition relating to the result of the election shall if required within a period of six weeks from the date of election, be referred by the Adhyaksha, to the Commissioner of the division concerned, whose decision shall be final and binding."

15. We, therefore, at this stage would not like to delve into the merits of the Constitution of the sub-committees including the Planning and Development committee which shall be open for consideration before the Commissioner in case any such objection is filed. The said issue has also been settled by a Division Bench of the High Court at Allahabad, vide judgment dated 04.07.2016 in Writ-C No.29823 of 2016: Sunil Charora and two others.Vs. State of U.P. And others.

16. The next question is as to whether the Zila Panchayat could have issued the agenda on 13.07.2016 with regard to the business of the Planning and Development that was yet to be constituted and had not come into existence. The petitioner raised an objection on 21.07.2016. The Zila Panchayat on 26.07.2016 responded to the said objection, a copy whereof is Annexure-9 to the writ petition. Strangely enough, this is an answer given subsequent to the date of meeting when the meeting itself was held on 23.07.2016. The same refers to the Uttar Pradesh Zila Panchayats (Formation of Committees) Rules, 1997 and also to the guidelines dated 31.07.2015 that are to be followed in this regard. The said letter purports to inform that the meeting **would be** held properly, as if in future. It is not understood as to why such a reply was given after the meeting had already been convened on 23.07.2016 and when the resolution had been passed. It appears as if the reply had been prepared earlier but was issued on 26.07.2016 with proper recitals.

17. The second letter dated 26.07.2016 was issued informing the petitioner and other members that the committee had already been constituted and the entire projects were discussed and got approved by the Planning and Development Committee that are in accordance with law.

18. We are unable to comprehend this simultaneous exercise of the committee and clearing of all the 174 projects in one sweep by it within 1½ hours that was clearly a paper transaction without any serious deliberations. To that extent Sri P.K. Khare is justified in relying on the judgment of the Apex Court including the judgment in the case of **Zenit Mataplat Private Limited. Vs. State of Maharashtra & Ors.: (2009) 10 SCC 388**, which rules that any action taken in undue haste can also be termed arbitrary and cannot be condoned

in law. We, therefore, find that the agenda item No.3 and 4 of the notice dated 13.07.2016 that was conducted on 23.07.2016 was absolutely in haste and without any proper deliberations.

19. Apart from this, if the very existence of the committee was not there till 23.07.2016, there was no occasion for the Zila Panchayat to have taken over the task of issuing the agenda of a notice pertaining to the subject matter of the Planning and Development Committee that was yet to come into existence. This is not in conformity with the procedure of holding the meeting of such committees formed by the Zila Panchayat as per Rule 41 of the U.P. Zila Parishad (Conduct of Proceedings) Rules, 1962.

20. We may put on record that the learned standing counsel for the State had pointed out these Rules to urge that the said Rules still hold the field. Accordingly, for the aforesaid reason also, the Committee that has been constituted, did not follow the 1962 Rules in conducting its meeting and the entire process appears to have been carried out in haste. It is settled law, including the law of meetings, that if a meeting has to be convened in a particular manner, then the same should be resorted to in that manner and not otherwise. The said rules clearly provide for at least three days prior notice. In the instant case, the committee was constituted and it completed all the deliberations in less than two hours on the same day.

21. We cannot appreciate the taking of such decision relating to a huge number of 174 projects in such a short period of time and the action clearly appears to be an eye wash resulting in arbitrariness. The Committee so constituted, ought to have followed the procedure under the 1962 Rules and, therefore, the decision to proceed with the proposals and issue of a fresh tender notice is clearly vitiated.

22. Thus, for all the reasons aforesaid, we leave the issue relating to the constitution of committees to be taken up if raised, before the Commissioner as per Rule 18 of the 1997 Rules but so far as the impugned tender notices are concerned, they cannot be sustained as the very meeting of the committee that has resolved to issue the tender notice has violated the procedure while processing the same. Consequently, the action taken by the committee as per item No.3 and 4 of the agenda dated 13.07.2016 is hereby annulled and the impugned tender notice dated 08.08.2016 as published on 13.08.2016 is hereby quashed.

23. The writ petition is partly allowed to the aforesaid extent and subject to the observations made therein. It shall be open to the committee so constituted to proceed with the processing of the projects and proposals received in accordance with the Rules referred to hereinabove, which shall be subject to any further orders by higher authorities or by any Court of law if raised before it.

(2016) 8 ILRA 100
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.08.2016

BEFORE

THE HON'BLE MRS. VIJAY LAKSHMI, J.

Application U/S 482 No.- 19576 Of 2013

Uma Kant Yadav

...Applicant
Versus

State Of U.P. & Anr.

...Opposite Parties

Counsel for Applicant:

R.P. Yadav

Counsel for Opposite Parties:

Government Advocate, Ajeet Singh

Present application was filed with prayer to quash the order dated 29.5.2013 passed in Criminal Appeal No.15/12, (Umakant Yadav Vs. State of U.P. & Ors), by the learned Additional Session Judge, Court No.3 Jaunpur, whereby the learned Additional Session Judge has rejected the application moved by the applicant under Section 391 Cr.P.C. seeking permission to adduce additional evidence in appeal.

The law regarding adducing of additional evidence in appeal has been well settled by Hon'ble Supreme Court in a catena of judgments in **Ashok Tshering Bhutia Vs. State of Sikkim, 2011 (73) ACC 371**, the Apex Court has held as under:-

""Additional evidence at appellate stage is permissible, in case of a failure of justice. However, such power must be exercised sparingly and only in exceptional suitable cases where the court is satisfied that directing additional evidence would serve the interests of justice. It would depend upon the facts and circumstances of an individual case as to whether such permission should be granted having due regard to the concepts of fair play, justice and the well-being of society. Such an application for taking additional evidence must be decided objectively, just to cure the irregularity. The primary object of the provisions of Section 391 Cr.P.C. is the prevention of a guilty man's escape through some careless or ignorant action on part of the prosecution before the court or for vindication of an innocent person wrongfully accused, where the court omitted to record the circumstances essential to elucidation of truth".

Court observed that The applicant had full opportunity and he was given sufficient time to adduce evidence and he had examined as many as four defence witnesses, but he did not make any such prayer before the trial court. The document i.e. the Certificate of Gram Pradhan, sought to be proved was available on record during trial, which is evident from the averment made in para 10 of the affidavit filed in support of present application wherein it is clearly mentioned that from the prosecution side, a number of documents were filed including the certificate dated 15.3.2009 issued by Phool Chandra Yadav, Gram Pradhan. Therefore, if the certified of Gram Pradhan was already available on record, there was no difficulty for the accused/applicant in moving an application before the trial court to summon its executor i.e. Gram Pradhan to prove it, but the applicant did not avail that opportunity.

The application being devoid of merit was rightly rejected by learned lower appellate court. Hence, this application is liable to be dismissed and is hereby dismissed.

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. The applicant, by means of this application under Section 482 Cr.P.C., has invoked the inherent jurisdiction of this court with prayer to quash the order dated 29.5.2013 passed in Criminal Appeal No.15/12, (Umakant Yadav Vs. State of U.P. & Ors), by the learned Additional Session Judge, Court No.3 Jaunpur, whereby the learned Additional Session Judge has rejected the application moved by the applicant under Section 391 Cr.P.C. seeking permission to adduce additional evidence in appeal.

2. Heard learned counsel for the applicants, learned A.G.A. and learned counsel for the O.P. No.2 and perused the records.

3. Some relevant background facts in brief are that the applicant was convicted by the learned trial court/Additional Chief Judicial Magistrate Ist, Jaunpur vide judgment and order dated 07.2.2012 under Sections 419,420,467,468,469,471 and 506 I.P.C. and was sentenced for rigorous Imprisonment under the aforesaid sections for various periods, the maximum being for 7 years under Section 471 with a fine of Rs. 5000/-.

4. Aggrieved by the aforesaid judgment, the applicant preferred criminal appeal no.15/12 in which he moved an application under Section 391 Cr.P.C. seeking permission to adduce additional evidence in appeal.

5. The learned trial court, after hearing both the parties, rejected the aforesaid application inter-alia on the ground that the applicant had full opportunity to lead evidence in his defence, during trial, but despite ample time and opportunity, the appellant did not avail it. More over, there was no document on the record, required to be proved by any witnesses sought to be summoned by the applicant. The learned trial court also observed that the applicant was trying to delay the proceedings of the case by repeatedly moving such kind of applications.

6. The legality and correctness of the aforesaid order has been challenged by the learned counsel for the applicant on the ground that the learned trial court did not consider his prayer and rejected his application without applying its mind to the facts and circumstances of the case. Learned counsel has submitted that from the prosecution side a number of documents were filed during trial including one paper No.14-Ka/6 which is a certificate dated 15.3.2009 issued by one Phool Chand Yadav, Gram Pradhan, having a photograph of a lady, with regard to whom, Phool Chandra Pradhan had certified that she is Geeta Devi w/o Harish Chandra Yadav who is very well known to him. However, when during trial, the said document was shown to defence witnesses DW-1 and DW-4, they stated that the photograph affixed on the said document was not of Geeta Devi but of one Smt. Suman, wife of Harish Chandra of Village Khobaria.

7. Learned counsel has submitted that the aforesaid document could not be duly proved due to non examination of its executor Phool Chandra Pradhan. Hence, he moved an application under Section 391 Cr.P.C. with prayer to summon Phool Chandra Yadav and wife of Harish Chandra as witnesses during appeal, but the court below illegally rejected his prayer in a mechanical way.

8. Per contra, learned A.G.A. has opposed the application on the ground that there is no illegality in the order impugned which is based on cogent and convincing reasons.

9. Considered the rival submissions made by both the learned counsels.

10. The law regarding adducing of additional evidence in appeal has been well settled by Hon'ble Supreme Court in a catena of judgments in **Ashok Tshering Bhutia Vs. State of Sikkim, 2011 (73) ACC 371**, the Apex Court has held as under:-

"Additional evidence at appellate stage is permissible, in case of a failure of justice. However, such power must be exercised sparingly and only in exceptional suitable cases where the court is satisfied that directing additional evidence would serve the interests of justice. It would depend upon the facts and circumstances of an individual case as to whether such permission should be granted having due regard to the concepts of fair play, justice and the well-being of society. Such an application for taking additional evidence must be decided objectively, just to cure the irregularity. The primary object of the provisions of Section 391 Cr.P.C. is the prevention of a guilty man's escape through some careless or ignorant action on part of the prosecution before the court or for vindication of an innocent person wrongfully accused, where the court omitted to record the circumstances essential to elucidation of truth. Generally, it should be invoked when formal proof for the prosecution is necessary. (Vide *Rajeswar Prasad Misra v. State of West Bengal and another*, 1965 (2) ACC 221, *Ratilal Bhanji Mithani v. The State of Maharashtra & Ors*; 1971 (8) ACC 148; *Rambhau & Anr. v. State of Maharashtra*, 2001 (42) ACC 1116, *Anil Sharma & Ors. v. State of Jharkhand*, AIR 2004 SC 2294, *Zahira Habibulla H. Sheikh and another v. State of Gujarat and others*; (2004) 4 SCC 158; and *Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi)* (2010) 6 SCC 1.

11. In ***Rambhau & Anr. v. State of Maharashtra*, 2001 (42) ACC 1116**, a larger Bench of this Court held as under:

"Incidentally, Section 391 Cr.P.C. forms an exception to the general rule that an Appeal must be decided on the evidence which was before the Trial Court and the powers being an exception shall always have to be exercised with caution and circumspection so as to meet the ends of justice. Be it noted further that the doctrine of finality of judicial proceedings does not stand annulled or affected in any way by reason of exercise of power under Section 391 Cr.P.C. since the same avoids a de novo trial. It is not to fill up the lacuna but to subserve the ends of justice. Needless to record that on an analysis of the Civil Procedure Code, section 391 is thus akin to Order XLI, Rule 27 of the C.P. Code." (Emphasis added)"

12. The applicant had full opportunity and he was given sufficient time to adduce evidence and he had examined as many as four defence witnesses, but he did not make any such prayer before the trial court. The document i.e. the Certificate of Gram Pradhan, sought to be proved was available on record during trial, which is evident from the averment made in para 10 of the affidavit filed in support of present application wherein it is clearly mentioned that from the prosecution side, a number of documents were filed including the certificate dated 15.3.2009 issued by Phool Chandra Yadav, Gram Pradhan. Therefore, if the certified of Gram Pradhan was already available on record, there was no difficulty for the accused/applicant in moving an application before the trial court to summon its executor i.e. Gram Pradhan to prove it, but the applicant did not avail that opportunity. Moreover, the aforesaid averment made in para 10 of the affidavit is in total contradiction of averment made in the application dated 14.3.2013 moved by applicant under Section 391 Cr.P.C., copy whereof has been annexed as Annexure no.14 to the affidavit filed in support of this application. In para 11 of this application it is clearly mentioned that the document (the certificate of Gram Pradhan) which the applicant had filed in support of his application under Section 391 Cr.P.C. was not in his possession, so he could not file it earlier during pendency of trial.

13. Considering all the facts and circumstances of the case, this court is of the considered view that the applicant had tried to fill up the lacunas by moving such application under Section 391 Cr.P.C. Though he could not succeed in this effort but he became successful in delaying the disposal of appeal.

14. The impugned order does not require any interference by this Court.

15. The application being devoid of merit was rightly rejected by learned lower appellate court. Hence, this application is liable to be dismissed and is hereby dismissed.

BEFORE

Criminal Misc. Bail Application No. - 23773 Of 2016

Counsel for Applicant:

Counsel for Opposite Party:

Present application has been moved seeking the release of the applicants on bail in Case Crime No.48 of 2016, u/s 147, 148, 149, 302, 120B, 506 I.P.C. and 7 Criminal Law Amendments Act, Police Station-Sarnath, District-Varanasi.

Applicant counsel made submissions that the F.I.R. was lodged by Ashish Yadav, who is the son of the deceased and also an eye-witness of the occurrence as he claims that at the time of occurrence he was going along with his father in his Safari car and it was at that time that they were waylaid by certain accused persons, who started firing indiscriminately upon the father resulting in his death. The next submission is that the first informant was examined by the Investigating Officer u/s 161 of Cr.P.C. and in his statement given before the police he reiterated his version given in the F.I.R. But it had so happened that the incident in question got recorded in a CCTV camera which was fitted near the place of occurrence. It has been pointed out by counsel that the aforesaid CCTV footage was taken in possession by the Investigating Officer and was seen and shown to the family members which included the wife of the deceased Smt. Rajwati Devi. Counsel has drawn the attention of the Court to the statement of aforesaid Smt. Rajwati Devi, who is also mother of the first informant, in which she stated to have identified some other persons as accomplices different from the aforesaid nominated assailants.

Court observed that after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, this Court is of the view that the applicant may be enlarged on bail.

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. This application has been moved seeking the release of the applicants on bail in Case Crime No.48 of 2016, u/s 147, 148, 149, 302, 120B, 506 I.P.C. and 7 Criminal Law Amendments Act, Police Station-Sarnath, District-Varanasi.

2. Heard Shri V.P. Srivastava, learned Senior Counsel, assisted by Shri Diwan Saifullah Khan, learned counsel for the applicant; Shri R.P. Rajan, learned counsel for the informant and learned A.G.A. for the State.

3. Perused the record.

4. Submission of counsel for the applicant is that the F.I.R. was lodged by Ashish Yadav, who is the son of the deceased and also an eye-witness of the occurrence as he claims that at the time of occurrence he was going along with his father in his Safari car and it was at that time that they were waylaid by certain accused persons, who started firing indiscriminately upon the father resulting in his death. Further submission is that the names of the assailants as were disclosed in the F.I.R. by the first informant were Rajesh Singh @ Rinku, Chandan Singh @ Pappu Singh, Arun Singh and Vinod Singh. It is further submitted that after receiving the fatal shots, the deceased was rushed to the hospital where he had been declared dead. The enmity with the aforesaid named assailants for reasons of election of Block Pramukh was alleged and it was also said that repeated threats were given by the aforesaid accused eventually resulting in his murder. The next submission is that the first informant was examined by the Investigating Officer u/s 161 of Cr.P.C. and in his statement given before the police he reiterated his version given in the F.I.R. But it had so happened that the incident in question got recorded in a CCTV camera which was fitted near the place of occurrence. It has been pointed out by counsel that the aforesaid CCTV footage was taken in possession by the Investigating Officer and was seen and shown to the family members which included the wife of the deceased Smt. Rajwati Devi. Counsel has drawn the attention of the Court to the statement of aforesaid Smt. Rajwati Devi, who is also mother of the first informant, in which she stated to have identified some other persons as accomplices different from the aforesaid nominated assailants. Subsequently when the first informant was again examined by the Investigating Officer, in this background he drastically changed his version given earlier in the F.I.R. and also given before the Investigating Officer at the first instance. According to this latter version, the role of applicant appears to have been ascribed is that of hatching a conspiracy while the names of all shooters involved in the actual act of shooting were completely changed and one Harendra Singh, Panna @ Rajan Chaudhary, Santosh @ Raju, Sonu Singh and Udal Bind were now ascribed the role of shooting at the deceased. In the second version given by the first informant, the co-accused Arun Singh who was also nominated in the F.I.R. as main shooter and one Manoj Singh were given the role of exhortation and it was stated by the first informant that at the time of occurrence the aforesaid co-accused Arun Singh and Manoj Singh had exchanged some expressions in between them saying that the heartfelt object and desire of co-accused Arun Singh and applicant Chandan Singh has got fulfilled. Submission is that it is this sentence uttered by co-accused Manoj Singh that has given the ground to the Investigating Officer to charge the applicant with the offence of hatching a conspiracy of this murder. Counsel has further tried to lay emphasis upon several contradictions existing in between earlier version of the first informant and the latter version to which he finally landed up and has tried to submit that the drastic change on the most fundamental aspects of the case goes a long way to detract the evidentiary value of the first informant and the nature of contradiction as mentioned herein before is so loud that it robs the prosecution from its credibility and worth. Contention is that in any view of the matter, in view of

what has been stated by the first informant in his latter statement recorded u/s 161 Cr.P.C. the case of prosecution against the applicant is reduced to only of hatching a conspiracy and the role of shooting has been withdrawn which was earlier ascribed to him and this carves out a prima facie case for bail in his favour. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required. It has also been submitted that the applicant is languishing in jail since 01.02.2016 and in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

5. The Court has also heard learned counsel for the informant and learned A.G.A. who have opposed the prayer for bail. Learned counsel for the informant submitted that the CCTV footage that has been taken by the Investigating Officer was not taken in accordance with the rules and is not an admissible piece of evidence on the basis of which the version of the F.I.R. may be discredited and the earlier version given by the first informant in consonance with the version of F.I.R. should be made the basis to act upon against the applicant.

6. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, this Court is of the view that the applicant may be enlarged on bail.

7. Let the applicant-Chandan Singh @ Pappu Singh, involved in Case Crime No.48 of 2016, u/s 147, 148, 149, 302, 120B, 506 I.P.C. and 7 Criminal Law Amendments Act, P.S.-Sarnath, District-Varanasi be released on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(1) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicant will personally appear on each and every date in the court and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

8. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

9. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merits of the case.

(2016) 8 ILRA 107
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.08.2016

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.

Civil Revision No.- 120 Of 2016

Virendra Yadav

...Revisionist
Versus

Ramesh & Anr.

...Opposite Parties

Counsel for Revisionist:

Rajendra Prasad

The revisionist who is a driver being aggrieved by the orders dated 01.11.2014 and 30.05.2016 passed by Motor Accident Claims Tribunal / Additional District Judge, Court No. 9, Lucknow in claim petition no. 587 of 2013 has questioned the legality of the impugned orders in the instant civil revision.

Court observed that interlocutory orders passed by a Tribunal unless an alternative remedy is provided for, and subject to other exceptions, shall be amenable to the jurisdiction of this Court under Article 227 of the Constitution of India which is akin to revisional/appellate jurisdiction. For the exercise of such a jurisdiction the purpose of law and justice must seem to have reconciled. The orders passed under Section 24 CPC being also in the nature of interlocutory orders are also amenable to the constitutional remedy under Article 227 of the Constitution. Having held that all interlocutory issues arising before the Motor Accident Tribunal resulting into miscarriage of justice in absence of an alternative remedy under the Special Act, are amenable to Article 227 of the Constitution of India, it is directed that all the civil revisions pending before this Court would be treated as civil revisions read with under Article 227 and likewise the applications filed under Section 24 CPC.

Court held that challenge to the impugned order dated 30.05.2016 under the supervisory jurisdiction of this Court is made out and the same is hereby set aside, leaving it open to the Tribunal to consider the grievance of the revisionist afresh and decide the recall application in accordance with law within a period of not later than six weeks from the date of receipt of this order.

The revision is partly allowed.

(Delivered by Hon'ble Attau Rahman Masoodi, J.)

1. Heard.

2. The revisionist who is a driver being aggrieved by the orders dated 01.11.2014 and 30.05.2016 passed by Motor Accident Claims Tribunal / Additional District Judge, Court No. 9, Lucknow in claim petition no. 587 of 2013 has questioned the legality of the impugned orders in the instant civil revision. By order dated 01.11.2014 an amendment application filed by the claimant seeking to change the number of offending tractor stated as UP 41 Q 3987 to UP 41 Q

3907 under Order VI Rule 17 read with Section 151 C.P.C. was allowed. The revisionist filed an application for recall of order dated 01.11.2014 alleging therein that he was neither served a copy of the amendment application nor afforded any opportunity before passing the order and as such the order may be recalled. The application for recall of order was rejected on 30.05.2016 by the Tribunal on the ground that the applicant had all the opportunity to defend and no prejudice would be caused even if the amendment was allowed without notice. Thus, the revisional jurisdiction of this Court under Section 115 CPC has been invoked to assail both the orders passed by the Motor Accident Claims Tribunal.

3. The maintainability of the civil revision became questionable on account of a direct conflict between two judgements; one rendered on Aug. 07, 1997 by a Full Bench of this Court reported in **2004 (22) LCD 40** in the case of **Kamla Yadav versus Smt. Sushma Devi and others** and a later judgement rendered by a Division Bench of this Court in the case of **Oriental Insurance Co. Ltd. Versus Manju and others** reported in **2007 (2) AWC 1927** which relies upon a five Judge Bench decision rendered by Karnataka High Court in the case of **Union of India versus Mysore Paper Mills Ltd. And Ors.** reported in **AIR 2004 Kant. 1**. It may be noted that at the time when Full Bench judgement was rendered; U.P. Motor Vehicles Rules, 1998 were not framed which came into force on 7.9.1998 and the Full Bench decision also went unnoticed by the Division Bench of this Court at the relevant time when the question of maintainability of appeal/revision against interlocutory orders passed by Motor Accident Claims Tribunal was once again decided.

4. The Division Bench judgement referred to above related to a dispute which arose in the background of a Motor Accident claim decided on 23.11.2006 wherein an application filed by the Insurance Company claiming benefit under Section 170 of the Motor Vehicles Act, 1988 prior to the final decision of claim was rejected on 15.11.2006. A question as to maintainability of appeal/revision against the interlocutory order dated 15.11.2006 passed on an application filed under Section 170 of the Act had cropped up and the Division Bench of this Court while dealing with the matter in the context of relevant statutory provisions as well as decisions and relying upon the five-Judges judgement (supra) rejected the appeal /revision and has recorded a clear opinion on the maintainability of revision under Section 115 as not maintainable. The relevant para of the Division Bench judgement reads:-

"8. According to us, an appeal or review or revision from the original order cannot be held to be an inherent right but statutory right. Unless the statute prescribes, no such right can be available for any person to proceed accordingly. In the instant case, a cryptic application was moved by the insurance company before the Tribunal making reference of collusion between the claimants and the insured without any supporting materials. The same was dismissed on such ground on 15.11.2006. Therefore, there is no infirmity in the order, which can call upon any court to interfere. Possibly the insurance company has understood the position having well equipped legal infrastructure unlike a rustic villager. It waited till the award was passed and when found responsible on behalf of the owner by the award, preferred the appeal from both the order and the award being forgetful that in case of rejection under Section 170 of the Act, the appeal lies, provided the order of rejection establishes cause under Section 149(2) of the Act. No such case has

been made out in the appeal, excepting the ground of illegal and arbitrary refusal in passing the order. Therefore, it cannot take the recourse of remedy of appeal under Section 173 of the Act."

5. The Division Bench heavily relying upon paragraph no. 21 of the five-Judges Bench judgement of Karnataka High Court, reproduced hereinunder, proceeded to hold that even the revisional jurisdiction of this Court would not be available against an interlocutory order:

"21. Section 173 of the M.V. Act provides for appeal to High Court by any person aggrieved by an award of the Claims Tribunal and appeal is barred only where the amount in dispute in the appeal is less than ten thousand rupees and intention of the legislature is to avoid any further appeal or revision so as to give finality to the award passed by the Tribunal. Therefore, the above said decisions would not be helpful to contend that an order passed by M.A.C.T., is revisable under Section 115, Civil Procedure Code. The Full Bench decision in Anirudh Prasad Ambasta v. State of Bihar, is also based on the said decisions and as such it is not helpful. Accordingly, we hold that M.A.C.T. is not a court subordinate to High Court so as to maintain a revision petition under Section 115, Civil procedure Code. All the decisions of this Court taking the contrary view are consequently overruled."

6. Contrary to the view taken by the Division Bench which relies upon the five Judges Karnataka High Court decision holding a revision not to be maintainable, attention of this Court was drawn to the Full Bench judgement reported in **2004 (22) LCD 40** as mentioned above wherein this Court after a detailed discussion on various aspects of the matter has firstly held the Motor Accident Claims Tribunal to be a 'Court' for the purpose of adjudicating upon civil disputes cognizable under the Motor Vehicles Act and the scope of revisional jurisdiction under Section 115 CPC before this Court on that basis has also been opined favourably. The relevant paras of the Full Bench judgement are extracted below:-

"(30).....Thus an adjudicating body which is composed of or consists of experienced judicial functionaries and it is under obligation to act judicially can hardly be said to be a body which is not a judicial adjudicating body. Appointment of any member of executive or non-judicial authority is not envisaged, rather it stands excluded under the provisions of the Act. It has rightly not been disputed before us that the nature of dispute arising in the claim petitions is a dispute of civil nature. It has also not been disputed that prior to constitution of Motor Accidents Claims Tribunals such disputes of claims on account of Motor Accidents were being tried by the Civil Court. It is, thus, clear that it is trial of dispute of civil nature by a Tribunal having a judicial functionary as its member. There is no escape from the conclusion that the Motor Accidents Claims Tribunal has all the trappings of a Civil Court. Additional District Judge is also undoubtedly a Civil Court. The only ingredient which has to be seen is that as to whether it is the State's judicial power which is being exercised by the tribunal or not. The Motor Accidents Claims Tribunal has been constituted by the State. Its members are appointed by State. It deals with disputes of civil nature which were being earlier dealt with by the regular civil courts. There is no dispute that the civil courts discharge the "States' judicial functions" part of jurisdiction of which stands transferred to the Motor Accidents Claims Tribunal, composition, character as well as

functioning of which, have already been indicated above. There can (not) also be any dispute that Motor Accidents Claims Tribunal is a court subordinate to the High Court in view of the fact that appeal against an award lies to the High Court which fact has been held to be conclusive on the point.

(31) In view of the discussions held above, we are of the view that the orders of the District Judge / Additional District Judge passed as Motor Accidents Claims Tribunal will be amenable to revisional jurisdiction of the High Court under Section 115 C.P.C.

(32) Our answer to question No. 1 is in affirmative, that a revision lies against an order of the Motor Accidents Claims Tribunal. Our answer to question No. 2 is that the Courts mentioned in Section 3 C.P.C. are not the only Civil Courts, other Courts and Tribunals can also be Civil Courts subordinate to the High Court, for the purposes of Section 115 C.P.C. Our answer to question No. 3 is that the judgment rendered in the case of Mussamat Afsari Begum v. Oriental Fire & General Assurance Company, 1979 ALJ 1168, has been rightly decided and is approved. Hence, the question of invoking Article 227 of the Constitution of India does not arise."

7. Since Full Bench judgement has clearly held that the Motor Accident Claims Tribunals discharge judicial functions and are a 'Court' for the purpose of adjudication of disputes which are civil in nature and against which an appeal under Section 173 of the Motor Vehicles Act is also provided for before this Court, therefore the interlocutory orders passed by the Tribunal are very well within the domain of revisional jurisdiction of this Court provided under Section 115 of the C.P.C. and at the same time it is observed that such orders would not be amenable to the jurisdiction of this Court under Article 227 of the Constitution of India.

8. In a situation of conflict between Division Bench judgement and Full Bench judgement, suffice it to say that the Full Bench decision would normally hold the field and more so when the Full Bench judgement which goes unnoticed, specifically has held the revisional jurisdiction of this Court to be available against the interlocutory orders passed by the Claims Tribunal. The position is different when subordination of Tribunal, not being a court within the meaning of CPC, is questioned in absence of an enabling provision under the Special Act and the rules framed thereunder. The question is whether by virtue of providing for an appeal against the judgement of Tribunal under Section 173 of the Motor Vehicles Act, 1988, the other civil remedies under CPC before this Court become automatically applicable.

9. There are other issues like the applicability of Section 24 of the C.P.C. which have come to the notice of this Court and in relation whereto an authoritative pronouncement may be called for but for the present in so far as the jurisdiction of this Court against the interlocutory orders passed by the Motor Accident Claims Tribunal and application of Section 24 C.P.C. is concerned, the issue deserves to be considered and decided so that the pending proceedings are not totally faced with an uncertainty.

10. Before coming to the provisions of the Act, it is necessary to have a birds view of the legal provisions and the mechanism devised under our Constitution for the discharge of sovereign judicial function read with the relevant statutes.

11. Separation of powers is a distinguishing feature of our constitution and independence of each organ of the State to achieve the constitutional goals needs to have a re-look. Legislation once notified by following due process is final, executive decisions under laws taken by following due process in the name of State are final and judicial decisions likewise. Finality attached to a decision legislative, executive or judicial, arrived at independently is the essence of Rule of law. This independence of all the three organs jointly or severally is subject to Part-III of the Constitution of India for the reason that a sovereign decision of the State is law and by virtue of Article 13 of the Constitution of India, law inconsistent with Part-III of the Constitution is void.

12. Now coming to the judiciary as an organ of the State, it is to be noted that the Supreme Court, as an institution, works at the apex level and enjoys concurrent jurisdiction with the High Courts of the State insofar as prerogative writ jurisdiction is concerned. Under Article 136 of the Constitution of India, the apex court enjoys powers to test the validity of judicial/quasi judicial decisions rendered by a court or Tribunal in the territory of India except any law relating to the armed forces. This jurisdiction of the apex court travels from top to bottom with the only exception carved out and respecting the rule of independence which each organ of the State enjoys under our unitary structure. Likewise a High Court under Article 228 enjoys an authority to decide substantial questions of law involved in pending cases before a subordinate court.

13. The existence of Tribunals can be traced even prior to the enforcement of our Constitution but Chapter XIV-A came to be inserted under Forty Second Constitutional Amendment and a parallel mechanism to reduce work load on the permanent judiciary was evolved. Adoption of a summary procedure or less rigorous procedure for adjudication was introduced and recognised in consonance with the principles of natural justice. Tribunals in this chapter are classified broadly in two categories viz. the Tribunals which are excluded from the jurisdiction except the jurisdiction of Supreme Court under Article 136; and the Tribunals which are subject to Article 226/227 of the Constitution and appellate/revisional jurisdiction conferred on the High Court under the special statute of which the Tribunal is a creation.

14. There does not seem to be a requirement of law for conferment of power under the special statute creating a Tribunal to subject the Tribunal to supervisory jurisdiction of High Courts under Article 227 but for the purposes of other jurisdictions, namely, appellate/revision/review, the conferment of power in the special statute is a condition precedent. Likewise, the power of transfer of proceedings from one State to another and within the State from one district to another has to be vested in the High Court, under the statute creating a Tribunal. Here I hasten to add that power of transferring judicial proceedings is vested in the apex court not only under Section 25 CPC but also under Article 139-A of the Constitution of India. The former applies to the civil disputes under CPC and the later applies to the disputes pending before one or more High Courts only. Whether proceedings before the Tribunal can be transferred from one State to another or from one district to

another, the Constitution is silent on this issue. It may not be wrong to note that there is no provision enabling either under the Constitution or the Motor Vehicles Act, yet under the general powers, the judicial precedents show that such a power has been exercised by the apex court and High Courts. This situation definitely deserves to be noticed by the law makers. Lack of an enabling provision in the relevant statute certainly goes to cause a prejudice and impedes the process of justice.

15. The judiciary has adopted a conflicting approach. One line of thought espouses the cause of justice and the other finds it difficult for want of jurisdiction. This uncertainty invites criticism against the very functioning of organs of State who are expected to address and remedy the public grievances. The judiciary is the worst victim of this situation and moreso when fine distinctions which do not withstand the challenges and tests for all times to come, are brought to focus. Judicial adventurism is a centre of criticism and the voice of delayed justice is loud and clear. This situation needs to be dealt with jointly and severally but finality of law on the questions of public grievances has to keep pace with the changing times.

16. The safest course for the law courts and the tribunals is to administer justice as per law but where the legislature or executive neglects to enable the judiciary to discharge its sovereign judicial functions by contemplating complete remedies and procedure, the cause of justice to be served independently is made to suffer. I wish to add that there may be tribunals which may not be courts within its strict sense looking to the provisions of Chapter XIV-A of the Constitution but functions of a Tribunal under Motor Vehicles Act, its object and purpose are no less than a forum of permanent nature looking to the dependence of public on surface transport and particularly when this jurisdiction is segregated from Section 9 of CPC. The independence of people to move speedily and to balance speed with the natural capability of human beings cannot be left unattended due to lack of law to effectuate justice. The object of law is to win faith in our Constitution but defective laws are a curse which the sovereign welfare State cannot afford to adventure of which judiciary is a part.

17. In the light of above discussion it would be safe to adopt a course which promotes the cause of justice independently than to follow a path that may impede the process for lack of statutory sanction which expressly does not bar a remedy. The evolution of a remedy, however, must serve the object of alternative mechanism which seeks to reduce the rigour of procedure and technicalities of evidence so as to unburden the regular courts from work load. But majesty of law, at the same time, as a matter of fundamental duty, is bound to be upheld by all courts and tribunals is equally true. The decision of the apex court in **Radhey Shyam & another v. Chhabhi Nath & others** (Civil Appeal No. 2548 of 2009 decided on 26.2.2015) has posed another difficulty when we see that any order passed by a court cannot be subjected to scrutiny under Article 226. Moreover, Section 141 CPC clearly bars application of CPC to the proceedings under Article 226. The remedies under Article 136 read with 227 are the only remedies wide enough to check miscarriage of justice in the judicial/quasi-judicial process.

18. In the light of recent apex court judgement (supra), and keeping in view the apex court judgements relied upon in the five-Judge judgement, the Division Bench judgement leaves no scope for revisional jurisdiction to be invoked under Section 115 CPC against interlocutory orders passed by the Tribunals unless prescribed under the Special Act. The view taken seems to be a good law for more than one reason. Firstly, restricting the remedy against the judgements passed by Motor Accident Claims Tribunal to appeal under Section 173 of the Act implies that other remedies are barred particularly when Section 169 read with Rule 221 framed thereunder narrow down the application of the provisions of CPC. Secondly, if the intention of legislation on the aspect of remedies before this court is understood on the criteria of treating the Tribunal to be a 'court' then in that event, the requirement of specifying the remedy of appeal under Section 173 of the Act would stand obliterated and the provisions of Section 96 CPC will automatically apply. Thus, the prescription of appeal clearly bars other remedies and reading something in the statute which is not prescribed would transgress the well settled principles of legislative interpretation. The Full Bench also does not notice the statutory rules framed in the year 1998 as well as the true import of bar on the civil courts to exercise jurisdiction in view of Section 175 of the Act. If the Full Bench view is allowed to hold the field, then by holding the Tribunal to be a court would automatically make the entire CPC applicable and the necessity of a provision like Section 173 would be a surplusage. In my humble view, the Division Bench judgement appears to have laid down the correct law.

19. Keeping in view the position of law as it exists and the essence of law and its purpose, I hold that interlocutory orders passed by a Tribunal unless an alternative remedy is provided for, and subject to other exceptions, shall be amenable to the jurisdiction of this Court under Article 227 of the Constitution of India which is akin to revisional/appellate jurisdiction. For the exercise of such a jurisdiction the purpose of law and justice must seem to have reconciled. The orders passed under Section 24 CPC being also in the nature of interlocutory orders are also amenable to the constitutional remedy under Article 227 of the Constitution. Having held that all interlocutory issues arising before the Motor Accident Tribunal resulting into miscarriage of justice in absence of an alternative remedy under the Special Act, are amenable to Article 227 of the Constitution of India, it is directed that all the civil revisions pending before this Court would be treated as civil revisions read with under Article 227 and likewise the applications filed under Section 24 CPC.

20. Now proceeding with the revision, it is relevant to notice that an application filed under Order VI Rule 17 is said to have been entertained by the Motor Accident Claims Tribunal by-passing the impugned order dated 01.11.2014. In so far as the procedure to be adopted by Motor Accident Claims Tribunal is concerned the same can be gathered from the provisions of Section 169 of the Motor Vehicles Act, 1988 read with Rule 221 of the U.P. Motor Vehicles Rules, 1998. Section 169 as well as Rule 221 being relevant are reproduced below:-

"Section 169 in The Motor Vehicles Act, 1988:-

169. Procedure and powers of Claims Tribunals.-- (1) In holding any inquiry under section 168, the Claims Tribunal may, subject to any rules that may be made in this behalf, follow such summary procedure as it thinks fit.

(2) The Claims Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed; and the Claims Tribunal shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

(3) Subject to any rules that may be made in this behalf, the Claims Tribunal may, for the purpose of adjudicating upon any claim for compensation, choose one or more persons possessing special knowledge of and matter relevant to the inquiry to assist it in holding the inquiry."

"Rule 221 of the Uttar Pradesh Motor Vehicles Rules, 1998:-

221. Code of Civil Procedure to apply in certain cases. - *The following provisions of the First Schedule to the Code of Civil Procedure, 1908, shall so far as may be apply to proceedings before the Claims Tribunal, namely, Rules 9 to 13 and 15 to 30 of Order V; Order IX; Rules 3 to 10 of Order XIII; Rules 2 to 21 of Order XVI; Order XVII; and Rules 1 to 3 of Order XXIII."*

21. From a plain reading of statutory provisions, it is evident that Order VI Rule 17 is not applicable in so far as the proceedings of Motor Accident Claims Tribunal are concerned but whether such a power can be read within the ambit of inherent powers under Section 166 of the Act needs to be considered and decided by the Tribunal independently. The application for recall of order was filed on the premise of notice/opportunity and this grievance certainly does call for an interference inasmuch as, the rule of notice and hearing on a cause is a fundamental principle which can not be compromised. The finding that amendment does not change the nature of claim could not be recorded without giving notice/opportunity and the learned Tribunal has not dealt with the objection of opportunity raised by the revisionist.

22. In view of the above, challenge to the impugned order dated 30.05.2016 under the supervisory jurisdiction of this Court is made out and the same is hereby set aside, leaving it open to the Tribunal to consider the grievance of the revisionist afresh and decide the recall application in accordance with law within a period of not later than six weeks from the date of receipt of this order.

23. It is also made clear that the claim filed before the Tribunal may itself be proceeded with and decided expeditiously without any delay to be caused in the matter. The registry shall forward a copy of this order to the Tribunal concerned forthwith and circulate the judgement to all the Tribunals through District Judge.

24. The revision is partly allowed.

(2016) 8 ILRA 115
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.08.2016

BEFORE

THE HON'BLE PRATYUSH KUMAR, J.

Criminal Appeal No.- 2413 Of 2015

Nirbhay Narayan Tiwari

...Appellant

Versus

State Of U.P.

...Respondent

Counsel for Appellant:

R.K. Upadhyay, Santosh Kumar Tiwari

Counsel for Respondent:

Govt. Advocate, Arvind Singh Sengar

The instant appeal filed on behalf of the accused-appellant is directed against the judgment and orders dated 4.5.2015, in Special Case No.25 of 2014, whereby the appellant has been convicted under Sections 363, 366, 376, IPC & under Section 4 of POCSO Act and sentenced to undergo rigorous imprisonment for five years, five years, ten years and seven years respectively. Consolidated amount of Rs.10,000/- has been imposed as fine.

Learned counsel for the appellant submits that in the present case victim was not matriculation passed. According to him, as per Rule 12(3) Clause (a)(ii) of the 2007 Rules date of birth entered in the school first attended could have been considered as determinative, but according to him, evidence of Rajpati Ram, PW-5 has been relied upon by the learned trial Judge in violation of the said rule because it was not the first school attended by the victim. Admittedly, she was admitted there in Class VIth. He further submits that as per clause (a)(iii) no certificate was filed by the prosecution, therefore, the medical evidence should have been considered as determinative of the age of the victim.

Court observed that the argument advanced on behalf of the appellant that the learned trial Judge has not appreciated the evidence in reference to determination of the age and commission of crime in legal prospective. The findings recorded by him are erroneous and not substantiated from the record. The impugned judgment and orders are against weight of the material on record and law. They deserve to be set aside. Since the prosecution has failed to prove charges beyond doubt against the present appellant, appellant deserves to be acquitted from the charges framed against him.

The appeal is allowed.

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

1. The instant appeal filed on behalf of the accused-appellant is directed against the judgment and orders dated 4.5.2015 passed by Shri Ashwani Kumar Singh, Additional Sessions Judge, Court No.1, Ballia in Special Case No.25 of 2014, whereby the appellant has been convicted

under Sections 363, 366, 376, IPC & under Section 4 of POCSO Act and sentenced to undergo rigorous imprisonment for five years, five years, ten years and seven years respectively. Consolidated amount of Rs.10,000/- has been imposed as fine. In default of payment of fine the appellant has been further directed to undergo one year's rigorous imprisonment. All the sentences have been directed to run concurrently.

2. Heard Shri S.K. Tiwari, learned counsel for the appellant, Smt. Archana Singh, learned A.G.A. for the State and Shri Arvind Singh Sengar, learned counsel for the complainant.

3. The facts giving rise to the present appeal may be summarized as under:-

4. That on 21.1.2014 at 12.45 p.m. Munna Paswan gave a written report at P.S. Pakdi, District Ballia stating therein that on 14.1.2014 at 5.00 a.m. his daughter (in place of name she is referred as victim hereinafter) was enticed away by Nirbhay Narayan Tiwari in collusion with his father Anil Tiwari. Anil Tiwari asked him not to approach the police. He had requested for suitable action.

5. At this check FIR was scribed. Case Crime No.19/2014, under Section 363, 366, IPC and Section 8 of the POCSO Act was registered. Investigation was entrusted to S.I. Sarnath Singh, the then Station Officer, who started the investigation on the same day and recorded the statement of the first informant and inspected the spot. On 7.3.2014 the Investigating Officer on the information of Mukhbir at Roadways Bus Station, Ballia arrested Nirbhay Narayan Tiwari and recovered the victim, got her medically examined, her statement under Section 164, Cr.P.C. was recorded. Thereafter, charge sheet was submitted against the present appellant.

6. Appellant stood for trial before the Special Judge, where he was charged, tried and convicted as above.

7. Shri S.K. Tiwari, learned counsel for the appellant in support of his appeal has submitted that age of the victim has not been determined in accordance with law. The appellant has not committed any offence. He has been erroneously held guilty. There are material contradictions in the prosecution evidence, medical evidence does not support the prosecution version. He further submits that the conviction and sentence of appellant are based on conjectures and surmises.

8. On behalf of the State-respondents these arguments have been repelled and it has been submitted that evidence has been properly appreciated. Findings recorded by the trial Judge are well substantiated from the record. Cogent reasons have been given in support thereof. The appeal has no substance, it deserves to be dismissed.

9. In reference to my obligations as an appellate court hearing appeal against conviction I would like to refresh the observation made by the Apex Court in the case of

Ishvarbhai Fuljibhai Patni Vs. State of Gujarat [1995 Supreme Court Cases (Crl) 222].
Para-4 of the judgment reads as under:

"4. Since, the High Court was dealing with the appeal in exercise of its appellate jurisdiction, against conviction and sentence of life imprisonment, it was required to consider and discuss the evidence and deal with the arguments raised at the bar. Let alone, any discussion of the evidence, we do not find that the High Court even cared to notice the evidence led in the case. None of the arguments of the learned counsel for the appellant have been noticed, much less considered and discussed. The judgment is cryptic and we are at loss to understand as to what prevailed with the High Court to uphold the conviction and sentence of the appellant. On a plain requirement of justice, the High Court while dealing with a first appeal against conviction and sentence is expected to, howsoever briefly depending upon the facts of the case, consider and discuss the evidence and deal with the submissions raised at the bar. If it fails to do so, it apparently fails in the discharge of one of its essential jurisdiction under its appellate powers. In view of the infirmities pointed out by us, the judgment under appeal cannot be sustained."

10. In the case of **Lal Mandi, Appellant v. State of West Bengal, Respondent [1995 CRI.L.J.2659 (Supreme Court), 2659]**, the Apex Court in para-5 of the report has given caution to the High Court reminding its duty in the matter of hearing of appeal against conviction. It would be gainful to reproduce the observation made in para-5 of the report, extracted below:

"5. To say the least, the approach of the High Court is totally fallacious. In an appeal against conviction, the Appellate Court has the duty to itself appreciate the evidence on the record and if two views are possible on the appraisal of the evidence, the benefit of reasonable doubt has to be given to an accused. It is not correct to suggest that the "Appellate Court cannot legally interfere with" the order of conviction where the trial court has found the evidence as reliable and that it cannot substitute the findings of the Sessions Judge by its own, if it arrives at a different conclusion on reassessment of the evidence. The observation made in Tota Singh's case, which was an appeal against acquittal, have been misunderstood and mechanically applied. Though, the powers of an appellate court, while dealing with an appeal against acquittal and an appeal against conviction are equally wide but the considerations which weigh with it while dealing with an appeal against an order of acquittal and in an appeal against conviction are distinct and separate. The presumption of innocence of accused which gets strengthened on his acquittal is not available on his conviction. An appellate court may give every reasonable weight to the conclusions arrived at by the trial court but it must be remembered that an appellate court is duty bound, in the same way as the trial court, to test the evidence extrinsically as well as intrinsically and to consider as thoroughly as the trial court, all the circumstances available on the record so as to arrive at an independent finding regarding guilt or innocence of the convict. An Appellate Court fails in the discharge of one of its essential duties, if it fails to itself appreciate the evidence on the record and arrive at an independent finding based on the appraisal of such evidence."

11. Before entering into the merits of the argument it would be convenient for me to place on record the evidence of the parties. Summary of the evidence adduced by the prosecution is as follows:-

12. **Munna Paswan, PW-1** is the first informant and father of the victim. He has reiterated the facts mentioned in the first information report, Exhibit Ka-1 and further stated that at that time his daughter was studying in Class VIIth in Higher Secondary College, Phulwaria. At that time she was aged about 12 years. The appellant used to give tuition to his daughter.

13. **Victim, PW-2** has supported the prosecution version and reiterated the facts stated by her father. According to her, on the pretext of some discussion about study she was taken away to Mau by a bus. On the way the appellant had threatened him not to raise alarm otherwise she would be killed. From there she was taken to Surat where she was confined in one room. The appellant committed rape with her forcibly. The police recovered her from there and brought to Ballia. She has proved her statement recorded under Section 164, Cr.P.C., Exhibit Ka-2.

14. **Dr. Jyotsana Singh, PW-3** is the Medical Officer, who on 10.3.2014 medically examined the victim. According to her, there was no external mark of injury on her person. Her physical growth was well developed. For determination of age she advised X-ray and ultrasound of lower abdomen and urine examination. Slide of vaginal smear was prepared. She has proved medical examination report, Exhibit Ka-3, Supplementary Report, Exhibit Ka-4, Reference Slips for X-ray and ultrasound reports, Exhibit Ka-5 and Ka-6 and consent of the father of the victim, Exhibit Ka-7. According to her, hymen of the victim was old torn. At that time she was major.

15. **S.I. Sarnath Singh, PW-4** is the Investigating Officer. He gave details of the steps taken in the course of investigation. According to him, after statement of the victim under Section 164, Cr.P.C., Section 376 was added to the case crime number. He has proved site plan and charge sheet, Exhibit Ka-8 and Ka-9, Check FIR, Exhibit Ka-10 and copy of the report of the General Diary, Exhibit Ka-11.

16. **Rajpati Ram, Principal Junior High School, Phulwaria, PW-5** has stated that on 20.7.2012 victim was admitted in Class VIth. Her date of birth in the admission register has been entered as 1.8.2002. He has filed photocopy of the extract of the admission register, Exhibit Ka-12.

17. After close of prosecution evidence statement of the appellant was recorded under Section 313, Cr.P.C. wherein he has denied the facts stated by the prosecution witnesses. In reference to the statement of the doctor Jyotsana Singh he has stated that her statement is correct. Admission entry is fictitious. Due to partibandi of the village he has been falsely implicated after he was taken from his house.

18. In the defence oral evidence was given. One letter Exhibit Kha-2 purported to be written by the victim has been filed. In the defence information about missing of the victim published on behalf of the Investigating Officer, Exhibit Kha-1 has been filed.

19. The first ground raised on behalf of the appellant is the age of the victim. In this reference learned counsel for the appellant has placed reliance on the judgment dated 25.8.2015 passed by Division Bench of this Court in **Special Appeal No.559 of 2015 (Ali Mohammad Vs. State of U.P. And 7 others)**. This authority has been cited in reference to provisions contained in Rule 12 of the Juvenile Justice Rules 2007. For ready reference Rule 12 is quoted as below:-

"12. Procedure to be followed in determination of Age.--(1) *In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be, the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.*

(2) *The court or the Board or as the case may be, the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be, the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.*

(3) *In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining--*

(a) (i) *the matriculation or equivalent certificates, if available; and in the absence whereof;*

(ii) *the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;*

(iii) *the birth certificate given by a corporation or a municipal authority or a panchayat;*

(b) *and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year,*

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a) (i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of Naziya Bano the age as regards such child or the juvenile in conflict with law."

20. Thereafter, Division Bench of this Court while relying on the judgment of the Hon'ble Apex Court given in **Jarnail Singh Vs. State of Haryana, AIR 2013 SC 3467** has laid emphasis about the manner in which the evidence envisaged in Rule 12(3) of the 2007 Rules should be considered.

21. On the strength of this authority, learned counsel for the appellant submits that in the present case victim was not matriculation passed. According to him, as per Rule 12(3) Clause (a)(ii) of the 2007 Rules date of birth entered in the school first attended could have been considered as determinative, but according to him, evidence of Rajpati Ram, PW-5 has been relied upon by the learned trial Judge in violation of the said rule because it was not the first school attended by the victim. Admittedly, she was admitted there in Class VIth. He further submits that as per clause (a)(iii) no certificate was filed by the prosecution, therefore, the medical evidence should have been considered as determinative of the age of the victim. Though this argument is substantiated from Clause (b) Rule 12(3) of the 2007 Rules, but I do not think that in the present case medical evidence is in conformity with the said provision. The opinion given by Dr. Jyotsana Singh, PW-3 is an individual opinion. It is not an opinion given by the Medical Board. For this reason, I find myself unable to take her opinion as determinative of the age of the victim.

22. When the determinative factors envisaged in Rule 12(3) of the 2007 Rules have not been proved, it is the duty of the Court to determine the age of the victim with the help of the evidence available on record. On this point there are other kinds of evidence. In the form of evidence of Munna Paswan, PW-1 and victim, PW-2 the prosecution submits that age of the victim should be held to be 12 years. On the other hand on behalf of the appellant X-ray report has been referred and statement of Dr. Jyotsana Singh made during the cross examination has been quoted where she has opined that on the basis of X-ray report victim was major.

23. I have gone through the original X-ray report. It has not been exhibited, but it has been filed on behalf of the prosecution. Though radiologist has not been examined, but considering the fact that he is a public servant and in discharge of official duty he has signed X-ray report, it has been relied by Dr. Jyotsana Singh. I think defence is entitled to base its argument on its basis. According to this X-ray report at the relevant time all epiphysis of the victim were found fused, thus, radiologically the victim appears to be major.

24. Statement of Munna Paswan, PW-1 on this point appears to be vague. He was married in the year 1989. His elder son was born in the year 1995. He has admitted that his elder son was registered voter in the year 2009. He has refused to disclose the date of birth of

his younger daughter. He has stated that the victim was born in the *Mayka* of his wife. From these evasive replies I do not think that any reliance can be placed on his statement.

25. Statement of Victim, PW-2 is also not confidence inspiring on this point. She has refused to disclose difference of years between her age and age of her elder brother. She has also failed to disclose at what age she had attended Class Ist. According to her, she was born in the hospital. According to her, she did not know what age has been entered in the school register for the reason admission form was submitted by her mother. Obviously the victim has not given straight answers. Development of her body and fusion of epiphysis appear to be more indicative of the fact that at the relevant date victim was major.

26. The second submission on behalf of the appellant is that the victim is a consenting party. She was not kidnapped. She has left her house with her own free will and she lived with the appellant due to love and affection felt by her. The victim, PW-2 in her statement has admitted that the letter, Exhibit-Kha 2 was in her handwriting. In this letter she has disclosed her plan to the appellant how she would leave her house and join him. Though during the examination-in-chief she supported the prosecution version, but during cross examination she admitted that appellant waited for her in front of her house on a bicycle. After running she sat on the bicycle herself. At that time day had not broken out. None had seen her leaving the house. She lived for about two months with the appellant, but she did not raise any alarm. When these facts are taken into consideration along with her letter, Exhibit Kha-2, her stay at Surat appears to be voluntary.

27. On behalf of the appellant it has been submitted that according to the victim, PW-2, she was recovered by the police at Gujrat whereas according to prosecution version, she was recovered at Bus Station, Ballia. On the strength of this discrepancy learned counsel for the appellant submits that where the recovery of the victim remained under mystery, FIR was lodged with delay, medical evidence did not support the prosecution version, the evidence of prosecutrix should not be relied upon. In support of this argument he has referred the case of **Mohd. Ali Vs. State of U.P., 2015(7) SCC 272.**

28. He has further submitted that during her journey from the village up to Surat and her stay at Surat the victim never raised any alarm. This makes her testimony to be suspicious. In support of this argument he has referred the case of **Alamelu Vs. State, (2011) 2 SCC 385.** He has placed reliance on the observations made by the Hon'ble Apex Court in para 55 of the report. The relevant observation is quoted hereinbelow.

"55.Earlier also, the girl had many opportunities to complain or to run away, but she made no such effort. It is noteworthy that she made no protest on seeing some known persons near the car, after her alleged abduction. She did not make any complaint at the residence of Selvi, sister of Sekar (A-1) at Pudupatti. Again, there was no complaint on seeing her relatives allegedly assembled at the temple. Her relatives apparently took no steps at the time when mangalsutra was forcibly tied around her neck by Sekar (A-1). No one sent for

police help even though a car was available. She made no complaint when she was taken to the house of PW5, Thiru Thirunavukarasu and stayed at his place. Again, there was no protest when Sekar (A-1) took her to the police station on the fifth day of the alleged abduction and told at the Tiruchi Police Station that they had already been married. The above behaviour would not be natural for a girl who had been compelled to marry and subjected to illicit sexual intercourse."

29. In view of the above, on the fact of kidnapping, confinement and commission of rape, I do not think that testimony of victim, PW-2 can be relied upon. Aside her testimony there is no corroborative evidence. Medical evidence does not support her allegations. Her letter Exhibit Kha-2 is contradictory to what she has stated before the Court, therefore, no reliance can be placed on her statement.

30. In view of the above, I find some substance in the argument advanced on behalf of the appellant that the learned trial Judge has not appreciated the evidence in reference to determination of the age and commission of crime in legal prospective. The findings recorded by him are erroneous and not substantiated from the record. The impugned judgment and orders are against weight of the material on record and law. They deserve to be set aside. Since the prosecution has failed to prove charges beyond doubt against the present appellant, appellant deserves to be acquitted from the charges framed against him.

31. Accordingly, appeal is allowed. Impugned judgment and orders dated 4.5.2015 passed by Shri Ashwani Kumar Singh, Additional Sessions Judge, Court No.1, Ballia in Special Case No.25 of 2014 as also the conviction and sentences of the appellant are set aside. Appellant Nirbhay Narayan Tiwari is acquitted from the charges under Sections 363, 366, 376, IPC and Section 4 of the POCSO Act. He is in jail. If he is not wanted in any other case, he be released forthwith.

32. Office is directed to communicate this order to the court concerned forthwith to ensure compliance and further sent back the lower court record.

(2016) 8 ILRA 123
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.08.2016

BEFORE

THE HON'BLE RAJAN ROY, J.

Criminal Revision No.- 582 Of 2016

Dinesh Kumar Yadav

...Revisionist

Versus

State Of U.P. & Anr.

Opposite Parties

Counsel for Revisionist:

Lalji Yadav

Counsel for Opposite Parties:

Govt. Advocate

This is a revision filed under Section 397/401 of the Code of Criminal Procedure, 1973 challenging the order passed by the Court of Sessions in Appeal filed under Section 29 of the 'Protection of Women from Domestic Violence Act, 2005 and an order passed under Section 12(5)(b) of the said Act, 2005, by the Magistrate, which has been upheld by the appellate court.

Hon'ble court has referred several questions to larger bench for its consideration and they are as follows:

i) whether a revision under Section 397/401 of the Code of Criminal Procedure, 1973 is maintainable before the High Court challenging an order passed by the Court of Sessions under Section 29 of the Act 2005?

ii) whether the decisions in the case of Nishant Krishna Yadav (supra) and Manju Shree Robinson (supra) lay down the law correctly on the question of maintainability of a Revision under Section 397/401 of the Code of Criminal Procedure before the High Court against an order passed by the Court of Sessions under Section 29 of the Act 2005 in view of the earlier decisions of the Supreme Court in the case of Thakur Das (supra); National Sewing Thread co. (supra); Maharashtra State Financial Corporation (supra); and ITI Ltd., (supra) ?

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard.

2. Issue notice to opposite party no.2 .

3. This is a revision filed under Section 397/401 of the Code of Criminal Procedure, 1973 challenging the order passed by the Court of Sessions in Appeal filed under Section 29 of the 'Protection of Women from Domestic Violence Act, 2005' (hereinafter referred to as 'the Act, 2005') and an order passed under Section 12(5)(b) of the said Act, 2005, by the Magistrate, which has been upheld by the appellate court.

4. First and foremost, the question of maintainability of this revision is required to be considered specially as learned Additional Government Advocate has raised such an objection based the decision of a Co-ordinate Bench of this court dated 27.01.2016 in ***Criminal Revision No. 4016 of 2015 (Nishant Krishan Yadav vs. State of U.P. And another)*** which has been rendered after considering the decision of the Supreme Court in the case of ***Shalu Ojha vs. Prashant Ojha*** reported in ***2015(2) SCC 99*** and it has been held that revision under Section 397/401 of the Code of Criminal Procedure, 1973 is not maintainable against an order passed by the District Judge under Section 29 of the Act, 2005 and while doing so it has expressed its dis-agreement with the view expressed by Kerala High Court in the case of ***Baiju Chandran Nair and another vs. Latha Balan Nair and another*** reported in ***2011 CrI. L.J. 4536*** and the view expressed by Madras High Court in the case of ***K. Rajendran vs. Ambika Valmy in Criminal Revision Case (M.D) No. 482 of 2012.***

5. Another Coordinate Bench of this Court hearing ***Writ Petition No. 7926 (MS) of 2015 (Mrs.) Manju Sree Robinson and 2 others vs. State of U.P. and others)*** has also taken the same view based on the decision of ***Shalu Ojha (supra)*** and has further held that a Writ Petition under Article 226 of the Constitution would also not be maintainable and appropriate remedy was only a petition under Section 482 of the Code of Criminal Procedure.

6. This Bench had also earlier followed the decision in ***(Mrs) Manju Shree Robinson (supra)***, however, on being apprised of the contrary view in the case of ***Chiranjeev Kumar (supra)*** and in ***CrI. Misc. Writ Petition No. 15337 of 2012 (Prabhu Nath Tewari & another vs. State of U.P. & another)*** as also the decisions of Kerala and Madras High Courts this Bench had a fresh look at the matter.

7. The Act, 2005 is a special enactment which has been promulgated, as is evident from its long title, to provide more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto. It provides remedy in such matters under Sections 12,18,19,20,21,22 and 23 as also a provisions for grant of interim order or ex-parte order under Section 23. The proceedings under the aforesaid provisions are to take place before the Judicial Magistrate Ist Class or Metropolitan Magistrate, as the case may be, within whose local limits the contingencies mentioned in Section 27 arise. As per section 28(1), save as otherwise provided in the Act, 2005, all proceedings under sections 12,18,19,20,21,22 and 23 and offences under Section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973. Sub section 2 of Section 28 provides that nothing in sub section (1) shall prevent the court from laying down its own procedure for disposal of an application under Section 12 or under sub-section (2) of Section 23, meaning thereby a procedure different from one provided in the Code of Criminal Procedure, 1973 could be laid down for the said purpose. There is nothing on record to show that procedure other than the one prescribed in Code of Criminal Procedure has been prescribed for proceedings under Section 12 and 23(2) of the Act, 2005.

8. Under Section 29 there shall lie an appeal to the Court of Session within 30 days from the date on which the order made by the Magistrate is served on the aggrieved person or the respondent, as the case may be, whichever is later. Section 29 is not mentioned in Section 28.

9. In *Nishant Krishna Yadava (supra)* the court was persuaded by the decision of the Supreme Court in *Shalu Ojha (supra)* wherein the Supreme Court held that after the appeal under Section 29, the Act, 2005 does not prescribe any further remedy. In paragraph 13 the Supreme Court observed that before we proceed to take any decision in the matter, we deem it appropriate to make a brief survey of the DV Act (Act, 2005) insofar as it is relevant for the present purpose. After considering the provisions of the scheme of the Act, 2005 in paragraphs 14,15,16,17,18 and 19 it observed in paragraph 19 that "**it can be seen from the DV Act that no further appeal or revision is provided to the High Court or any other court against the order of the Sessions court under Section 29. It is in this background of the above mentioned scheme of the DV Act this case is required to be considered**". It went on to hold that when interim maintenance was granted by the Magistrate then the High Court should not have lightly interfered with the same.

10. A perusal of the said judgment shows that the specific issue as to whether a revision under Section 397/401 of the Code of Criminal Procedure, 1973 can be maintained against an order passed in appeal under Section 29 of the Act, 2005 was neither involved, raised nor argued as, at no stage was any revision filed against any order passed under Section 29 of the Act, 2005, but nevertheless on a consideration of the scheme of the Act, 2005, an observation has been made in paragraph 19 which has already been quoted hereinabove. The question is whether this constitutes a binding precedent on the issue involved in this case especially in view of the earlier decisions which find mentioned hereinbelow, the ratio of which is to the contrary.

11. Reference may be made in this regard to the decision of the Supreme Court in the case of *Thakur Das vs. State of Madhya Pradesh and another* reported in **(1978) 1 SCC 27** wherein the question was regarding maintainability of a Revision under Section 439 and 435 of the Code of Criminal Procedure 1898 (old Code) against an order passed by Sessions Judge under Section 6C of the Food and Essential Commodities Act, 1955. Under Section 6C of the said Act, the State Government was empowered to appoint a judicial authority to hear the appeal as per Notification of the State Government. The sessions Judge was appointed as the appellate authority. The Supreme Court considered the issue and held that the Sessions Judge while acting as an appellate authority under Section 6C of the Act 1955 "exercising judicial power of the State is an authority having its own hierarchy of superior and inferior Court, the law of procedure according to which it would dispose of matters coming before it depending upon the nature of jurisdiction exercised by it acting in judicial manner". The Supreme Court further went on to hold in paragraph 8 that Sessions Judge exercising power of appeal under Section 6C of the Act 1955 would only mean the Judge presiding over the Session Court and discharging the functions of that Court constituted under Section 7 & 9 of the Code of Criminal Procedure 1898, therefore, the conclusion is inescapable that he is not a persona designata which expression is understood to mean a person pointed out or described as an individual as opposed to a person ascertained as a member of a class or as filling a particular character. Based on aforesaid reasoning the Supreme Court further held in paragraph 11 that the

Sessions Judge though appointed as an appellate authority by a Notification of the state Government was the Sessions Court over which the Sessions Judge presides and that the Sessions Court is constituted under the Code of Criminal Procedure and indisputably it is an inferior criminal court in relation to High Court, therefore, against the order made in exercise of powers conferred by Section 6C of the Act, 1955 a revision application would lie to the High court and the High Court would be entitled to entertain a revision application under Sections 435 and 439 of the Code of Criminal Procedure, 1898 which was in force at the relevant time and such revision application would be competent. The aforesaid provisions of the old Act are substantially similar to Section 397/401 of Code of Criminal Procedure, 1973

12. This decision covers the issue involved hereinabove on all its fours and has also been relied by a Coordinate Bench in the case of ***Chiranjeev Kumar vs. State of U.P. in Criminal Revision No. 879 of 2003*** but has escaped the notice of two other Coordinate Benches in ***Nishant Krishna Yadava (supra)*** and ***Mrs. Manju Shree Robinson(supra)*** which have taken a contrary view.

13. Section 28 makes the procedure prescribed in Code of Criminal Procedure applicable to proceedings under Sections 12,18,19,20,21,22,23 and 31 of the Act, 2005, but it does not refer to Section 29. It is well settled that if a special statute provides a remedy before an established court without saying anything further to the contrary then the procedure followed before the said court automatically becomes applicable to the proceedings even under a special Act. In the present case the reference to a Court of Sessions is to the Court constituted under Sections 6,7 and 8 of the Code of Criminal Procedure, 1973. The omission to refer Section 29 in Section 28 appears to be for the reason that section 29 follows Section 28 and based on this, exclusion of the Code of Criminal Procedure to Section 29 cannot be inferred. Reference may be made in this regard to the decision of the Supreme Court in the case of ***National Sewing Thread Co. Ltd, Chidambaram vs. James Chadwaick and Bros***, reported in ***A.I.R. 1953 SC 357*** wherein it was held that "**rule is well settled that when a statute directs that an appeal shall lie to a Court already established, then that appeal must be regulated by the practice and procedure of that Court. This rule was very succinctly stated by Viscount Haldane L.C. in *National Telephone Co. Ltd. vs. Postmaster-General*, (1913) AC 546 (A), in the following terms:-**

"When a question is stated to be referred to an established court without more, it in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decision likewise attaches".

The same view was expressed by Their Lordships of the Privy Council in - Adalkappa Chettiar vs. Chandrasekhara Thevar, AIR 1948 PC 12 (B), wherein it was said:

"Where a legal right is in dispute and the ordinary courts of the country are seized of such dispute the Courts are governed by the ordinary rules of procedure applicable thereto and an appeal lies if authorized by such rules, notwithstanding that the legal right claimed arises under a special statute which does not, in terms confer a right of appeal."

14. The aforesaid consideration was made by the Supreme Court in the context of a Letter's Patent Appeal being maintainable from an order passed by the learned Single Judge of High Court under the Trade Marks Act, 1913.. The Supreme Court in said the case also referred to the case of ***Secretary of State of India v. Chellikani Rama Rao*** reported in ***A.I.R. 1916 PC 21*** wherein it was held that Section 76 of Trade Marks Act confers a right of appeal to the High Court **"and says nothing more about it"**, that being so the High Court has to exercise its other appellate jurisdiction by a Single Judge. Therefore, his judgment becomes subject to appeal under Clause 15 of Letters Patent Act, **"there being nothing to the contrary in the Trade Marks Act"**.

15. These judgments were also referred to and relied upon in the case of ***Maharashtra State Financial Corporation v. Jayee Drugs & Pharm*** reported in ***(1991) 2 SCC 637***, wherein a similar proposition has been laid down while considering the applicability of the Code of Criminal Procedure to the proceedings before the District Judge under the State Financial Corporation Act, 1951.

16. Likewise in the case of ***ITI Ltd. v. Siemens Public Communications Network Ltd.*** reported in ***(2002) 5 SCC 510*** the Supreme Court while considering the question as to whether a revision under Section 115 of the Code of Civil Procedure, 1908 lies to the High Court as against an order made by a Civil Court in an appeal preferred under Section 37 of the Arbitration and Conciliation Act, 1996 specially when a Second Appeal is statutorily barred under the Act and the Code of Civil Procedure, 1908 is not specifically made applicable, the Court opined in paragraph 10 that **"it is true in the present Act application of Code is not specifically provided for but what is to be noted is; is there an express prohibition against the application of the Code to a proceeding arising out of the Act before a Civil Court ? We find no such specific exclusion of the Code in the present Act. When there is no express exclusion, we cannot by inference hold that the Code is not applicable"**. Justice D.M. Dharmadhikari concurring with the judgment of Justice N. Santosh Hegde in that very case in paragraph 19 held **"when a special Act on matters governed by that Act confers a jurisdiction on an established court, as distinguished from a persona designata, without any words of limitation, then the ordinary incident of procedure of that court including right of appeal or revision against its decision is attracted"**. Based on said reasoning and following the judgments already referred to hereinabove the Court held that against an order passed under Section 37 of the Arbitration and Conciliation Act, 1996 a revision under Section 115 of the Code of civil Procedure was maintainable.

17. *The analogy of these judgments applies to the present case also for the reasons already mentioned hereinabove specially as a court of Sessions mentioned in Section 29 is not a persona designata but a Court established under the Code of Criminal Procedure, without saying anything more, and as there is nothing in the Act, 2005 excluding the applicability of Code of Criminal Procedure, therefore, the procedure followed before a court of Sessions which includes a Revision under Section 397/401 of the Code of Criminal Procedure against its orders, will be maintainable.(emphasis supplied)*

18. As per Section 5 of the Code of Criminal Procedure, 1973 nothing contained in this Code shall, in absence of a specific provision to the contrary, affect any special or local law for the time being

in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force. The Act of 2005 does not prescribe any special form of procedure either for the proceedings under Sections 12,18,19,20,21,22 and 23 or for appeal under Section 29; in fact Section 28(1) therein categorically mentions that the proceedings under the aforesaid provisions including section 31 shall be governed by the Code of Criminal Procedure, 1973. Section 29 refers to an appeal before the court of Sessions without saying anything more, therefore, the normal procedure applicable to it under Code of criminal Procedure will apply. Reference may be made in this regard to Section 397 of the Code of Criminal Procedure, 1973 which is as under:-

"397. Calling for records to exercise of powers of revision.--(1) *The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending and examination of the record.*

Explanation.--*All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of Section 398.*

(2) *The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.*

(3) *If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them."*

19. Under Section 397 of the Criminal Procedure Code the High Court may call for examination of the record before any inferior court situate within its or his local jurisdiction for the purpose to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed. The Court of Sessions referred to in Section 29 of the Act, 2005 is a Criminal Court inferior to the High Court and in the present case it is situated within its limits or local jurisdiction of this High Court. In ***Thakur Das's Case (supra)*** the Supreme Court has already held it to be so in the context of appointment of the District Judge as appellate authority by the State Government under the Essential Commodities Act, 1955. The ratio of this decision as also the decision rendered in the case of ***National Thread sewing Co. Ltd (supra)***; ***Challikavi Rama Rao (supra)***; ***Maharashtra State Financial Corporation (supra)***; ***ITI Ltd (supra)***, as noted earlier, apply to the present case also, which have escaped the attention of the coordinate Bench in ***Nishant Krishna Yadav (supra)*** and in the case of ***(Mrs) Manju Shree Robinson (supra)***.

20. A coordinate bench of this Court in Criminal Misc. ***Writ Petition No. - 15337 of 2012 (Prabhunath Tiwari and another vs. State of U.P. And another)*** opined, after perusal of the provisions

contained in Sections 28,29,30 and 31, that it did not find any provision under the Act which may attach finality to an order passed in exercise of power under Section 29 of the Act. Moreover as the proceedings under Section 31 of the Act, 2005 are governed by the provisions of the Code of Criminal Procedure, 1973, a revision would be maintainable before the High Court against an appellate order passed by a Court of Sessions in exercise of power under Section 29 of the Act, 2005.

21. Another coordinate bench in the case of **Chiranjeev Kumar (supra)** after considering a conspectus of judgments of the Supreme Court, a Division Bench of this Court in the case of **Shafaat Ahmad vs. Smt. Fahmida Sardar** reported in **AIR 1990 All.182** and the judgment of Kerala High Court in the case of **Baiju Chandran Nair(supra)**, the judgment of Madras High Court in the case of **Chiranjeev Kumar (supra)** has also come to the conclusion that the Court of Sessions being a Court inferior to the High Court, a Revision under Section 397/401 of the Code of Criminal Procedure, 1973 would be maintainable against an order passed under Section 29 of the Act, 2005. It has also considered **Shalu Ojha's** case and has opined that this issue was not directly involved in the said case before the Supreme Court. **Chiranjeev Kumar (supra)** also takes into consideration the judgment of the Supreme Court in **Thakur Das (supra)**.

22. In view of the above the legal proposition laid down in **Nishant Krishna Yadav (supra)** and **(Mrs.) Manju Shree Robinson (supra)** requires reconsideration and the conflicting opinion expressed by coordinate Benches also require a clarification so as to bring certitude on the issue involved.

23. As a Coordinate Bench in **Chiranjeev case (supra)** has relied upon the Division Bench in the case of **Shafaat Ahmad (supra)** which related to the provisions of the Muslim Women Protection of Rights on Divorce) Act, 1986 it would be appropriate that the matter be placed before a Larger Bench.

24. In view of above the following questions are being referred for consideration by a larger Bench:-.

i) whether a revision under Section 397/401 of the Code of Criminal Procedure, 1973 is maintainable before the High Court challenging an order passed by the Court of Sessions under Section 29 of the Act 2005?

ii) whether the decisions in the case of **Nishant Krishna Yadav (supra)** and **Manju Shree Robinson (supra)** lay down the law correctly on the question of maintainability of a Revision under Section 397/401 of the Code of Criminal Procedure before the High Court against an order passed by the Court of Sessions under Section 29 of the Act 2005 in view of the earlier decisions of the Supreme Court in the case of **Thakur Das (supra)**; **National Sewing Thread co. (supra)**; **Maharashtra State Financial Corporation (supra)**; and **ITI Ltd., (supra)** ?

25. Let the office place the record of this Criminal Revision before the Hon'ble Chief Justice in terms of Chapter V, Rule 6 of the Allahabad High Court Rules, 1952 for constituting a bench of such strength as he deems fit and necessary for considering the above reference.

(2016) 8 ILRA 130
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.08.2016

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Habeas Corpus Writ Petition No.- 49736 Of 2015

Naveen Kumar (Detenue)	...Petitioner
	Versus
State Of U.P. & Ors.	...Respondents

Counsel for Petitioner:

Rajni Ojha, Ravindra Nath Chaubey

Counsel for Respondents:

Govt. Advocate, Sudhir Mehrotra

This writ petition has been filed with the prayer to direct the respondents to produce the corpus of detenue namely, Naveen Kumar i.e. petitioner before this Court.

It has been contended by the learned counsel for the petitioner that the petitioner was arrested on 7.8.2015 and thereafter remand was granted on 8.8.2015 by the Magistrate concerned. He submits that the said remand order was a cyclostyle and subsequently, on 21.8.2015 further remand was granted through video conferencing.

Section 167 (2) proviso (b) of The Code of Criminal Procedure, 1973 is quoted below:-

"(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;"

A Magistrate cannot order the detention of any person in custody or extend such detention without the production of the accused before him in violation of the provisions of proviso (b) to S. 167(2) Cr.P.C.

Court observed that the judicial custody remand order dated 21.8.2015 of the accused person Naveen Kumar through video conferencing, it is evident from the counter affidavit filed by Sri Ram Karan Yadav, presently posted as Railway Magistrate, Ghaziabad and who has passed the judicial custody remand order dated 21.8.2015 of the accused person Naveen Kumar. It is proved that this order was passed by him when the accused person Naveen Kumar was present before him through video conferencing and on the basis of request made by the Investigating Officer of the aforesaid matter, judicial custody remand of the accused person Naveen Kumar was granted w.e.f. 21.8.2015 to 3.9.2015.

Court does not find any good ground for interference in the matter.

The writ petition is accordingly dismissed.

(Delivered by Hon'ble Prabhat Chandra Tripathi, J.)

1. Heard Ms. Rajni Ojha, learned counsel for the petitioner, Sri Sudhir Mehrotra, learned Special Counsel of High Court and Sri Vikas Sahai, learned A.G.A. for the State.

2. This writ petition has been filed with the prayer to direct the respondents to produce the corpus of detenue namely, Naveen Kumar i.e. petitioner before this Court.

3. It has been contended by the learned counsel for the petitioner that the petitioner was arrested on 7.8.2015 and thereafter remand was granted on 8.8.2015 by the Magistrate concerned. He submits that the said remand order was a cyclostyle and subsequently, on 21.8.2015 further remand was granted through video conferencing.

4. Sri Sudhir Mehrotra, learned Special Counsel of High Court states that an affidavit has been filed by Judicial Officer that he has granted the said remand order dated 21.8.2015 through video conferencing which has been disputed by the learned counsel for the petitioner. It has been further pointed out that the detenue has already been released, hence, the present Habeas Corpus petition has become infructuous.

5. Learned counsel for the petitioner further argued that the said Habeas Corpus petition can be adjudicated by this Court for granting damages to the petitioner to which learned Special Counsel of High Court states that first-of-all petitioner has to make out a case that the detention of detenue of the case is illegal.

6. Section 167 (2) proviso (b) of The Code of Criminal Procedure, 1973 is quoted below:-

"(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;"

7. A Magistrate cannot order the detention of any person in custody or extend such detention without the production of the accused before him in violation of the provisions of proviso (b) to S. 167(2) Cr.P.C.

8. The relevant rulings in this regard are cited below:-

1983 Mad LW (Cri) 121 : 1984 Mad LJ (Cri) 246 ** 1993 (3) Rec Cri R 377 (389) : 1992 (3) Cur Cri R 2793 (Delhi) ** (1991)1 Andh LT 315 : (1991)1 All Cri LR 422 ** (1983) 10 Cri LT 52 (53) (P&H) ** 1981 Luck LJ 78 (81) (DB) ** AIR 1958 Manipur 33 (34) : 1958 Cri LJ 1325.

9. The remand order sheet of the Court of the learned Remand Magistrate, Ghaziabad in case Crime No. 766 of 2015, under Sections 377, 406, 34 I.P.C., Police Station Vijay Nagar, District Ghaziabad of the accused person Naveen Kumar dated 8.8.2015 reveals that the judicial

custody remand order was passed by the learned Remand Duty Magistrate (Additional Civil Judge (Junior Division)/Judicial Magistrate, Court No. 3, Ghaziabad) after perusal of the F.I.R., case diary, extract of the G.D. of the arrest of the accused, memo of arrest and the accused was produced by the police personnel of Police Station Vijay Nagar, District Ghaziabad after arresting the accused person Naveen Kumar. The accused person Naveen Kumar was produced before the learned Remand Duty Magistrate who after passing the judicial order on the remand application of the Investigating Officer, remanded the accused person Naveen Kumar for 14 days of the judicial custody w.e.f. 8.8.2015 to 21.8.2015. This is evident from the signature of the accused person Naveen Kumar appended therein on the remand sheet. This judicial custody remand order dated 8.8.2015 is a detailed and speaking order. There is no legal infirmity or perversity in it.

10. Now, coming to the judicial custody remand order dated 21.8.2015 of the accused person Naveen Kumar through video conferencing, it is evident from the counter affidavit filed by Sri Ram Karan Yadav, presently posted as Railway Magistrate, Ghaziabad and who has passed the judicial custody remand order dated 21.8.2015 of the accused person Naveen Kumar. It is proved that this order was passed by him when the accused person Naveen Kumar was present before him through video conferencing and on the basis of request made by the Investigating Officer of the aforesaid matter, judicial custody remand of the accused person Naveen Kumar was granted w.e.f. 21.8.2015 to 3.9.2015.

11. A short counter affidavit of Jainendra Singh Tomar, Sub-Inspector of Police Station Vijay Nagar, District Ghaziabad clearly proves the factum of production of the accused person Naveen Kumar through video conferencing on 21.8.2015 and along with this affidavit has also been filed the letter of the Superintendent, District Jail, Ghaziabad as Annexure-1 in support thereof.

12. It would not be out of place to mention here that in the letter dated 02.09.2015 of the Superintendent, District Jail, Ghaziabad it has been mentioned that there is no facility of retrieving in the video conferencing.

13. This letter dated 02.09.2015 of the Superintendent, District Jail, Ghaziabad annihilates and belies the contention of the petitioner-detenu Naveen Kumar in this regard.

14. After having considered the submissions advanced by learned counsel for the parties, we do not find any good ground for interference in the matter.

15. The writ petition is accordingly **dismissed**.

(2016) 8 ILRA 133
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.08.2016

BEFORE

THE HON'BLE DR DEVENDRA KUMAR ARORA, J.

Writ Petition No.- 558 (MS) Of 2006

Abdul Rasheed

...Petitioner

Versus

Ayuktat, Lucknow Division, Lucknow & Anr.

...Opposite parties

The sole question involved in the instant writ petition is whether the stamp duty is payable on the property as it stands on the date of execution of deed or demand for additional stamp duty can be created on the presumption of future or intended change of use to which the property may be put to by the vendee.

Court observed that the authority had proceeded to determine the value on the presumption that though the land is agricultural land but it has not been purchased for the said purpose. The said presumption does not appear to be sound and reasonable. It may be added that the report of the Sub-Registrar could not legally form basis of the impugned orders. There is no material in possession of the respondents to show that on the date of the execution of sale deed, the land in dispute was not agricultural land. The petitioner has brought on record copies of Khasra of 1422 Fasli and Khatauni of 1418-1423 Fasli (issued on 21.4.2015) to show the land is still recorded in the Revenue records as agricultural land and agricultural activities are being carried out by the petitioner.

The writ petition is allowed.

(Delivered by Hon'ble Dr Devendra Kumar Arora, J.)

1. Heard Sri Ram Karan Verma, learned Counsel for the petitioner and Standing Counsel for the respondents.

2. The sole question involved in the instant writ petition is whether the stamp duty is payable on the property as it stands on the date of execution of deed or demand for additional stamp duty can be created on the presumption of future or intended change of use to which the property may be put to by the vendee.

3. Abdul Rasheed, the petitioner, by means of a registered sale deed dated 27.8.2002 purchased the $\frac{1}{4}$ piece of land of Gata no. 126/242 hectare situate in village Pipariya Dhani Pargana Atwapipariya, Tehsil Mohammadi, District Kheri from one Karamjeet Singh son of Jagdish Singh and paid the stamp duty as applicable to agricultural land at the relevant time. After a long time, proceedings under Section 47-A of the Indian Stamp Act were initiated on the report of Sub Registrar and a show cause notice was issued to the petitioner requiring him to pay a sum of Rs. 64,936/- as there has been deficiency in the payment of stamp duty. A report in this connection

was also sought for from the Naib- Tehsildar, who after inspection submitted his report indicating therein that the land in question situates in close proximity to residential area and commercial establishment on main road of Mohammadi-Gola. Therefore, the land being purchased for residential purposes, as such the stamp duty is payable thereon at the rate applicable to an Abadi land. In response to the show cause notice, the petitioner submitted that the proper stamp duty has been paid on the instrument in question as per circle rate fixed for this purpose by the Collector. It has been contended that the land purchased by them was and still is being used for agricultural purposes and the stamp duty has been paid accordingly. The said plea did not find favour with the authority concerned, who under the order dated 21.3.2003 held that the land purchased by the petitioner was for residential purpose and as such, the stamp duty is payable thereon at the rate applicable to an Abadi land. A sum of Rs. 64,936/- was demanded towards the deficiency in stamp duty, Rs. 4240/- towards registration charge and Rs. 10,390/- towards penalty.

4. The said order dated 21.3.2003 was challenged by way of Appeal No. 232/2002-03 under-Section 56 of the Indian Stamp Act before the Commissioner, Lucknow Division, Lucknow, unsuccessfully. He, by the order dated 12.5.2005 dismissed the appeal on the ground that the order of the Collector Stamps/Sub Divisional Officer, Mohammadi, Kheri is perfectly justified, which is based on cogent materials.

5. Being dis-satisfied with the aforesaid orders, the petitioner has filed the instant writ petition questioning the correctness and validity of the aforesaid impugned orders.

6. The learned Counsel for the petitioner submits that the authorities below have wrongly held that the land in question is not agricultural land. The date when it was purchased, it was recorded as agricultural land in the Revenue records and it continues to be so even till date. There being no declaration under Section 143 of the UP ZA & LR Act declaring it as a Abadi/residential, the authorities below have acted arbitrarily and illegally in treating the land in question as non-agricultural land. The burden to prove that the land was other than the agricultural land, lay upon the shoulders of respondents and not on the petitioners.

7. To substantiate the aforesaid assertions, the petitioner has placed reliance on **Anirudha Kumar and Ashwini Kumar Versus Chief Controlling Revenue Authority** [2000 (3) A.W.C. 2587] and **Smt. Anasuya Singh vs. Commissioner, Faizabad Division**[2008(26) LCD 588], **Surendra Singh and another vs. State of U.P. And others** [2009(106) RD 427], **Smt. Anasuya Singh vs. Commissioner Faizabad Division, Faizabad** [2008(104) RD 725], **Kuldeep Chaurasia vs. State of U.P. And another** decided on 14.11.2008.

8. The learned Standing Counsel, on the other hand, supports the impugned orders and submits that authorities below were justified in treating the land in dispute as non-agricultural land in view of the spot inspection report of the Naib Tehsildar. Placing reliance on the decisions rendered in **Wasi Ur Rehman and another Vs. Commissioner Moradabad Division Moradabad** (decided on 26.2.2015) **Haroon Ahmad and another vs. State of U.P. And others** (decided on 30.8.2011) and **Radhey Shyam vs.State of U.P. And others** (decided on 6.8.2013),

learned Standing Counsel submitted that property in question was undervalued, not disclosing that the property has future potential, whereas stamp duty was paid as applicable on agricultural property.

9. In the case of ***Prakashwati v. Chief Controlling Revenue Authority, Board of Revenue***; 1996 AWC 1331, the Apex Court had held that situation of a property in an area close to a decent colony not by itself would make it part thereof and should not be a factor for approach of the authority in determining the market value. According to the said decision, valuation has to be determined on constructive materials which could be made available before the authorities concerned.

10. In ***Anirudha Kumar and Ashwini Kumar Versus Chief Controlling Revenue Authority*** [2000 (3) A.W.C. 2587] and ***Smt. Anasuya Singh vs. Commissioner, Faizabad Division*** [2008(26) LCD 588], on which reliance has been placed by the petitioner, this Court has referred the aforesaid *Prakashwati's* case [supra] and observed as under:-

"In the present case, the market value is to be determined on the basis of the value that would satisfy the vendor. Thus, the question of future potential cannot be a factor for determining the market value of such a land for the purpose of stamp duty payable under the Stamp Act. The vendee pays the price that satisfies the vendor and, therefore, it is the utility of the land as on the date of transfer by the vendor and as such, if the land was an agricultural land, it has to be treated as such and the valuation has to be done accordingly. Whether in future the purchaser puts the land into residential use or changes the character is immaterial for the purpose of payment of stamp duty. The principle that has been laid down in *P. Ram Reddy (supra)* can be attracted for the purpose of determining the market value only to the extent of potential as on the date of transfer and not beyond. Thus, the market value has to be determined according to the factors, which includes the situation of the land, the amenities available in and around and various other factors, including the close proximity of the residential area as well as any transfer made immediately before the transfer or after the transfer in close proximity if such documents are produced in respect of the area that similarly situated land by either of the parties."

11. In ***Rakesh Chandra Mittal's case*** [supra] a Division Bench of this Court held:-

"It is well settled that market value of the property has to be determined with reference to the date on which the document is executed. Market value as such keeps on varying and changing. Any subsequent improvement or change in the nature or user of the land, which may result into enhancement of the market value of the property on the date of execution of the document that is to be considered for the purpose of determination of stamp duty payable on the instrument."

12. Apart from the above decisions, recently a Full Bench of this Court in the case of ***Shri Ramesh Chandra Srivastava, Kanpur v. State of U.P. and others***; 2007 UPTC 335 held that the

market value of the property has to be determined with reference to the date on which the document is executed.

13. Recently, a question was referred to the Full Bench in the case of **Smt. Pushpa Sareen Vs. State of U.P. And others** [2015(33) LCD 1575] as to whether the Collector Stamps has power to fix the valuation of a plot on the assumption that the same is likely to be used for commercial purposes, and whether the presumed future prospective use of the land can be a criterion for valuation by the Collector?

14. The Full Bench while answering the aforesaid question answered as follows:-

"Now insofar as the second question is concerned, the issue posed for consideration before the Court is whether the Collector has the power to fix the valuation of a plot on the assumption that it is likely to be used for commercial purposes and whether the presumed future prospective use of the land can be a criterion for valuation by the Collector. The Collector, while exercising his jurisdiction under Section 47-A, is required to determine the market value of the property on the date of the instrument. It is a well settled principle of law that stamp duty is a levy which is imposed not on the transaction but on the instrument."

15. The valuation cannot be determined straightway on such an assumption that the land is situated in close proximity of "abadi" area or on the presumption that the land is to be used for a purpose other than the agriculture. As averred above, the Full Bench of this Court has clearly held on the basis of the various provisions of the Stamp Act, that the market value is to be determined with reference to the date on which the document was executed and that any subsequent change in the nature or use of the land which may result in the enhancement of the market value of the property was not to be taken into account.

16. Thus, the legal position which emerges out from the aforesaid cases is that the market value of the land cannot be determined with reference to the use of the land to which buyer intends to put it. The market value is what a general buyer may offer and what the seller may reasonably expect. In determining the market value, the potential of the land as on the date of sale alone can be taken into account and not what potential it may have in the distant future. Any subsequent improvement or change in the nature or user of the land, which may result into enhancement of the market value of the property, is not to be taken into account and it is only the value of the property on the date of execution of the document that is to be considered for the purpose of determination of proper stamp duty payable on the instrument.

17. In addition to above legal proposition, the State Government with a view to remove doubts of the Collector (Stamps) issued a Government Order dated 16.9.1999 to all the Divisional Commissioners, District Magistrates and Additional District Magistrates (Finance & Revenue), providing therein that while determining the valuation of the property under 1997 Rules, neither the future potential or use of the property nor the status of the purchaser (Organization, Society,

Company etc.) will be taken into consideration. The relevant clause of the Government Order dated 16.9.1999 reads as under :

(क) अचल सम्पत्ति के भविष्य में संभावित उपयोग तथा क्रेता का भूमि को क़य करने के पीछे भविष्य में उसका क्या उद्देश्य है, इसको बाज़ार मूल्य के निर्धारण व उसके आगंणन का आधार नहीं बनाया जाना चाहिए,

(ख) दिनांक 01 सितम्बर, 1997 से प्रभावी कलेक्टर रेट लिस्ट में यदि भविष्य के भू-भाग तथा पक्षकार कें किसी विशिष्ट नाम से होने के कारण (यथा किसी विशिष्ट प्रयोजन हेतु स्थापित कोई संस्था, समिति, कम्पनी आदि) भूमि के क़य हेतु रेट लिस्ट से ड़यो

18. Having considered the submissions made by the learned Counsel for the parties and the materials placed before this Court, it appears that the authority had proceeded to determine the value on the presumption that though the land is agricultural land but it has not been purchased for the said purpose. The said presumption does not appear to be sound and reasonable.

19. It may be added that the report of the Sub-Registrar could not legally form basis of the impugned orders. There is no material in possession of the respondents to show that on the date of the execution of sale deed, the land in dispute was not agricultural land. The petitioner has brought on record copies of Khasra of 1422 Fasli and Khatauni of 1418-1423 Fasli (issued on 21.4.2015) to show the land is still recorded in the Revenue records as agricultural land and agricultural activities are being carried out by the petitioner. In view of the proposition of law as laid down in **Prakashwati 's case** by the Apex Court and by the Full Bench in **Smt. Purshpa Sareen's case**, the case law relied upon by the Standing Counsel are of no avail.

20. This being so, there is no hesitation to hold that the respondent no.2 did not possess any cogent material on record to show that the instrument in question is deficiently stamped or under valued in any manner. The first respondent was, therefore, not justified in confirming the order passed by the Collector (Stamps). The Appellate Authority proceeded to dismiss the appeal without recording any finding for discarding the pleas as raised by the petitioner in his appeal.

21. In view of the above discussion, the impugned orders dated 21.3.2003 passed by the Collector (Stamps)/Sub Divisional Officer and the order dated 20.12.2005 passed by the Commissioner in appeal are quashed by issuing a writ of certiorari. Any amount deposited by the petitioner shall be refunded to him within a period of two month from the date of production of certified copy of the order.

22. With the aforesaid observations and directions, the writ petition is allowed. No order as to costs.

(2016) 8 ILRA 138
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.08.2016

BEFORE

THE HON'BLE RITU RAJ AWASTHI, J.

Second Appeal No.- 231 Of 2008

Mohd. Iliyas & Ors.

...Appellants
Versus

Smt. Ram Dulari & Ors.

...Respondents

Counsel for Appellants:

Mr. Mohiuddin Khan, Mr. Mohd. Aslam Khan, Mr. Mohd. Adil Khan, Mr. Ghaus Beg, Mr. Mohd. Arif Khan, Sr. Advocate

Counsel for Respondents:

Apoorva Tiwari & Sunil Pandey

Held

The Court held that the suit for specific performance filed in 1990 on the basis of agreement dated 07.01.1983 was barred by limitation under Article 54 of the Limitation Act, as the period commenced from the date of knowledge of permission (24.01.1983) and not from alleged refusal. It further held that extension of time or oral agreement was not proved and Section 15 of the Limitation Act was inapplicable in absence of any stay/injunction. The Court also held that the plaintiff failed to establish continuous readiness and willingness as required under Section 16(c) of the Specific Relief Act, and mere pleading without evidence is insufficient. Consequently, the appellate court erred, and the trial court's dismissal was upheld while setting aside the decree for specific performance.

CASE LAW CITED

Ramzan vs. Smt. Hussaini (AIR 1990 SC 529)

Damodaran Pillai vs. South Indian Bank Ltd. (2005) 7 SCC 300

Director of Inspection of Income Tax vs. Pooran Mall & Sons (1975 AIR SC)

Ahmadsahab Abdul Mulla vs. Bibijan (2009) 5 SCC 462

Panchanan Dhara vs. Monmatha Nath Maity (2006) 5 SCC 340

Badat & Co. vs. East India Trading Co. (AIR 1964 SC 538)

Muddasani Venkata Narsaiah vs. Muddasani Sarojana (2016)

Faquir Chand vs. Sudesh Kumari (2006) 12 SCC 146

Pushparani S. Sundaram vs. Pauline Manomani James (2002) 9 SCC 582

Smt. Raj Rani Bhasin vs. S. Kartar Singh Mehta (1975 Delhi 139)

(Delivered by Hon'ble Ritu Raj Awasthi, J.)

1. Heard Mr. Mohd. Arif Khan, learned Senior Advocate assisted by Mr. Mohiuddin Khan, learned counsel appearing on behalf of the appellants as well as Mr. Sunil Pandey and Mr. Apoorva Tewari, learned counsel appearing on behalf of the contesting respondents i.e., respondents no. 1 to 8.

2. No one has put in appearance on behalf of respondents no. 9 to 13. During pendency of appeal, respondents no. 6, 8 and 13 have died. They have been substituted by their legal heirs.

3. The instant second appeal has been filed by the defendants-appellants against the judgment and decree dated 31.5.2008 passed in **Regular Civil Appeal No. 154 of 2005 (Smt. Ram Dulari and others vs. Mohd. Ayyub Khan and others)** by learned Special Judge (E.C.) Act, Lucknow setting aside the judgment and decree dated 6.10.2005 passed in **Regular Suit No. 86 of 1990 (Ram Dulari and others Vs. Mohd. Ayyub Khan and others)** by the learned Additional Civil Judge (Junior Division), Lucknow by means of which the Trial Court had dismissed the suit of the respondents-plaintiffs for Specific Performance of Contract for sale.

4. The appeal has been admitted on the following substantial questions of law:

"(i) Whether the suit filed by the respondents on 20.3.1990 on the basis of an agreement for sale dated 7.1.1983 was within limitation?.

(ii) Whether in the absence of any pleadings and evidence on record that the respondents no. 1 to 8 possessed of and are capable of performing their part of contract, the lower appellate Court was justified in law in decreeing the suit, ignoring the law laid down in that behalf by this Hon'ble Court as well as Apex Court?

(iii) Whether there being no order of stay granted by District Judge, Gonda, staying filing of the suit by Tulsi Ram, the learned lower appellate Court was justified in law in granting benefit of Section 15 of the Limitation Act in decreeing the suit filed by him beyond three years?

(iv) Whether the learned lower appellate Court was justified in law in granting the decree for specific performance of contract, ignoring the provisions of Sections 12 and 15 of the Specific Relief Act?"

5. As per the given facts, a registered agreement for sale dated 07.01.1983 of plot measuring 8000 square feet was entered into between late Tulsi Ram (original plaintiff who is now represented by his legal heirs respondents no. 1 to 8) and one Farooq, Mohd. Matin (father of

respondents no. 11 & 12) and Jameeluddin (respondent no. 13) - prospective purchasers as first party and Mohd. Ayyub Khan and Mohd. Shoaib Khan (respondents no. 9 & 10) - sellers as second party. A suit for specific performance of contract for sale was filed on 20.3.1990 by Tulsi Ram impleading Mohd. Ayyub Khan and Mohd. Shoaib Khan as defendants who were the owners of the plot in dispute. Respondents no. 11 to 13 and the present appellants were also impleaded as defendants.

6. Respondents no. 9 and 10 were the owners of the plot in dispute on the basis of registered sale-deed dated 25.7.1957. It was the case of the plaintiff that as per said agreement for sale a sum of Rs.50,000/- was paid by the purchasers out of which, Rs.20,000/- was paid by Tulsi Ram, Rs.10,000/- was paid by Farooq, Rs.10,000/- was paid by Mohd. Mateen and Rs.10,000/- was paid by Jameeluddin. They had agreed to purchase definite portions of the plot in dispute by getting individual and separate sale-deeds executed in favour of each individual purchaser.

7. It was also the term of agreement for sale dated 07.01.1983 that the seller would obtain necessary permission from the competent authority under the Act¹ and the sale-deed would be executed within a month from grant of permission by the competent authority. The agreement stipulated that the seller would intimate the buyers and call upon them to execute the sale-deed.

8. It was the case of respondents-plaintiffs that sellers had not acted upon their solemn undertaking and despite repeated request and demands to execute the registered sale-deed, the respondents no. 9 and 10 avoided to execute the sale-deed, hence they had filed a suit for specific performance. It was also the case of respondents-plaintiffs that respondents no. 9 & 10 had filed a collusive suit (Regular suit no. 81 of 1981) at Gonda in which the plot in dispute was got attached due to which they had shown their inability to execute the sale-deed.

9. It was also case of the respondents-plaintiffs that subsequent to the agreement for sale, the respondents no. 9 and 10 had delivered actual possession and he was always ready and willing to perform his part of contract and is still ready to pay sale consideration but the respondents no. 9 and 10 avoided to execute the sale-deed which necessitated for filing the suit.

10. It was the case of the respondents-plaintiffs that the respondents no. 9 & 10 (sellers) had not given any intimation to get the sale-deed executed and had extended the period of limitation through oral agreement.

11. The suit was contested by the appellants (defendants no.6 to 10), who were subsequent purchasers from respondents no. 9 and 10 for valuable sale consideration on the ground that the respondents no. 9 and 10 who were arrayed as defendants no. 1 and 2 were in actual possession and they had transferred the actual possession to the present appellants.

12. It has been vehemently contended by the learned counsel for appellants that the first appellate Court has grossly erred in reversing the finding recorded by the Trial Court. The suit was, admittedly, filed beyond the period of limitation as specified under Article 54 of Schedule to

Limitation Act. The respondents-plaintiffs have failed to establish their case before the Trial Court. The Trial Court has given its categorical finding that the suit is barred by limitation. The respondents-plaintiffs have not been able to establish their possession over the plot in dispute. The respondents-plaintiffs have not been able to show that they were ready and willing to execute their part of agreement. The Trial Court, relying on the statement of examination-in-chief of Mohd. Farooq, had come to conclusion that the plaintiffs had knowledge of the notice sent by the sellers, however, they had not produced any evidence to show that they were ready to get the sale-deed executed, from the conduct and circumstances, it is evident that the plaintiffs had failed to perform their part of agreement.

13. It is submitted that the first appellate Court has held that the respondents no. 9 & 10 (sellers) had not contested the suit and there is no specific denial that there was an agreement for sale between the respondents-plaintiffs (purchasers) and respondents no. 9 and 10 (sellers), the respondents no. 9 & 10 accepted part of the amount of consideration paid by the plaintiffs along with three other persons, since the plaintiffs had not received the intimation about the permission granted by the urban ceiling authority and the plot in dispute being under attachment in the Court of District Judge, Gonda, there was legal difficulty in execution of sale-deed and respondents no. 9 & 10 had kept on taking time from the plaintiff, hence the extension of period of performance of the contract extends the period of limitation. The said finding of the first appellate Court are not sustainable in the eyes of law. The first appellate Court has erred in coming to conclusion that since there is no specific denial of the appellants who were contesting as respondents in first appeal and rather; it has been admitted by one of the appellants in his statement that the plaintiff has put a wooden kiosk in part of the plot in dispute, hence the finding of the Trial Court that the plaintiffs have failed to establish their possession over the plot in dispute is wrong.

14. It is submitted that the first appellate Court has grossly erred in ignoring the material fact that the permission from urban ceiling authority was applied jointly by sellers and purchasers, it was duly received by M. Hamza, Advocate who was engaged by respondents-plaintiffs themselves and the knowledge of the said permission cannot be denied by the plaintiffs. The first appellate Court has also erred in coming to conclusion that no notice was served on the respondents-plaintiffs for getting the sale-deed executed. Mohd. Farooq, who was also a party to the agreement being one of the purchasers, has stated before the Trial Court that they had received notice sent by the respondents no. 9 & 10, as such, it was evidently clear that the plaintiff along with other prospective purchasers had received notice sent by the respondents no. 9 and 10 (sellers) and, as such, it cannot be said that the respondents no. 9 & 10 had not sent the notice to the plaintiff.

15. It is contended by counsel for the appellants that in absence of any evidence on record the first appellate Court has grossly erred in concluding that respondents-plaintiffs were ready and willing to perform their part of contract.

16. In support of his submissions, learned counsel for appellants has placed reliance on the judgment of the Delhi High Court in the case of **Smt. Raj Rani Bhasin & others vs. S. Kartar**

Singh Mehta², wherein a distinction has been drawn between the readiness to perform the contract and willingness to perform the contract. Readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial ability to pay the purchase price but for determining his willingness to perform his part of contract, his conduct has to be scrutinized. From the evidence on record, the respondents-plaintiffs could not prove their willingness to perform their part of contract.

17. It is also contended that there was no order or injunction passed against the respondents no. 9 and 10, hence the suit filed by Tulsi Ram, predecessor-in-interest of the respondents no. 1 to 8 on 20.3.1990, in pursuance to the agreement for sale dated 07.01.1983, was admittedly barred by limitation and Trial Court was correct in law in dismissing the suit.

18. In this regard, the appellants have relied upon the judgment of the Apex Court in the case of **Director of Inspection of Income Tax (Investigation), New Delhi and another vs. M/s Pooran Mall and Sons and another**³ in which it has been laid down by the Apex Court that it is well established principles of judicial procedure that wherein proceedings are stayed by an order of a court, or by an injunction issued by any court only that period should be excluded in computing any period of limitation laid down by law.

19. The appellants have contended that from a bare reading of the submissions made in the plaint, it is very much clear that Tulsi Ram in order to overcome the bar of limitation as the suit was admittedly filed beyond the period of 3 years, had set up a case of oral agreement.

20. It is submitted that the plaintiff has to succeed on the strength of his own case and could not rely upon the weakness of the defence. The case of oral agreement extending the period of limitation, pleaded was not proved by the plaintiff by leading any positive evidence on record, hence the theory as set up regarding extension of the period of limitation is also unequivocal and the finding recorded by the Trial Court could not be held to be perverse.

21. Learned counsel for the respondents no. 1 to 8, on the other hand, vehemently submitted that it was specifically stated in the plaint that the sellers i.e. defendants no. 1 and 2 had applied for permission from the competent authority under the Act but the plaintiff had no knowledge about the grant of any such permission. The plaintiff had not received any notice for getting the sale-deed executed. The sellers i.e., defendants no. 1 & 2 had orally informed their inability to execute the sale-deed as the plot in dispute was under attachment in a case before the District Judge, Gonda. It was further stated in the plaint that the plaintiff was always ready and willing to perform his part of the agreement to sell but the defendants no. 1 and 2 repeatedly extended the period for performance of the contract on the pretext that they were in legal difficulty in executing the sale-deed as the entire property was under attachment as per the order passed in Regular Suit No. 81 of 1981.

22. It is contended that the extension of the period of performance of the contract extends the period of limitation and the cause of action for filing the suit arose to the plaintiff on

31.12.1989 when the plaintiff demanded the execution and registration of sale-deed from defendants no. 1 and 2.

23. It is submitted that defendants no. 1 and 2 despite sufficient notice never appeared before the Trial Court to contest the suit and, thus, the suit was proceeded ex-parte against them. It is submitted that in absence of specific denial of the defendants no. 1 and 2 the contention of the present appellants, who was also defendants in the suit, could not have been accepted as the appellants are the subsequent purchasers and cannot plead before the Trial Court that the plaintiff was not ready and willing to perform his part of agreement for sale and the agreement for sale was cancelled by defendants no. 1 and 2 before the plot in dispute was sold to the present appellants. It is contended that the Trial Court had erred in coming to conclusion that the provision of first part of Article 54 of Schedule to the Limitation Act would be applicable. It is also contended that no specific date was fixed for execution of the sale-deed in the agreement for sale. The said agreement for sale stipulated that the sale-deed would be executed within one month from the date of grant of permission from the competent authority under the Act. In absence of any date fixed in the agreement for sale which was also not ascertainable from the terms of the agreement for sale for the execution of the sale-deed, the second part under Article 54 would apply and the period of limitation shall commence from the date when the plaintiff had the knowledge that performance is refused.

24. In support of his submissions, learned counsel for respondents has relied on the judgment of the Apex Court in the case of **Ahmadsahab Abdul Mulla (2) (Dead) vs. Bibijan and others⁴**, particularly Paragraph 10, 11 & 12 where it has been held that the expression date fixed for performance in Article 54 of the Schedule to Limitation Act, 1963 is a crystallized notion which is not subject to any change or fluctuation and in the absence of any such stipulation only the second part of Article 54 shall apply and the period of limitation shall commence from the date when the plaintiff has noticed that the performance is refused.

25. It is contended by learned counsel for respondents that the legal position as regards the notices sent "Under Certificate of Posting" is no longer res integra and stands concluded by a recent decision of this Court in **West Watch Company vs. Additional District Judge, Court No. 5 and others⁵**, particularly Paragraphs 17 & 18, wherein it has been held that in order to raise presumption of service of notice "Under Certificate of Posting, the employee of the post and telegraph department has to be examined to prove the factum of posting of the notice. It is held that in absence of proof of posting of notice no presumption of service can be drawn.

26. It is submitted that since the defendants no. 1 and 2 had accepted part of the sale consideration after institution of the suit it has to be presumed that they did not refuse their part of performance and had not cancelled the agreement to sale till the filing of the suit. It is further submitted that the first appellate Court has also recorded a finding of fact to the effect that the plaintiff and the defendants no. 1 and 2 had extended the period of performance on account of the plot in dispute being under attachment before the Court i.e., Regular Suit No. 81 of 1981.

27. It is submitted that in view of the law laid down by the Apex Court in the case of **Panchanan Dhara and others vs. Monmatha Nath Maity (Dead) Through LRS. And another**⁶, particularly Paragraphs 21 and 22, wherein it has been held that the time for performance of an agreement would extend the period of limitation and it would begin to commence when plaintiff has noticed that performance has been refused.

28. It is also contended that in view of the judgment of the Apex Court in the case of **Badat & Co. v. East India Trading Co.**⁷, in the absence of specific denial the pleadings shall be treated to be admitted. Thus, in the absence of the denial of the plaintiff's assertion by the defendants no. 1 and 2 they shall be deemed to have been admitted by them. It is submitted that the plaintiff has proved his assertions regarding extension of time for performance by way of his evidence and the defendants no. 6 to 11 while cross examining him did not controvert or challenge his version.

29. The Apex Court in the case of **Muddasani Venkata Narsaiah (D) Th. Lrs. vs. Muddasani Sarojana**⁸, has held that if the version of plaintiff in his examination-in-chief is not challenged in the cross examination the same shall amount to admission.

30. Learned counsel for respondents has also submitted that the application for permission from the competent authority under the Act is required to be applied jointly by the vendor and vendee. In view of the aforesaid, the plaintiff had signed the application along with defendants no. 1 and 2 and also executed Vakalatnama in favour of Mr. M. Hamza, Advocate.

31. It is submitted that the defendants no. 6 to 11 did not lead any evidence to prove that the signatures or the receiving of Mr. M. Hamza, Advocate on the ceiling permission. It was incumbent on the defendants to have proved the signatures by virtue of Section 67 of the Indian Evidence Act and having failed to do so no presumption or inference can be raised against the plaintiff on the said score. Thus, the finding of the first appellate court that the suit for specific performance preferred by the plaintiff was within limitation suffers from no error and the question of law framed in the second appeal is liable to be answered in favour of the respondents-plaintiffs.

32. It is also submitted that the plaintiff has specifically pleaded in the plaint that the plaintiff has been throughout ready and willing to perform his part of agreement. The said assertion was not denied by the defendants no. 1 and 2, therefore, shall stand admitted against them. The defendants no. 6 to 11 have denied the statement in the plaint vaguely and in their evidence admitted to not having any knowledge of the transaction which took place prior to execution of sale-deed in their favour. In the absence of requisite denial and rebuttal or challenge to the evidence of PW-1, the readiness and willingness of the plaintiff to perform his part of the agreement would stand proved.

33. I have considered the submissions made by the parties' counsel and gone through the records.

34. It is the admitted fact that a joint agreement to sale dated 07.01.1983 was executed between the sellers i.e., respondents no. 9 and 10 and the purchasers, namely, Tulsi Ram, Mohd. Farooq, Mohd. Mateen and Jameeluddin for a common piece of land measuring 8000 square feet. As per the understanding between the purchasers, they had agreed to get the sale-deed executed of the separate portions of the plot in favour of individual purchasers. As per the terms of the said agreement for sale, the respondents no. 9 and 10 (sellers) had to obtain the permission from the competent authority under the Act and intimate the purchasers to get the sale-deed executed which was to be done within one month from the date of grant of permission by the competent authority. It is evident from the records that the suit for specific performance was filed by predecessor-in-interest of respondents no. 1 to 8 i.e., late Tulsi Ram on 20.3.1990. Article 54 of Schedule to the Limitation Act provides the period of limitation as three years and the date from which the period of limitation would begin to run would be the date fixed for the performance or, if no such date is fixed, when the plaintiff has noticed that performance is refused. Article 54 of Schedule to the Limitation Act, for convenience, is reproduced below:

**THE SCHEDULE
PERIOD OF LIMITATION ACT**

	Description of Suit	Period of Limitation	Time from which period begins to run
54	For specific performance of a contract.	Three Years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

35. Learned Trial Court while deciding the suit filed by the respondents-plaintiffs had framed certain issues translation of which on reproduction read as under:

"(1) Whether any agreement between the plaintiff as well as defendants no. 3 to 5 and defendants no. 1 and 2 was entered into for sale of the disputed property, as pleaded in para 5 of the suit?

(2) Whether the possession was delivered by the defendants no. 1 and 2 to the plaintiff of the agreed property in compliance of the agreement to sale?

(3) Whether the plaintiff has followed the agreement to sale and defendants no. 1 and 2 have cancelled the same?

(4) Whether the suit is time barred?

(5) Whether the suit is not maintainable as per the reasons pleaded in para 33 of the written statement?

(6) Whether the plaintiff is entitle to get any relief?"

36. The issue no. 4 relates to whether suit is barred by limitation. The Trial Court while deciding the said issue has held that since as per the terms of the agreement for sale the sellers after obtaining the permission from the competent authority was required to intimate the purchasers and the purchasers were required to get the sale-deed executed within one month from the date of intimation, as such, the period of limitation would be governed by the first part of Article 54 of Schedule to Limitation Act. The learned Trial Court has come to conclusion that the suit for specific performance filed by the respondent-plaintiff was filed beyond period of limitation, hence barred by limitation. The first appellate Court dealing with the said issue has opined that the intimation about the permission from the urban ceiling Authority was to be given by the purchasers and since the land in question was under attachment in a case i.e., Regular Suit No. 81 of 1981, pending before the District Judge, Gonda, as such, there was legal impediment in the execution of the sale-deed, as such, the sellers (respondents no. 9 and 10) had kept on taking time and ultimately after not getting the sale-deed executed the suit was filed by the respondent-plaintiff. The sellers had received Rs. 20,000/- from Tulsi Ram on 26.3.1990, although they had already entered into an agreement to sale dated 09.03.1990 with appellants (defendants no. 6 to 11). The suit for specific performance, as such, was filed within time from the date of refusal.

37. As per the agreement to sale although no specific date was mentioned for execution of sale-deed, however, by reference to the happening of an event, namely, the permission from the competent authority and thereafter intimation by the purchasers to the sellers for execution of the sale-deed within one month clearly would mean that the date of limitation is to be determined as per first part of Article 54 of Schedule to the Limitation Act. The permission from the competent authority is dated 22.1.1983 which was received by Mr. M. Hamza, Advocate on 24.1.1983.

38. The counsel for respondents, Mr. Apoorva Tewari, has argued that in absence of any date fixed in the agreement for sale, which was also not ascertainable from the terms of the agreement for sale for execution of the sale-deed, the second part of Article 54 of Schedule to Limitation Act would apply and the period of limitation shall commence from the date when the plaintiff had the knowledge that performance is refused. In this regard he has relied on the judgment of Apex Court in the case of **Ahamdsahab Abdul Mulla (2) (Dead)** (supra) where it has been held that the expression date fixed for performance in Article 54 of the Limitation Act, 1963 is a crystallized notion which is not subject to any change or fluctuation and in the absence of any such stipulation only the second part of Article 54 shall apply and the period of limitation shall commence from the date when the plaintiff has noticed the refusal of performance of the contract.

39. In the present case, as has been noted above, by a reference to the happening of a certain event, namely, the date of permission and the date of knowledge about such permission by the plaintiff-purchasers would clinch the issue about the period of limitation and the same would be counted from the date of knowledge. The permission from the competent authority was granted on 22.1.1983 which was received by counsel for the plaintiff Mr. M. Hamza on 24.1.1983, as such, the period of limitation for filing of suit for specific performance would commence from the date of

knowledge i.e., 24.1.1983. In this regard, I am supported in my view by the judgment of the Apex Court in the case of **Ramzan Vs. Smt. Hussaini**⁹ wherein it has been held that in the agreement the date for defendant-seller to execute the sale-deed was fixed, although by not mentioning a certain date but by a reference to the happening of a certain event, namely, the redemption of the mortgage; and, immediately after the redemption by the plaintiff purchaser, the defendant became liable to execute the sale-deed which the plaintiff was entitled to enforce. The period of limitation thus started running on that date. The case was, therefore, covered by the first part of Article 54 and not by the second part of Article 54. The suit was, admittedly, filed in the year 1990, hence barred by limitation. Relevant paragraph 6 of the judgment on reproduction reads as under:

" 6. The relevant provisions in the alleged agreement of sale as quoted in the judgment of the trial court reads as follows:-

"This house is under mortgage with Jethmal Bastimal for Rs. 1000/-. When you will get this house, the description of which is given below, redeemed from M/s Jeth Mat Bastimal and take the papers of the registry in your possession, on that day I will have the sale deed of the said house, written, executed and registered in your favour."

(Emphasis supplied)

*The question is whether a date was 'fixed' for the performance of the agreement and in our view the answer is in the affirmative. It is true that a particular date from the calendar was not mentioned in the document and the date was not ascertainable originally, but as soon as the plaintiff redeemed the mortgage, it became an ascertained date. If the plaintiff had, immediately after the redemption, filed the suit, could it be thrown out on the ground that she was not entitled to the specific performance asked for? We do not think so. She would have been within her rights to assert that she had performed her part of the contract and was entitled to insist that her brother should complete his part. The agreement is a typical illustration of a contingent contract within the meaning of S. 31 of the Indian Contract Act, 1872 and became enforceable as soon as the event of redemption (by the plaintiff herself) happened. We agree with the view of the Madras High Court in *R. Muniswami Goundar and Another v. B.M. Shamanna Gouda and Others*, AIR 1950 Madras 820 expressed in slightly different circumstances. The doctrine of id certum est quod certum reddi potest is clearly applicable to the case before us which in the language of Herbert Broom (in his book dealing with legal maxims) is that certainty need not be ascertained at the time; for if, in the fluxion of time, a day will arrive which will make it certain, that is sufficient. A similar question had arisen in *Duncombe v. The Brighton Club and Norfolk Hotel Company*, [1875] 10 QB 371, relied upon in the Madras case. Under an agreement, the plaintiff had supplied some furniture to the defendant for which payment was made but after some delay. He claimed interest. The rule at Common Law did not allow interest in such a case, and the plaintiff in support of his claim relied upon a statutory provision which could come to his aid only if the price was payable at a certain time. Blackburn, J. observed that he did not have the slightest hesitation in saying that the agreement contemplated a particular day, which, when the goods were delivered would be ascertained, and then the money would be payable at a certain time; but rejected the plaintiff's*

demand on the ground that the price did not become payable by the written instrument at a certain time. The other learned Judges did not agree with him, and held that the statute did not require that the document should specify the time of payment by mentioning the day of payment. If it specified the event upon which the payment was to be made, and if the time of event was capable of being ascertained, the requirements of the section were satisfied. The same is the position in the case before us. The requirement of Article 113 is not that the actual day should necessarily be ascertained upon the face of the deed, but that the basis of the calculation which was to make it certain should be found therein. We, accordingly, hold that under the agreement the date for the defendant to execute the sale deed was fixed, although not by mentioning a certain date but by a reference to the happening of a certain event, namely, the redemption of the mortgage; and, immediately after the redemption by the plaintiff, the defendant became liable to execute the sale deed which the plaintiff was entitled to enforce. The period of limitation thus started running on that date. The case is, therefore, covered by the first part of Article 54 (third column) and not the second part."

40. It is to be noted that in the application for permission the purchasers had also made their signature along with sellers and Mr. M. Hamza, Advocate was engaged by the plaintiffs for that purpose. The power of attorney of Mr. M. Hamza indicates the signature of purchasers including plaintiff, Tulsi Ram. The said permission from the competent authority was received by Mr. M. Hamza, counsel for the plaintiff. The fact that the permission from the competent authority having been received by Mr. M. Hamza is on record, hence it is the admitted fact that Mr. M. Hamza, Advocate had received the permission on behalf of the purchasers as well as sellers and the said fact has not been denied by the plaintiff. The knowledge of the permission from the competent authority to Mr. M. Hamza, the counsel for the plaintiff would clearly mean that the plaintiff had the knowledge about the grant of permission by the competent authority.

41. The learned Trial Court in its finding has noted that Mr. M. Hamza, Advocate was engaged by the plaintiff. He had accepted the permission from the competent authority issued under Section 26 of the Act dated 22.1.1983 and the same advocate in another case i.e., **Regular Suit No. 20 of 1988, Mohd. Mateen vs. Mohd. Ayyub** had brought the said documents C-19 and C-20 showing that the same were sent by registered post, which indicates that M. Hamza, Advocate was the lawyer for the plaintiff since 1983 and had sent the same to the plaintiff in the year 1983.

42. The fact that the defendants did not lead any evidence to prove the signature of Mr. M. Hamza, Advocate or the receiving by him would not make any difference as it is the admitted case of parties that Mr. M. Hamza, Advocate was engaged by the respondents for getting permission from the ceiling authorities and the documents relied in this regard by the defendants such as application for permission bearing signature of plaintiff and the power of attorney of M. Hamza, Advocate which also borne the signature of plaintiff, Tulsi Ram, and other purchasers are not denied, as such, the period of limitation for the purpose of filing of a suit for specific performance in the instant case would commence from the date of knowledge of the permission which was duly received by Mr. M. Hamza on 24.1.1983, therefore, the suit filed by the plaintiff on 20.3.1990 on the basis of agreement for sale dated 07.01.1983 was beyond the period of limitation as prescribed

under Article 54 of the Schedule to the Limitation Act. The Apex Court in the case of **Damodaran Pillai and others vs. South Indian Bank Ltd.**¹⁰ has observed that knowledge of any proceedings to the Advocate implies presumption of such knowledge on the part of the party.

43. So far as the question of service of notice sent by the sellers to the purchasers (plaintiff) is concerned, it is to be noted that the examination-in-chief Mohd. Farooq (DW-2) in his statement has stated that he as well as other purchasers including plaintiff had received the said notice on 05.03.1983. As per said notice, the sellers had informed that the sale-deed may be executed. Mohd. Farooq had also informed that as per said notice dated 05.03.1983, the suit was to be filed before 05.06.1986.

44. Mohd Farooq was party to the agreement to sale being one of the purchasers. He had also filed a suit for specific performance but had subsequently withdrawn the same after entering into a compromise with the present appellants. However, the fact remains that Mohd. Farooq, who was party to the said agreement for sale and one of the prospective purchasers had admitted that he had received the notice dated 05.03.1983 sent by the sellers along with other purchasers. The statement of Mohd. Farooq can not be set-aside simply because he had subsequently entered into a compromise with the present appellants, particularly in absence of any other evidence contradicting the statement of Mohd. Farooq. It is to be noted that Mohd. Mateen and Jameeluddin, two other persons, who were also party to the agreement to sale along with plaintiff Tulsi Ram, were not produced by Tulsi Ram to contradict the statement of Mohd. Farooq. It is said that the said notice dated 05.03.1983 was sent by respondents no. 9 and 10 (sellers) to the prospective purchasers under certificate of posting. The learned Trial Court on the basis of statement of Mohd. Farooq has accepted the service of said notice on the plaintiff.

45. Learned counsel for respondents has argued that presumption of service of notice sent by 'Under Certificate of Posting' cannot be made and the employee of the post and telegraph department was required to be examined to prove the factum of posting of the notice which was not done. In support his submissions, he has relied on the judgment of the this Court in the case of **West Watch Company** (supra) wherein it has been held that in order to raise presumption of service of notice 'Under Certificate of Posting', the employee of the post and telegraph department has to be examined to prove the factum of posting. It is held that in absence of proof of posting of notice no presumption of service can be drawn.

46. There is no dispute to the aforesaid legal proposition. In the present case, the Trial Court relying on the statement of Mohd. Farooq has presumed the service of notice on the plaintiff. As observed above, the statement of Mohd. Farooq cannot be set-aside and has to be given weightage. The learned Trial Court was right in coming to conclusion that the plaintiff had received the notice dated 05.03.1983 and as per the said notice the sale-deed was required to be executed by 05.06.1983. The suit instituted in the year 1990 was, therefore, time barred.

47. It has been submitted by the counsel for respondents that the first appellate Court has come to conclusion that the land in question was under attachment in a case pending before the

District Judge, Gonda and, therefore, there was legal impediment in execution of the sale-deed and the sellers, as such, had extended time for performance of the contract which had resulted into extension of period of limitation.

48. Learned counsel for the appellants, on the other hand, has contended that the plaintiff has very cleverly and intentionally mentioned in the plaint that by oral agreement the time for performance of contract was extended as the sellers had shown their inability to execute the sale-deed because the land in question was under attachment in a case pending before the District Judge, Gonda. There was no such oral agreement and there was no legal impediment.

49. Section 15 of Limitation Act, 1963 relates to the exclusion of time in certain cases. Section 15 of the Act, for ready reference, is quoted below:

"15. Exclusion of time in certain other cases.--(1) In computing the period of limitation of any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

(2) In computing the period of limitation for any suit of which notice has been given, or for which the previous consent or sanction of the Government or any other authority is required, in accordance with the requirements of any law for the time being in force, the period of such notice or, as the case may be, the time required for obtaining such consent or sanction shall be excluded.

Explanation.--*In excluding the time required for obtaining the consent or sanction of the Government or any other authority, the date on which the application was made for obtaining the consent or sanction and the date of receipt of the order of the Government or other authority shall both be counted.*

(3) In computing the period of limitation for any suit or application for execution of a decree by any receiver or interim receiver appointed in proceedings for the adjudication of a person as an insolvent or by any liquidator or provisional liquidator appointed in proceedings for the winding up of a company, the period beginning with the date of institution of such proceeding and ending with the expiry of three months from the date of appointment of such receiver or liquidator, as the case may be, shall be excluded.

(4) In computing the period of limitation for a suit for possession by a purchaser at a sale in execution of a decree, the time during which a proceeding to set aside the sale has been prosecuted shall be excluded.

(5) In computing the period of limitation for any suit the time during which the defendant has been absent from India and from the territories outside India under the administration of the Central Government, shall be excluded."

50. The period of limitation can be extended giving benefit of Section 15 of the Limitation Act only in such cases where stay or injunction order has been passed relating to the subject matter and only in such cases the institution or execution of which has been stayed by injunction order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

51. In the present case, no stay or injunction with respect to the land in question was granted by the concerning Court where the land in question was said to be attached. The first appellate Court as such has fallen in error in coming to conclusion that there was legal impediment in the execution of sale-deed. The Apex Court in the case of **Director of Inspection of Income Tax (Investigation), New Delhi and another** (supra), has held that it is well established principles of judicial procedure that wherein proceedings are stayed by an order of a court, or by an injunction issued by any court only that period should be excluded in computing period of limitation laid down by law. Relevant paragraph 8 of the judgment on reproduction reads as under:

"8. It was also argued based on Explanation 1 to Section 132 and similar provision in certain other sections which lay down that computing the period of limitation any period during which any proceeding is stayed by an order or injunction of any court shall be excluded, that where it is intended that the period of limitation prescribed by any of the provisions of the Income-tax Act should not be strictly enforced the law itself makes a specific provision. It is a well established principle of judicial procedure that where any proceedings are stayed by an order of a Court that period should be excluded in computing any period of limitation laid down by law. Especially after Limitation Act, 1963, the provisions of which are now applicable to all proceedings, a provision like Explanation 1 to Section 132 is superfluous and no argument can be based on it."

52. So far as the contention of respondents no. 1 to 8 about acceptance of part consideration by respondents no. 9 and 10 (sellers) on 26.3.1990 and thereby there was extension of period of performance of contract is concerned, it is to be noted that as per the given facts, the suit for specific performance was filed by the plaintiff (predecessor-in-interest of respondents no. 1 to 8) on 20.3.1990 and at that time the sellers had already entered into another agreement for sale with the present appellants (defendants no. 6 to 11) on 09.03.1990 and it was fully in the knowledge of plaintiff but in spite of that plaintiff had allegedly given Rs. 20,000/- to respondents no. 9 and 10 on 26.3.1990, meaning thereby that the plaintiff on the one hand had filed a suit for specific performance and on the other hand allegedly given Rs. 20,000/- to the respondents no. 9 and 10 which is hard to believe, particularly when the respondents no. 9 and 10 had already entered into another agreement for sale with the present appellants (defendants no. 6 to 11) on 09.03.1990 and had agreed to sell the land in question and had also handed over possession to them. The document produced in this regard by the plaintiff were not denied by the sellers (respondents no. 9 and 10) as they had not contested the suit because they had lost their interest in the property in

question. Subsequent purchasers i.e., present appellants, have denied the said document due to lack of knowledge. In the given circumstances, it is hard to believe that the plaintiff on the one hand had filed a suit for specific performance alleging therein that the sellers have refused to perform their part of contract and have not executed the sale-deed of the land in question and on the other hand had paid handsome amount of Rs. 20,000/- which had substantial value at that time i.e., on 26.3.1990. Learned counsel for respondents in this regard has relied on the judgment of the Apex Court in the case of **Badat & Co.** (supra) as well as **Muddasani Venkata Narsaiah (D) Th. Lrs.** (supra) to assert that in the absence of specific denial the pleadings shall be treated to be admitted and, thus, in the absence of the denial of plaintiff's assertions by the defendants no. 1 and 2 (present respondents no. 9 and 10), they shall be deemed to have been admitted by them. It is submitted that the first appellate Court was right in accepting the version of the plaintiff in this regard. However, in the given facts, as have been noted above, the contention of plaintiff that he has given Rs. 20,000/- to respondents no. 9 and 10 on 26.3.1990 cannot be accepted on its face value and creates doubt about the genuineness of the document i.e., GA102/1. The judgments relied by the respondents, as noted above, are of no assistance to them.

53. So far as the question as to whether the plaintiff-respondent had established its readiness and willingness of performing his part of contract is concerned, which is the essential part in a suit for specific performance. Section 16 of the Specific Relief Act, 1963 provides bars when the suit for specific performance of contract cannot be enforced. Section 16 (c) provides that the suit for specific performance of contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant. Section 16 of the Specific Relief Act, 1963, for ready reference, is quoted below:

"16. Personal bars to relief.-- *Specific performance of a contract cannot be enforced in favour of a person--*

(a) who would not be entitled to recover compensation for its breach; or

(b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation.--*For the purposes of clause (c),--*

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction."

54. The learned Trial Court in its finding has specifically recorded that the plaintiff had not produced any evidence and he has also not made any statement in this regard that the purchasers were ready with the total remaining amount of Rs. 1,90,000/- or part amount of Rs. 47,000/- i.e., share of the plaintiff, which goes to show the non-compliance of the terms of the agreement for sale on the part of the purchasers. Witness Radhey Shyam, who was produced by the plaintiff, in his statement has stated that he was not aware as to whether his father (Tulsi Ram), Mohd. Mateen, Jameeluddin and Mohd. Farooq had given any money to the sellers to get the land in question released from attachment. The first appellate Court while reversing the finding of the Trial Court has concluded, without there being any evidence, that plaintiff was ready and willing to perform his part of the agreement for sale. There was no evidence on record to show that the respondent-plaintiff was ready and willing to perform his part of contract. The learned counsel for appellants has placed reliance on the judgment of the Delhi High Court in the case of **Smt. Raj Rani Bhasin & others** (supra) wherein a distinction has been drawn between the readiness to perform the contract and willingness to perform the contract. Readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial ability to pay the purchase price but for determining his willingness to perform his part of contract, his conduct has to be scrutinized. Relevant paragraph 10 of the judgment on reproduction reads as under:

"10. A distinction may be drawn between readiness to perform the contract and willingness to perform the contract. By readiness may be meant the capacity of the plaintiff to perform the contract. This includes his financial ability to pay the purchase price. We will assume for the sake of argument that the plaintiff respondent could have raised the money to pay the purchase price if he wanted to do so. But the more important question is whether he was willing to perform his part of the contract even if 'he had the financial capacity to do so. It is here that the plaintiff's conduct has to be properly scrutinised. In our view, the trial Court has not done so. It has merely concentrated its attention on the financial ability of the plaintiff to raise the money to pay the purchase price but has not noticed the unwillingness of the plaintiff to perform his part of the contract and to present a sale deed on stamp paper for the execution of the defendants and to pay the purchase price from 16-8-1962 to 16-9-1962. The trial Court was under the misapprehension that the defendants complied with the terms of the agreement only on 8-9-1962 when the documents were handed over to the plaintiff respondent as per Exhibit D-38. It failed to notice that the agreement did not require the defendants to hand over any documents as such to the plaintiff. The permission of the Rehabilitation Ministry was with the defendants from 1956 onwards. The certificate of the Wealth Tax Officer was also obtained in good time and the plaintiff did not raise any dispute about it at any time during

August September 1962. The plaintiff however, persisted in asking for a copy of the certificate from the District Judge. This was the only document the demand for which could be rested by the plaintiff on the agreement. The trial Court has found that the defendants were not bound to give the certificate from the District Judge to the plaintiff inasmuch as the application for the certificate was dismissed by the District Judge on 21-8-1962 as Chandra Prakash had attained majority on 16-8-1962. The trial Court, however thought that either a registered notice in terms of the agreement or a Personal delivery of the copies of the certificates would amount to compliance with the agreement. The trial Court failed to see that the registered letter of 13-8-1962 complied with the terms of the agreement. For it referred to the school certificate which the trial Court has rightly held to be a satisfactory evidence of the age of Chandra Parkash. The defendants had already informed the plaintiff that the other two documents namely, the permission of the Rehabilitation Ministry and the certificate of the Wealth Tax Officer had been already obtained by the defendants. The defendants had informed the plaintiff that Chandra Parkash was to attain majority on 16-8-1962. The plaintiff was not justified in either insisting that the date of the performance of the agreement could not be changed from 8-8-1962 to 16-8-1962 or that the certificate of the District Judge must be obtained even though Chandra Parkash was to become major on 16-8-1962. For, under Section 8 of the Hindu Majority and Guardianship Act, 1956 the question of grant of the certificate by the District Judge could not arise after Chandra Parkash had obtained majority. It is only because the intimation regarding the school certificate was given to the Plaintiff by the registered letter dated 13-8-1962 that we have to hold that a literal compliance with clause 9 of the agreement was fully made by the defendants on 13-8-1962. Otherwise the substance compliance was made even prior to that date inasmuch as the defendants had communicated to the plaintiff before that date that Chandra Parkash was to attain majority on 16-8-1962 and not 8-8-1962. As the attitude of the plaintiff even from before 13-8-1962 was dilatory, the defendants were justified in thinking that the plaintiff was delaying, to pay the purchase Price in time and to buy the Property. The question of delay on the part of the Plaintiff has to be considered in the background of two more pre-existing facts. Firstly the plaintiff was a tenant of the defendants occupying the ground-floor of the building in suit. It is because the plaintiff represented to the defendants that he wanted to buy the property that the defendants had refrained from filing a petition for his eviction on the ground that the defendants wanted possession of the building in suit for their own bona fide occupation. The plaintiff had agreed to buy the property in 1961 but because he did not pay the purchase money the said agreement had fallen through and the new agreement of 20th March 1962 was entered into. The facts regarding the procrastination by the plaintiff had been finally set out in the pleading made by the defendants and the evidence adduced by them. They have not been rebutted by the plaintiff. The defendants were found justified in thinking that the plaintiff was interested merely in prolonging his tenancy as much as possible on the pretext that he was buying the property and the defendants should not take steps to evict him. Later when the defendants took proceedings to evict him, the plaintiff's eviction proceedings staved on the ground that his suit for specific performance was pending. In this manner the plaintiff has managed to stay in the premises from 1961 onwards till now. Secondly, the Plaintiff's conduct shows that he only wanted to have a grip on the suit premises so that the defendants would not be able to transfer them to some other Person. Thereby the

plaintiff could ensure the continuance of his stay in the premises. The business of the plaintiff was that of financing purchase of vehicles, etc. He was thus interested only in tying up the property in suit by a Purchase contract and indefinitely prolonging the performance of the same. In the above circumstances, we are of the view that the plaintiff was not willing to perform his part of the contract and this became apparent to the defendants by 13-8-1962."

55. In the case of ***Faquir Chand and Another vs. Sudesh Kumari***¹¹ the Apex Court while considering the import of Section 16 (c) of Specific Performance Act has observed that the plaintiff must aver that he has performed or has always been ready and willing to perform his part of the contract. The compliance with the readiness and willingness has to be in spirit and substance and not in letter and form. Relevant paragraph 4 of the judgment on reproduction reads as under:

"4. The language under Section 16(c) of the Act, in our view, does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been ready and willing to perform his part of the contract. Therefore, the compliance with the readiness and willingness has to be in spirit and substance and not in letter and form. The continuous readiness willingness could very well be seen in the instant case from the conduct of the plaintiff as a whole. The first agreement was entered into between the parties on 17.6.1985 and the last date to execute the sale deed was 14.11.1985. The second agreement was executed on 9.4.1987 and the last date to execute the sale deed was 13.6.1987. Again, the time was extended at the instance of the defendant up 30.10.1987 Since the sale deed was not executed, the respondent herein was compelled to file the suit on 26.11.1987. Thereafter, the appellant herein issued a notice to the plaintiff, respondent herein, on 7.1.1988 and at Exhibit 'P-5'. It is also not in dispute that the respondent herein has deposited the entire sale consideration into the Court on 18.5.1999. He was also present in the Registrar's office for registration of the document. However, the appellant-defendant was not present at the Registrar's Office A careful perusal of the pleadings, the evidence and the documents filed in this case would only go to show that the respondent-plaintiff was ever ready and willing to perform his part of the obligation under the agreement. The decree passed by the High Court confirming the decree of the lower courts does not suffer from any infirmities. We, therefore, have no hesitation to dismiss the appeal.

(emphasis supplied)"

56. In the case of ***Pushparni S. Sundaram and others vs. Pauline Manomani James (Deceased) and others***¹² the Apex Court while considering the 'readiness and willingness' to perform their part under the contract came to conclusion that the High Court has rightly concluded that willingness and readiness is no doubt pleaded but they led no evidence to prove it. Thus, the plaintiff is not entitle to the decree of specific performance. Relevant paragraph 4 of the judgment on reproduction reads as under:

"4. The only question raised before the High Court, which it considered, to which we are called upon for consideration is, whether the appellants were always ready and

willing to perform their part under the contract. The High Court came to the conclusion that willingness and readiness is no doubt pleaded but they led no evidence to prove it. Thus held, that the plaintiff is not entitled to the decree of specific performance. The submission by the learned counsel for the appellants is that the plaintiff was always willing and ready to perform his part under the contract but mere non-leading of any evidence is not sufficient to reject it. Inference of readiness and willingness could be drawn by the conduct of the plaintiff, the circumstances in a particular case in other words to be gathered from the totality of circumstances.

(emphasis supplied)"

57. In the instant case, from the evidence on record, it is evident that the respondent-plaintiff did not prove his willingness to perform his part of contract. He had not produced any evidence even to show his readiness, as such, the finding of the first appellate Court in this regard was perverse and not sustainable in the eyes of law.

58. So far as the question as to whether the learned appellate Court was justified in granting specific performance of contract ignoring the provisions of Sections 12 and 15 of the Act is concerned, I am in agreement with the finding recorded by the Trial Court that as per terms of the agreement to sale Sections 12 and 15 of the Act would not be applicable.

59. So far as the question of possession of plaintiff over the land in question is concerned, the learned Trial Court has categorically recorded that the plaintiff has failed to establish his possession over the land in question, it is to be noted that the sellers (respondents no. 9 and 10) have not contested the suit filed by the plaintiff, Tulsi Ram (predecessor-in-interest of respondents no. 1 to 8). They had not contested the first appeal filed by the plaintiff and have also not appeared before this court. Subsequent purchaser, one of the appellants, in his statement before the Trial Court has admitted that a wooden kiosk was put by late Tulsi Ram in a part of the land in question. Since, from the facts and circumstances of the case, it is clear that when the plaintiff had failed to get the sale-deed executed, the respondents no. 9 and 10 (sellers) had cancelled his agreement for sale and entered into another agreement for sale with the appellants and had executed a sale-deed in favour of the present appellants for the land in question and handed over the possession of the land in question, as such, the wooden kiosk put by the plaintiff was unauthorized and he has no right to claim his possession on the basis of such wooden kiosk.

60. In view of the aforesaid discussions, I am of the considered view that the impugned judgment and decree passed by the first appellate Court is not sustainable in the eyes of law. As such, the second appeal is allowed. The judgment and decree dated 31.5.2008 passed in Regular Civil Appeal No. 154 of 2005 is hereby set aside. The judgment and decree dated 06.10.2005 passed by the Trial Court in Regular Suit No. 86 of 1990 is upheld.

(2016) 8 ILRA 157
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.08.2016

BEFORE

THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE SHAMSHER BAHADUR SINGH, J.

Special Appeal No.- 311 Of 2016

Hari Pal Singh

...Appellant

Versus

State Of U.P. & Ors.

...Respondents

Counsel for Appellant:

Dr. L.P. Misra, Prafulla Tiwari

Counsel for Respondents:

C.S.C., Ashutosh Shahi, Raj Kr Singh Suryvanshi

This present intra-Court appeal arises out of the judgment delivered by a learned Single Judge whereby the appellant's writ petition has been dismissed and it has been held that the process of appointment of the respondent No.11/Dr. Krishna Kant Yadav for being appointed as a Principal in the Lucknow Montessori Inter College, Purana Qila, Lucknow by way of transfer under Regulations 55 to 61 of Chapter III of the U.P. Intermediate Education Act, 1921 can be undertaken provided he fulfills the conditions of the aforesaid Regulations. The post has not yet been advertised by the U.P. Secondary Education Services Selection Board for being filled up by direct recruitment.

The learned Single Judge dismissed the writ petition holding that the Committee of Management of a recognized institution is possessed of the discretion to decide and choose the mode/process of direct recruitment as enumerated under Section 16 of the U.P. Secondary Education Services Selection Board Act, 1982 for appointing a Principal and since the said discretion is available before the advertisement is published by the Board, then the same can be gone into and the competent authority cannot be prevented from assessing the candidature of a person to be appointed by way of transfer.

Court observed that the process for determining the vacancy and notifying it commences with the exercise under Rule 11 of the 1998 Rules and is not dependent upon the date of advertisement by the Commission under Rule 12 thereof. Consequently, court is unable to sustain the reasons given by the learned Single Judge on that count and we accordingly set aside the same. However, at the same time, the direction given by the learned Single Judge to the authority to consider the issue of transfer of respondent No.11 in accordance with the Regulations 55 to 61 of Chapter III does not call for any interference. Court also observed that while determining this issue, the competent authority will also have to consider as to whether the Committee of Management had passed a valid resolution unilaterally and as to whether it was in consonance with the aforesaid Regulations or not, as the learned Counsel for the appellant has raised this issue specifically. The authority will therefore have to determine the said process as well. Apart from this, the authority will also examine the status of the conscious decision taken for adopting the mode of recruitment or it's failure by the Committee of Management and the facts relating thereto.

Learned counsel for the respondent No.11 Sri Ramesh Pandey has categorically objected to this contending that the Committee of Management had taken a conscious decision on 6.5.2016 to adopt the mode of transfer and the District Inspector of Schools merely on an alleged complaint of the appellant had proceeded to send these communications thereafter on 7.5.2016 and 25.5.2016 which is a mala fide exercise and does not amount to a bona fide exercise of power under Rule 11 (4) of the 1998 Rules. This issue also, in court opinion, would be subject to the facts brought on record to be determined by the authority who will process the claim of transfer and advert to this issue as well. The status of the communication of the District Inspector of Schools whether it would amount to an intimation of a vacancy as per Rule 11 (4) will also have to be looked into.

The appeal is therefore allowed.

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.
&
Hon'ble Shamsheer Bahadur Singh, J.)

1. This intra-Court appeal arises out of the judgment delivered by a learned Single Judge whereby the appellant's writ petition has been dismissed and it has been held that the process of appointment of the respondent No.11/Dr. Krishna Kant Yadav for being appointed as a Principal in the Lucknow Montessori Inter College, Purana Qila, Lucknow by way of transfer under Regulations 55 to 61 of Chapter III of the U.P. Intermediate Education Act, 1921 can be undertaken provided he fulfills the conditions of the aforesaid Regulations. The post has not yet been advertised by the U.P. Secondary Education Services Selection Board for being filled up by direct recruitment.

2. The appellant had challenged the letter dated 11.7.2016 issued by the Joint Director of Education, VI Region, Lucknow, whereby he had called upon the District Inspector of Schools to take further action in processing the appointment of the respondent No.11 by way of transfer on the basis of the documents received, and also prayed for quashing of the resolution dated 18.6.2016 of the respondent No.10 Committee of Management as well as the No Objection of the Committee dated 21.6.2016.

3. The appellant relying on the Full Bench decision of this Court in the case of ***Prashant Kumar Katiyar vs. State of U.P. and others [2013 (1) ESC 221]*** had urged before the learned Single Judge that once the District Inspector of Schools had taken the steps for requisitioning the post to be filled up by direct recruitment, then this amounted to a determination of vacancy to be filled up by direct recruitment which could not be reversed by the Committee of Management by resorting to fill-up the post by way of transfer under the aforesaid Regulations. It is for this reason learned counsel for the appellant has urged that the Joint Director of Education had committed an error by calling upon for the documents vide letter dated 11.7.2016 for processing the appointment by way of transfer of the respondent No.11.

4. The learned Single Judge dismissed the writ petition holding that the Committee of Management of a recognized institution is possessed of the discretion to decide and choose the

mode/process of direct recruitment as enumerated under Section 16 of the U.P. Secondary Education Services Selection Board Act, 1982 for appointing a Principal and since the said discretion is available before the advertisement is published by the Board, then the same can be gone into and the competent authority cannot be prevented from assessing the candidature of a person to be appointed by way of transfer.

5. Dr. L. P. Misra, learned Counsel for the appellant submits that the aforesaid conclusion of the learned Single Judge is based on an incorrect inference drawn of the ratio of the Full Bench decision in the case of **Prashant Kumar Katiyar (supra)** and the Committee of Management could not have undertaken the process of appointment by way of transfer once the District Inspector of Schools had taken the step of filling up of the post by selection and direct recruitment through the Board vide letters dated 7.5.2016 and 25.5.2016. He has further submitted that the learned Single Judge having not correctly appreciated the ratio of the Full Bench has arrived at an incorrect conclusion, inasmuch the Committee of Management has no right to proceed to take a decision in the given circumstances for appointment by way of transfer. Firstly, it is in violation of the Uttar Pradesh Secondary Education Services Selection Board Rules, 1998, particularly Rules 10, 11 and 12 as the Committee of Management had overstepped its authority and secondly, the respondent No.11 cannot claim any such right of appointment.

6. It may be placed on record that admittedly, the post has not yet been advertised and secondly, the process of the claim of the respondent No.11 has not attained any finality as no final decision by the competent authority has been taken to give effect to the proposed transfer of the respondent No.11. It was only at the stage of the letter of the Joint Director of Education dated 11.7.2016 that the appellant approached this Court for restraining the said process.

7. Dr. L. P. Misra has also urged that apart from the fact that the Committee of Management could not have made any proposal for filling up of the post by way of transfer, it could not have defeated the right of the appellant as contained under the 1998 Rules which mandate that while sending a proposal for direct recruitment, the name of the senior-most Teacher has to be sent alongwith requisition for consideration and the appellant being the senior-most Teacher in the institution would be losing his right and privilege as a candidate for being selected as a Principal on permanent basis. This right being reserved under Rule 11 (2) (b) of the 1998 Rules, if the Committee of Management is allowed to fill-up the post by way of transfer, the appellant would be losing this opportunity and therefore, his cause is being prejudiced, hence he has a right to challenge the action impugned.

8. Dr. L. P. Misra has further submitted that the appellant is officiating and has a right to be appointed on ad hoc basis as a Principal and get his salary. The appellant has a right to function as an *ad hoc* Principal in terms of Section - 18 of the Act. He is entitled to release of his salary on the post of Principal, hence the writ petition filed by him was very much maintainable. He therefore submits that the contention of the respondent No.11 that the appellant has no right to interfere with the process of direct recruitment or by way of transfer is misplaced. To the contrary, Dr. L. P.

Misra submits that none of the rights of the respondent No.11 have crystallized for him to stake his claim as against the rights of the appellant which have already accrued in his favour.

9. Replying to the aforesaid submissions raised, Sri Ramesh Pandey, learned Counsel for the respondent No.11 has urged that the writ petition was absolutely pre-mature and not maintainable on behalf of the appellant, inasmuch as the process of appointment by way of transfer had not yet attained finality with any final order having been passed in that regard by the competent authority. Secondly, the appellant has no right to claim his continuance or challenge the process of appointment by way of transfer or direct recruitment, inasmuch as the right to choose the mode of appointment is preserved in the Committee of Management and which has rightly been exercised on 6.5.2016. The said resolution determines the mode selected by the Committee for filling up of the post by way of transfer and no requisition has been sent by the Committee for filling up the post by direct recruitment. This resolution of the Committee cannot be overridden by the District Inspector of Schools, who on 7.5.2016 had erroneously issued a letter to the Management to notify and requisition the post to the U.P. Secondary Education Services Selection Board for direct recruitment. The contention is that the District Inspector of Schools could not have exercised its authority so as to dilute the decision and resolution of the Committee of Management to fill-up the post by way of transfer.

10. He submits that the learned Single Judge has not committed any error in drawing the inference that the Full Bench authority in the case of **Prashant Kumar Katiyar (supra)** clearly intended to preserve the said determination of mode of filling up of the post in the Committee of Management which can be exercised up to the stage of the advertisement, if issued for appointment by way of direct recruitment by the Board. He contends that mere sending of a requisition or determination of a vacancy does not prohibit the committee from taking steps to exercise its option for filling up the post by way of transfer, even if any requisition has been sent to the District Inspector of Schools or by him to the Board. His contention is that the determination of the vacancy and the requisitioning of the post to the Selection Board is not the stage of prohibition of exercise of option for filling up the post by way of transfer. According to the Full Bench as inferred by the learned Single Judge, this process of appointment by way of transfer can be adopted at any stage prior to the issuance of the advertisement of the post by the Selection Board. He submits that the Full Bench clearly intended to hold that the selection process should not be jeopardized after the advertisement, but before the advertisement takes place the Committee can take steps for filling up the said post by way of transfer. He therefore submits that the learned Single Judge has neither misunderstood the Full Bench judgment nor a wrong inference has been drawn.

11. He further submits that in the absence of any right crystallized in favour of the respondent No.11 and the stage of the processing of filling up of the post by way of transfer having not attained finality, the writ petition filed by the appellant was not only pre-mature but was also an unnecessary exercise for impeding the correct process that had been adopted by the Committee of Management. He further submits that the District Inspector of Schools had not in effect determined the vacancy nor he had undertaken any such exercise and he had suddenly acted on the complaint of the appellant. This process does not amount to determination of vacancy by the District

Inspector of Schools and therefore neither the letter dated 7.5.2016 nor the letter dated 25.5.2016 in any way amounts to a determination of the mode or requisitioning the post to be filled up by way of direct recruitment by the Selection Board. He submits that the District Inspector of Schools has acted hurriedly at the instance of the appellant for no valid reason and therefore, the Joint Director of Education was perfectly justified in calling for documents vide letter dated 11.7.2016. He submits that the District Inspector of Schools had mala fide tried to forestall the resolution of the Committee of Management of the institution.

12. Replying to the said arguments, in rejoinder Dr. L. P. Misra contended that under Regulations 55 to 61 of the Chapter III, the process of appointment by way of transfer has several steps. He submits that if the transfer is from one district to another, which is involved presently, where the transfer is sought from an institution from Faizabad to an institution in district Lucknow, the appellant-institution is first required to pass a resolution and send it to the Regional Director of Education. This is to be done through the District Inspector of Schools. It is thereafter that the recipient college where the appointment is to be made is informed about it through the District Inspector of Schools of that district that the recipient-institution passes a resolution for accepting any such proposal. In the instant case, it is a unilateral transfer in the sense that the respondent No.11 has opted for being appointed by way of transfer in the institution at Lucknow and this is not a matter relating to reciprocal transfer between the two incumbents. Thus, according to Dr. L. P. Misra, the process has been completely reversed in the present case whereby the recipient college at Lucknow, where the appellant is functioning as ad hoc Principal, has on its own passed a resolution in favour of the respondent No.11 and sent it directly to the Joint Director of Education. This process therefore is contrary to the Regulations and hence, the entire action of processing the transfer of respondent No.11 is vitiated.

13. Learned Standing Counsel for the State Authorities/ respondent Nos. 1 to 9 contends that the decision on the claim of transfer by the respondent No.11 is yet to be taken and therefore, the exercise was pre-mature. Learned Standing Counsel however submits that the law of the Full Bench in the case of **Prashant Kumar Katiyar (supra)** will have to be taken into consideration even by the authority while determining the process of transfer to be adopted in the present case. The fact with regard to the sending of the letters dated 7.5.2016 and 25.5.2016 by the District Inspector of Schools for filling up of the post by direct recruitment and then the subsequent letter dated 11.7.2016 of the Joint Director (Education) calling for the records for consideration of the transfer of the respondent No.11 will have to be determined in view of the law laid down by the Full Bench.

Dates & events

- Amar Bahadur Singh was the permanent Principal about whom there was a dispute with regard to his date of retirement. His Writ Petition No.6246 (SS) of 2015 in this regard came to be dismissed on 3.11.2015, which was affirmed in Special Appeal No.560 of 2015.

- 30.11.2015 - Services of Amar Bahadur Singh were discontinued and officiating charge was given to the appellant vide order of the Committee of Management dated 1.12.2015.
- Signatures of the appellant were attested by the District Inspector of Schools on 7.12.2015.
- The Committee of Management did not send any requisition for the post of Principal and Lecturers to be filled by direct recruitment.
- 6.5.2016 - Alleged resolution of the respondent No.10/ Committee of Management to fill up the post by way of transfer which is seriously disputed by the appellant as being manipulated.
- 7.5.2016 and 25.5.2016 - The District Inspector of Schools dispatches the letters for notifying the vacancies of Principal and Lecturers vacant in the institution to be filled up by direct recruitment alleged to have been received by the Selection Board on 2.6.2016.
- 8.6.2016 - The District Inspector of Schools disagrees with the proposal of transfer in view of the determination of the vacancy and its notification on 25.5.2016.
- 18.6.2016 - Resolution of the Committee of Management to provide No Objection to the respondent No.11 for his transfer.
- 21.6.2016 - No Objection Certificate to the respondent No.11.
- 6.7.2016 - The Joint Director of Education, Faizabad Region, where the respondent No.11 is working, forwards the documents relating to the proposal of transfer of respondent No.11.
- 11.7.2016 - The Joint Director of Education, VI Region, Lucknow sends a letter to the District Inspector of Schools for further action.
- Writ Petition No.16642 (SS) of 2016 giving rise to the present appeal filed.

14. On a conspectus of the aforesaid facts and the arguments advanced, the issue which deserves determination is as to what is the stage up to which the appointment by way of transfer can be permitted. The learned Single Judge has held that since the process of selection begins with the advertisement and since the advertisement has not yet been made by the U.P. Secondary Education Services Selection Board, therefore, the Full Bench according to the learned Single Judge permits the consideration of appointment by way of transfer up to the stage of advertisement. This is being countered by the learned counsel for the appellant contending that the learned Single

Judge even though has extracted certain paragraphs of the judgment of the Full Bench in the case of **Prashant Kumar Katiyar (supra)**, but has omitted to consider the impact of what has been stated by the Full Bench after noticing Rules 10, 11 and 12 of the 1998 Rules in paragraphs 25 to 41 of the judgment read as a whole.

15. On a consideration of the ratio of the Full Bench in the case of **Prashant Kumar Katiyar (supra)**, what we find is that the learned Single Judge in the impugned decision has extracted paragraphs 36, 37 and 38 of the said judgment and thereafter, it crosses over to paragraph - 43 of the judgment and has then reconciled it with the judgments in the cases of **Asha Singh vs. State of U.P. And others [2007 (3) UPLBEC 2497]** and **Smt. Amita Sinha vs. State of U.P. And others [2008 (4) ESC 2799]** to conclude that the appointment through transfer would be legally permissible up to the stage of advertisement only.

16. We are unable to uphold the said view of the learned Single Judge, inasmuch as it appears that the learned Single Judge has concluded that the process of direct recruitment starts with the issuance of advertisement and in such a situation, prior to that, the process of appointment by way of transfer would be permissible. The ratio of the Full Bench in the case of **Prashant Kumar Katiyar (supra)** in paragraphs 38, 39, 40 and 41 has clearly concluded that the power of the Management or the District Inspector of Schools or even the authority which is to give effect to any transfer cannot proceed to adopt any other mode of recruitment after the steps taken for determination and notification as per Rule 11 of the 1998 Rules. It has also been held that the alteration of any such determination is not permissible and cannot be reversed. This has been reiterated in paragraph - 39 of the decision. Not only this in paragraph - 40, the Full Bench also obliges the Committee and the District Inspector of Schools to fulfill their obligations as per Rule 11 for determination and intimation of vacancies. The ratio therefore of the Full Bench read with the aforesaid Rules is clearly to the effect that the authorities, who are obliged to fill up the vacancies occurring in the year of recruitment, have to mandatorily perform their function of determining and notifying the vacancy. The failure by the Management or the District Inspector of Schools to act as per Rule 11 of the 1998 Rules would therefore not generate a right in favour of any person to seek transfer or even in the Committee of Management to defeat the very purpose of Rule 11 of determining or intimating the vacancies to the Selection Board for direct recruitment. The Committee of Management no doubt has the right to select the mode of recruitment when it has to be filled up directly in the event it has an option from a candidate seeking transfer. However, this conscious decision of the Committee of Management to adopt a particular mode has to be taken within the time frame as provided under Rule 11 of the 1998 Rules. If the Committee of Management is allowed to violate the time schedule, then it would be allowing the Committee of Management to have a free play to choose to determine its mode of recruitment at any time which is not the purpose of the Rules. For that matter, under Sub-Rule (4) of Rule 11, the District Inspector of Schools is also obliged to take a decision as per the specifications of the time schedule provided in Rule 11 itself for the Committee as well as for the District Inspector of Schools. This compliance has to be adhered to keeping in view the year of recruitment and also the eligibility of the candidate including his qualification as on the first day of the year of recruitment which would be the 1st of July of the year in question. However, any failure on their part would not extend the

right of the Management to any stage beyond that for adopting the mode of appointment by way of transfer. It is this aspect which has been insisted upon by the Full Bench in the paragraphs referred to here-in-above and which has not been noticed by the learned Single Judge in the impugned judgment. Consequently, we are of the opinion that the learned Single Judge has not correctly appreciated the ratio of the Full Bench and has therefore arrived at an incorrect conclusion that the option is open up to the stage of advertisement for making appointment by way of transfer. The impugned judgment therefore cannot be sustained to that extent.

17. There is yet another aspect which deserves to be explained, namely, that the process of determination and intimation of vacancy for direct recruitment is a distinct process under Rule 11 of the 1998 Rules. The stage of advertisement comes after the request is received by the Board. The stage of determination and notification of the vacancy is therefore a unique methodology in this process of selection which is a stage prior to advertisement. It is for this reason that the judgment in the case of **Prashant Kumar Katiyar (supra)**, as noted above, has held that this process should not be avoided which is mandatory. Consequently, the learned Single Judge did not appreciate this distinction while applying the principles of commencement of the date of selection process on the strength of the judgments of the Supreme Court and the ratio of the judgments in the cases of **Asha Singh (supra)** and **Smt. Amita Sinha (supra)** respectively. The said logic of the initiation of the selection process has to be distinguished in the present process of recruitment where the initiation of the determination of vacancy is relevant for the purpose of choosing the mode of recruitment under the 1998 Rules. Consequently, we are of the opinion that once the determination and the notification process is either made or there is a failure on the part of the Management to do so, then the District Inspector of Schools has to perform his duty as per Rule 11 (4). Once this contingency has occurred, then the option of the mode to recruit by transfer is not available. This issue will therefore have to be taken into account by the Joint Director (Education) who would be under our orders in this appeal be now proceeding to examine the matter.

18. We may further again clarify that an argument is advanced in most of the cases as also at present that even there is a determination and intimation of vacancy, the Commission takes a long time in proceeding to fill up a post or even not advertising the post in spite of notification. This deserves to be clarified by us that in the event any such situation arises, then the remedy open to the Committee of Management or any aggrieved party is to approach this Court for a Mandamus for performance of the obligatory duty under Rule 11 of the 1998 Rules. Any failure on the part of the Commission to either advertise or not proceeding with the recruitment expeditiously cannot devolve a corresponding right on any person seeking transfer or the Committee of Management to proceed to process an appointment by way of transfer on account of such a lapse. Any allowance to the Committee of Management would therefore defeat the very purpose of Rule 11 and any Committee can slip away by this method to alter its mode of recruitment by resorting to transfer even at a later stage. The judgment of the Full Bench in the case of **Prashant Kumar Katiyar (supra)** has emphasized to plug all such loopholes that may be available to the Committee of Management for avoiding its responsibility. Thus, for the purpose of invoking its power of determination to choose the mode of direct recruitment would be limited to the Committee of Management within the period as prescribed under Rule 11 of the 1998 Rules for determination and

notification of vacancies and not beyond that. The issuance of advertisement or otherwise by the Commission therefore in relation to the mode of direct recruitment will be of no avail. It is for this reason that the Full Bench in the case of **Prashant Kumar Katiyar (supra)** made this allowance up to the date of advertisement only in the case of compassionate appointment and not in the case of transfer.

19. In a writ petition that gave rise to **Special Appeal No.1879 of 2013, Raja Ram v. Dr. Rajesh Kumar and 6 others**, an interim order was made subject matter of the aforesaid Special Appeal in a pending writ petition. The Special Appeal was disposed of vide judgment dated 9.12.2013 by observing as follows:-

"Prima-facie at this stage, it appears that in 2008, a requisition was sent by the Management in view of the retirement of the then principal. In view of the law laid down by the Full Bench, the exercise of resorting to a transfer of an employee has to be completed prior to determination and intimation of the vacancy to the Board and not thereafter. The appellant has in pursuance of the direction dated 08th November, 2013 joined the office of the principal on officiating basis and the respondent was relieved on 09th November, 2013."

20. We find ourselves in agreement with the aforesaid observations of the Division Bench as the process for determining the vacancy and notifying it commences with the exercise under Rule 11 of the 1998 Rules and is not dependent upon the date of advertisement by the Commission under Rule 12 thereof. Consequently, we are unable to sustain the reasons given by the learned Single Judge on that count and we accordingly set aside the same.

21. However, at the same time, the direction given by the learned Single Judge to the authority to consider the issue of transfer of respondent No.11 in accordance with the Regulations 55 to 61 of Chapter III does not call for any interference. We may, however, add that while determining this issue, the competent authority will also have to consider as to whether the Committee of Management had passed a valid resolution unilaterally and as to whether it was in consonance with the aforesaid Regulations or not, as the learned Counsel for the appellant has raised this issue specifically. The authority will therefore have to determine the said process as well. Apart from this, the authority will also examine the status of the conscious decision taken for adopting the mode of recruitment or its failure by the Committee of Management and the facts relating thereto.

22. The District Inspector of Schools in this case has intervened directing the Committee by issuing communications for proceeding to fill up the post by direct recruitment and accordingly inform the Selection Board as per the documents on record. Learned counsel for the respondent No.11 Sri Ramesh Pandey has categorically objected to this contending that the Committee of Management had taken a conscious decision on 6.5.2016 to adopt the mode of transfer and the District Inspector of Schools merely on an alleged complaint of the appellant had proceeded to send these communications thereafter on 7.5.2016 and 25.5.2016 which is a mala fide exercise and does not amount to a bona fide exercise of power under Rule 11 (4) of the 1998 Rules. This issue also, in

our opinion, would be subject to the facts brought on record to be determined by the authority who will process the claim of transfer and advert to this issue as well. The status of the communication of the District Inspector of Schools whether it would amount to an intimation of a vacancy as per Rule 11 (4) will also have to be looked into.

23. We, therefore, direct the authority that in addition to the directions given by the learned Single Judge to also advert to the aforesaid questions as well. We would have ourselves gone into the aforesaid questions but we find that the learned Single Judge has completely omitted to answer the aforesaid contentions. Since we are setting aside the judgment on the issue of law determined by us as indicated here-in-above, we leave it open to the parties to canvass the aforesaid facts to be determined by the competent authority accordingly and independently.

24. There is yet another issue to be clarified with regard to the contention of the learned Counsel for the respondent No.11 that the appellant has absolutely no right to contest this position as he is only claiming a right to function on ad hoc basis. Dr. L. P. Mishra, learned counsel for the appellant is not unjustified in contending that the appellant being the senior-most Teacher has a right to the extent that his name has also to be sent while notifying the vacancy by direct recruitment as per Rule 11 (2) (b) of the 1998 Rules. Not only this, it is the senior-most Teacher who has a right to function on ad hoc basis on the post of Principal which is sought to be occupied by way of transfer by the respondent No.11. If the transfer of the respondent No.11 cannot be given effect to in law, then the appellant will certainly have a right to object to the same as his continuance on ad hoc basis as Principal and receiving salary on such post would directly be involved. It would therefore be not correct to say that the appellant has no right to contest the said position.

25. However, there is substance in the argument that the issues that have been raised are at a slightly pre-mature stage, inasmuch as the claim of the respective parties is yet to be determined by the competent authority which is directly dependent on the claim of the transfer of the respondent No.11. It shall therefore open to the respective parties to raise a challenge on merits as and when, if permissible under law, whenever the competent authority takes a decision as per our directions given hereunder and the law as observed here-in-above.

26. The appeal is therefore **allowed** and the impugned judgment is set aside to the aforesaid extent with a direction to the Joint Director (Education) of the region concerned to proceed with the matter and determine the respective claims expeditiously, preferably within six weeks of the date of presentation of a certified copy of this order before him and after giving an opportunity of hearing to the Committee of Management as well as to the appellant and the respondent No.11.

(2016) 8 ILRA 167
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.08.2016

BEFORE

THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Application U/S 482 No.- 22502 Of 2016

Akaram Farruki @ Chunmun

...Applicant

Versus

State Of U.P. & Anr.

...Opposite Parties

Counsel for Applicant:

Pravendra Kumar Chauhan

Counsel for Opposite Parties:

G.A.

In complaint case no. 172 of 2014 (Sudhir Vs. Sabir Ali and others), prosecution case in brief was that applicant and five other persons had trespassed the house of complainant Sudhir Kumar (present OP No.-2) and used force to get signature of complainant and his brother on certain blank documents. On the basis of statement under sections 200 and 202 Cr.P.C., summoning order dated 10.1.2014 was passed against applicant and other co-accused persons.

Offence under section 3(1) (x) SC/ST Act is made out only when it is committed "in any place within public view", but in present matter, according to complaint and statement of witnesses, the alleged incident had occurred within the house of complainant-OP No.-2 and not in any place within public view.

Court observed that this application is partly allowed. The order of prosecution for offence under section 3(1) (x) SC/ST Act is quashed, but the prosecution of applicant in complaint case no. 172/2014 (Sudhir Vs. Sabir Ali and others) will be carried out for other offence.

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. Heard learned counsel for the applicant, learned AGA and perused the records.

2. In complaint case no. 172 of 2014 (Sudhir Vs. Sabir Ali and others), prosecution case in brief was that applicant and five other persons had trespassed the house of complainant Sudhir Kumar (present OP No.-2) and used force to get signature of complainant and his brother on certain blank documents. On the basis of statement under sections 200 and 202 Cr.P.C., summoning order dated 10.1.2014 was passed against applicant and other co-accused persons.

3. From perusal of complaint and statement of complainant under section 200 Cr.P.C., it appears that, if prosecution case is taken to be true in its entirety, in that case also the alleged overt

acts were committed by applicant and other co-accused because of property dispute and not because of the fact that complainant is a member of scheduled caste or scheduled tribe community.

4. Apart from it, offence under section 3(1) (x) SC/ST Act is made out only when it is committed "*in any place within public view*", but in present matter, according to complaint and statement of witnesses, the alleged incident had occurred within the house of complainant-OP No.- 2 and not in any place within public view.

5. In these circumstances, the order of cognizance for offence under section 3(1) (x) SC/ST Act is found illegal and erroneous. In such matter, issuing notice will delay the proceedings of trial before lower court. Therefore, exercising power under section 482 Cr.P.C., this application is decided at this stage.

6. In view of the above, this application is partly allowed. The order of prosecution for offence under section 3(1) (x) SC/ST Act is quashed, but the prosecution of applicant in complaint case no. 172/2014 (Sudhir Vs. Sabir Ali and others) will be carried out for other offence.

(2016) 8 ILRA 169
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.08.2016

BEFORE

THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Application U/S 482 No.- 23239 Of 2016

Muhammad

**...Applicant
Versus**

State Of U.P. & Anr.

...Opposite Parties

Counsel for Applicant:

Amit Kumar Srivastava

Counsel for Opposite Parties:

G.A.

Present application under section 482 Cr.P.C. has been moved for quashing the proceeding of Complaint Case No. 596 of 2015, Akbar Ali Vs. Adil and others and the summoning order dated 27.6.2016 of cognizance. The complaint case no. 3029 of 2014 (New No. 596 of 2015) was filed by present opposite party no. 2 Akbar Ali against four persons. accused persons have allegedly trespassed the house of complainant, hurled abuses, threatened and caused injuries by fist, kicks, clubs and sticks. Complainant had examined himself under section 200 Cr.P.C. and two witnesses under section 202 Cr.P.C, on the basis of which the trial court had passed summoning order dated 27.6.2016.

Learned counsel for the applicant contended that impugned order of cognizance had been passed after concealment of pertinent facts in mala fide way, including the status of accused no.-1 of being judicial officer.

It is settled principle that while summoning an accused, the court has to see prima facie evidence. The 'prima facie evidence' means the evidence sufficient for summoning the accused and not the evidence sufficient to warrant conviction.

Court observed that No criminal proceeding can be initiated against any judicial officer without obtaining prior sanction from the High Court even to the allegations relate to acts which are not done in discharge of his official duty. The most relevant fact about the judicial officer's involvement was deliberately concealed, due to which directions of Hon'ble Apex Court, as above, could not be complied. The impugned order of cognizance and summoning is legally erroneous and on the other hand it is found that complaint case has been filed after deliberately suppressing relevant facts and without previous sanction of High Court such prosecution cannot be carried out.

This application u/s 482 CrPC is allowed.

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. This application under section 482 Cr.P.C. has been moved for quashing the proceeding of Complaint Case No. 596 of 2015, Akbar Ali Vs. Adil and others, police station Mubarakpur, District Azamgarh and the summoning order dated 27.6.2016 of cognizance passed in it by Judicial Magistrate, Court No. 21, Azamgarh for offences under sections 323 and 504 IPC against four accused including present applicant.

2. The complaint case no. 3029 of 2014 (New No. 596 of 2015) was filed by present opposite party no. 2 Akbar Ali against four persons. In alleged act proposed accused committed offence on 31.7.2014 at about 8:00 a.m. when accused persons have allegedly trespassed the house of complainant, hurled abuses, threatened and caused injuries by fist, kicks, clubs and sticks.

3. Complainant had examined himself under section 200 Cr.P.C. and two witnesses under section 202 Cr.P.C, on the basis of which the trial court had passed summoning order dated 27.6.2016 by which all the four accused named on complaint were summoned for offence under section 323, 504 IPC. The proceedings of said complaint case alongwith said order of cognizance is under challenge in present proceeding.

4. Learned counsel for the applicant contended that impugned order of cognizance had been passed after concealment of pertinent facts in mala fide way, including the status of accused no.-1 of being judicial officer. He further submitted that impugned order of cognizance is non-speaking and had been passed without application of mind, so proceeding of case on basis of such order is liable to be quashed. He contended that from concealment of relevant facts deliberately directions of Apex Court cannot be complied. Had these facts been in knowledge of trial court, there was no possibility of passing of such order.

5. These contentions were opposed by learned AGA who submitted that although impugned summoning order is non-speaking and cryptic but on merits there is no error in it.

6. In ruling "**M/s. Pepsi Food Ltd. & another vs. Special Judicial Magistrate & others, 1998 UP Cr R 118**" Hon'ble Supreme Court held :-

"Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning the accused. Magistrate had to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

7. In "**Paul George vs. State, 2002 Cri.L.J. 996**" Hon'ble Supreme Court held :-

"We feel that whatever be the outcome of the pleas raised by the appellant on merit, the order disposing of the matter must indicate application of mind to the case and some reasons be assigned for negating or accepting such pleas.- - - It is true that it may depend upon the nature of the matter which is being dealt with by the Court and the nature of the jurisdiction being exercised as to in what manner the reasons may be recorded e.g. in an order of affirmance detailed reasons or discussion may not be necessary but some brief indication by the application of mind may be traceable to affirm an order would certainly be required. Mere ritual of repeating the words or language used in the provisions, saying that no illegality, impropriety or jurisdictional error is found in the judgment under challenge without even a whisper of the merits of the matter or nature of pleas raised does not meet the requirement of decision of a case judicially."

8. In **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, (2005) 8 SCC 89** the Apex Court had held :

"Section 203 of the Code empowers a Magistrate to dismiss a complaint without even issuing a process. It uses the words "after considering" and "the Magistrate is of opinion that there is no sufficient ground for proceeding". These words suggest that the Magistrate has to apply his mind to a complaint at the initial stage itself and see whether a case is made out against the accused persons before issuing process to them on the basis of the complaint. For applying his mind and forming an opinion as to whether there is sufficient ground for proceeding, a complaint must make out a prima facie case to proceed. This, in other words, means that a complaint must contain material to enable the Magistrate to make up his mind for issuing process. If this were not the requirement, consequences could be far reaching. If a Magistrate had to issue process in every case, the burden of work before the Magistrate as well as the harassment caused to the respondents to whom process is issued would be tremendous. Even Section 204 of the Code starts with the words "if in the opinion of the Magistrate taking cognizance of an offence there is sufficient ground for proceeding". The words "sufficient ground for proceeding" again suggest that ground should be made out in the complaint for proceeding against the respondent. It is settled law that at the time of issuing of the process the Magistrate is required to see only the allegations in the complaint and where allegations in the complaint or the charge-sheet do not constitute an offence against a person, the complaint is liable to be dismissed."

9. It is settled principle that while summoning an accused, the court has to see prima facie evidence. The 'prima facie evidence' means the evidence sufficient for summoning the accused and not the evidence sufficient to warrant conviction. The enquiry u/s 202 CrPC is limited only to ascertain of truth or falsehood of allegations made in the complaint and whether on the material placed by the complainant a prima facie case was made out for summoning the accused or not.

10. As held by the Courts as above, the passing of order of summoning any person as accused is a very important matter, which initiates criminal proceeding against him. Such orders cannot be passed summarily or without applying judicial mind. In light of this legal position I have

gone through the impugned order. A perusal of this order indicates that after noting the names of witnesses Magistrate mentioned that on basis of evidence the four accused persons should be summoned for offences u/ss 323, 504 IPC. Neither any discussion of evidence was made, nor was it considered as to which accused had allegedly committed what overt act or what words were uttered by accused for cognizance of offence u/s 504 IPC. The four accused persons of complaint were summoned for offences mentioned above. I doubt whether the learned Magistrate had actually read statements u/ss 200, 202 CrPC or the documents of the original file or not. No reason was mentioned in the impugned order as to what those evidences contain, and how they help the prosecution case. Impugned order clearly lacks the reflection of application of judicial discretion or mind. Nothing is there which may show that learned Magistrate, before passing of the order under challenge had considered facts of the case and evidence or law. Therefore it appears that, in fact, no judicial mind was applied before the passing of impugned order of summoning. Such order cannot be accepted as a proper legal judicial order passed after following due procedure of law. Therefore it is liable to be quashed.

11. In **Anita Malhotra v. Apparel Export Promotion Council, (2012) 1 SCC 520** the Apex Court had held as under :

"20. As rightly stated so, though it is not proper for the High Court to consider the defence of the accused or conduct a roving enquiry in respect of merits of the accusation, but if on the face of the document which is beyond suspicion or doubt, placed by the accused and if it is considered that the accusation against her cannot stand, in such a matter, in order to prevent injustice or abuse of process, it is incumbent on the High Court to look into those document/documents which have a bearing on the matter even at the initial stage and grant relief to the person concerned by exercising jurisdiction u/s 482 of the Code."

12. For the reasons discussed above, the impugned summoning order of the court below is erroneous. Such order of cognizance and summoning without using judicial mind is unacceptable in law and liable to be quashed.

13. From verification it is found that accused no.-1 mentioned in complaint and summoned by trial court, is a judicial officer, who was posted on the date of incident at Sitapur as Additional District Judge, and he is still continuing in judicial service. The applicants no.-1 and 2 are cousin brothers of complainant. Admittedly, civil litigation for property is continuing between them and complainant. Therefore, this contention of applicant side is found acceptable that complainant had knowledge of accused no.-1 being a judicial officer, but he has deliberately concealed this fact in complaint as well as in his statement under section 200 CrPC. These facts were concealed by two witnesses examined under section 202 CrPC also, who had previous acquaintance with aforesaid accused persons.

14. In **Delhi Judicial Service Assn. v. State of Gujarat, (1991) 4 SCC 406** Hon'ble Apex Court had held:

"55. The facts of the instant case demonstrate that a presiding officer of a court may be arrested and humiliated on flimsy and manufactured charges which could affect the administration of justice. In order to avoid any such situation in future, we consider it necessary to lay down guidelines which should be followed in the case of arrest and detention of a Judicial Officer. No person whatever his rank, or designation may be, is above law and he must face the penal consequences of infraction of criminal law. A Magistrate, Judge or any other Judicial Officer is liable to criminal prosecution for an offence like any other citizen but in view of the paramount necessity of preserving the independence of judiciary and at the same time ensuring that infractions of law are properly investigated, we think that the following guidelines should be followed:

(A) If a Judicial Officer is to be arrested for some offence, it should be done under intimation to the District Judge or the High Court as the case may be.

(B) If facts and circumstances necessitate the immediate arrest of a Judicial Officer of the subordinate judiciary, a technical or formal arrest may be effected.

(C) The fact of such arrest should be immediately communicated to the District and Sessions Judge of the concerned District and the Chief Justice of the High Court.

(D) The Judicial Officer so arrested shall not be taken to a police station, without the prior order or directions of the District and Sessions Judge of the concerned district, if available.

(E) Immediate facilities shall be provided to the Judicial Officer for communication with his family members, legal advisers and Judicial Officers, including the District and Sessions Judge.

(F) No statement of a Judicial Officer who is under arrest be recorded nor any panchnama be drawn up nor any medical tests be conducted except in the presence of the Legal Adviser of the Judicial Officer concerned or another Judicial Officer of equal or higher rank, if available.

(G) There should be no handcuffing of a Judicial Officer. If, however, violent resistance to arrest is offered or there is imminent need to effect physical arrest in order to avert danger to life and limb, the person resisting arrest may be overpowered and handcuffed. In such case, immediate report shall be made to the District and Sessions Judge concerned and also to the Chief Justice of the High Court. But the burden would be on the police to establish the necessity for effecting physical arrest and handcuffing the Judicial Officer and if it be established that the physical arrest and handcuffing of the Judicial Officer was unjustified, the police officers causing or responsible for such arrest and handcuffing would be guilty of misconduct and would also be personally liable for compensation and/or damages as may be summarily determined by the High Court.

56. The above guidelines are not exhaustive but these are minimum safeguards which must be observed in case of arrest of a Judicial Officer. These guidelines should be implemented by the State Government as well as by the High Courts. We, accordingly, direct that a copy of the guidelines

shall be forwarded to the Chief Secretaries of all the State Governments and to all the High Courts with a direction that the same may be brought to the notice of the concerned officers for compliance."

15. In **High Court of Judicature of Bombay v. Shirishkumar Rangrao Patil, (1997) 6 SCC 339** Hon'ble Apex Court had held:

"At the same time the High Court is the protector of the subordinate judiciary. Often some members of the Bar, in particular, in Muffasil Courts, attempt to take undue advantage of their long standing at the Bar and attempt to abuse their standing by bringing or attempting to bring about diverse forms of pressures and pinpricks on junior judicial officers or stubborn and stern and unbendable officers. If they remain unsuccessful, to achieve their nefarious purpose, some members of the Bar indulge in mud-slinging without any base, by sending repeated anonymous letters against the judicial officers questioning their performance/ capacity/ integrity. The High Court should, therefore, take care of the judicial officers and protect them from such unseemingly attempts or pressures so as to maintain their morale and independence and support the honest and upright officers."

16. No criminal proceeding can be initiated against any judicial officer without obtaining prior sanction from the High Court even to the allegations relate to acts which are not done in discharge of his official duty. In present matter from perusal of record, it is found that neither the factum of accused no.-1 being a judicial officer was informed to court below nor any permission for starting criminal proceeding and prosecution was obtained from High Court. On the contrary the most relevant fact about the judicial officer's involvement was deliberately concealed, due to which directions of Hon'ble Apex Court, as above, could not be complied. This court is under obligation to take care of and protect its subordinate judicial officers from nefarious activities of persons acting malafidely due to enmity. Therefore in absence of such permission/ sanction from High Court, the proceeding of complaint case under challenge is liable to be quashed.

17. In view of above, it is found that at one hand the impugned order of cognizance and summoning is legally erroneous and on the other hand it is found that complaint case has been filed after deliberately suppressing relevant facts and without previous sanction of High Court such prosecution cannot be carried out. In such very special circumstances of the matter, in view of above, there is no propriety of issuing notice to opposite parties. Considering facts and circumstances, it appears that the continuation of criminal proceeding in this case would tantamount to abuse of process of law. Therefore, by exercising inherent jurisdiction of this Court and for preventing abuse of process of Court, this application u/s 482 CrPC is allowed. The proceeding of Complaint Case No. 596 of 2015 (Akbar Ali Vs. Adil & others) under section 323, 504 IPC, police station Mubarakpur, District Azmagarh pending in the Court of Judicial Magistrate, Court No. 21, Azmagarh are hereby quashed.

18. Let a copy of this order was sent to the trial court concerned, through the District and Sessions Judge, immediately.

(2016) 8 ILRA 175
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.08.2016

BEFORE

THE HON'BLE B. AMIT STHALEKAR, J.

Writ A No.- 24824 Of 2016

Mohd. Irfan & Ors.	...Petitioners
	Versus
State Of U.P. & Ors.	...Respondents

Counsel for Petitioners:

Anup Kumar Khare, Ashok Khare, S.N. Singh

Counsel for Respondents:

C.S.C.

Held

The entire selection process was **vitiated by large-scale irregularities and manipulation**, including:

Overwriting and tampering of interview marks,

Non-verification of documents,

Selection of ineligible candidates,

Incomplete application forms,

Absence of signatures of selection committee members.

The irregularities were **systemic, widespread, and affected the entire selection**, making it impossible to segregate valid selections from invalid ones.

In such cases of **mass malpractice**, the authority is justified in:

Cancelling the entire selection process,

Without issuing individual show-cause notices or granting hearing.

No candidate has a vested or indefeasible right to appointment merely because their name appears in a select list.

The decision to cancel the selection was:

Based on an inquiry report,

Supported by material evidence,

Neither arbitrary nor mala fide.

Allegations of **political mala fide (MP/MLA complaint)** were rejected as:

Inquiry independently established serious irregularities.

Principles of natural justice are not attracted in cases where:

The entire selection is tainted,

Cancellation is based on mass irregularities.

Judicial review under Article 226 is **limited**, and the Court will not interfere where:

Administrative decision is based on relevant material,

No arbitrariness is shown.

The cancellation orders dated **07.05.2016 and 13.05.2016 are valid**.

The writ petition is **dismissed**.

CASE LAW CITED

Bihar School Examination Board vs. Subhas Chandra Sinha (1970 (1) SCC 648)
Union Territory of Chandigarh vs. Dilbagh Singh (1993) 1 SCC 154
Gurdeep Singh vs. State of J. & K. (1995 Supp (1) SCC 188)
Biswa Ranjan Sahoo vs. Sushanta Kumar Dinda (1996) 5 SCC 365
Dilip Kumar Goswami vs. Central Administrative Tribunal (2001 (3) ESC All 939)
Union of India vs. O. Chakradhar (2002) 3 SCC 146
Union of India vs. Tarun K. Singh (2003) 11 SCC 768
Arvind Kumar Pipal vs. Commissioner, Trade Tax, U.P. (2004 (1) ESC All 444)

(Delivered by Hon'ble B. Amit Sthalekar, J.)

1. Heard Sri S.N. Singh, learned counsel for the petitioner and Sri Vikram Bahadur Yadav, learned standing counsel for the respondents.

2. The petitioners who are 23 in number are seeking quashing of the order dated 7.5.2016 whereby the selection on contract basis for various posts under the NPCDES Programme by the Human Resources Department has been cancelled. The petitioners are also seeking quashing of the order dated 13.5.2016 notifying the order dated 7.5.2016 in furtherance of National Health Mission Scheme of the Government of India and its implementation in different districts.

3. An advertisement was issued on 24.2.2016 published in the newspaper 'Amar Ujala' on 26.2.2016. Applications were invited for various posts. The petitioners no.1,2, 3 and 4 submitted their applications for the post of Senior Treatment Supervisor under the National Tuberculosis Control Programme. The petitioner no.3 submitted his application under the OBC category and the petitioner no.4 submitted his application under the SC category. The petitioner no.5 submitted his application for the post of Lab Technician in the general category. Petitioner no.6 submitted her application for the post of Staff Nurse under the SC category. Petitioner nos.7 and 8 submitted their applications for the post of Staff Nurse under the general category and OBC respectively. Petitioner no.9 applied for the post of Lab Technician under the SC category. Petitioner no.10 submitted his application for the post of Staff Nurse in the general category. Petitioner no.11 submitted his application for the post of Lab Technician in the general category. Petitioner nos.12 and 13 submitted their applications for the post of Staff Nurse in general category. Petitioner no.14 submitted his application for the post of Staff Nurse under the OBC category. Petitioner no.15 submitted her application for the post of Staff Nurse under the SC category. Petitioner no.16 submitted her application for the post of District Leprosy Advisor under the general category. Petitioner no.17 submitted her application for the post of Block Programme Manager under the OBC category. Petitioner no.18 submitted her application for the post of Staff Nurse under the OBC category. Petitioner no.19 submitted her application for the post Nutrition Care Taker under the general category. Petitioner no.20 submitted her application for the post of Nutrition Care Taker under the general category. Petitioner no.21 submitted his application for the post of Block Data cum Account Assistant under the OBC category, petitioner no.22 submitted his application form

for the post of Para Medical Worker and petitioner no.23 submitted his application for the post of Lab Technician under the OBC category.

4. According to the petitioners, they possess all the requisite qualifications for the posts against which they have applied. It is stated that a Selection Committee was constituted comprising Chief Medical Officer, Jalaun, at Orai as President and four members namely City Magistrate, Orai, C.M.O. Superintendent District Mahila Hospital and Additional Chief Medical Officer as well as District Tuberculosis Decease Officer. The petitioners were called for interview and after verification of documents they were declared successful. It is stated that earlier one Sri Ram Ganesh was the District Magistrate, Jalaun but he was transferred and therefore he could not put his signature on the select list. One Sandeep Kaur took over charge as the District Magistrate and put his signature on the select list as Chairman of the Selection Committee. Thereafter the select list was issued on 31.3.2016. It is stated that earlier the last date for joining was 31.3.2016 but since the select list itself was published on 31.3.2016, the date of joining was extended upto 30.4.2016. However, the petitioners were not permitted to join on their selected posts and no letter of appointment was issued. It is alleged that one Sri Bhanu Pratap Verma, Member of Parliament and one Sri Daya Shanker Verma, local MLA written a complaint to the District Magistrate, Orai alleging irregularities made in the selection and claiming that no joining be given and the select list be cancelled on the ground that some writ petition had been filed being Writ Petition No.12779 of 2016, Sant Ram vs. State of U.P. and others. On receipt of the complaint the District Magistrate through his letter dated 7.4.2016 endorsed the same to the Additional District Magistrate to look into the matter. In the meantime the petitioner submitted an application on 10.5.2016 requesting that appointment letter be issued to them.

5. In paragraph 32 of the writ petition it is stated that in the select list 68 candidates have been shown as selected but not a single candidate has been allowed to join including the petitioners. It is stated that the Writ Petition No.12774 of 2016, Sant Ram Vs. State of U.P. and Others was subsequently dismissed on 18.04.2016 but still no appointment letter was issued to the petitioners and in the meantime by the impugned order dated 07.05.2016 and 13.05.2016 the entire selection as well as the select list has been cancelled. It is stated that no reasons have been given for cancellation of the selection and therefore, the order is cryptic and in any case it has been cancelled on a complaint of a Member of Parliament and a local M.L.A. therefore the selection has been cancelled on political consideration and therefore the impugned orders are tainted by malafides. The petitioners also contend that before cancelling the selection no opportunity of hearing was given to them

6. A counter affidavit has been filed on behalf of respondents in which it is stated that no doubt there was a complaint with regard to the manner in which the selection was held and select list issued but thereafter a Committee was constituted headed by the Additional District Magistrate (Finance and Revenue) which examined the entire matter and submitted its report on 30.04.2016. In his report the Committee has disclosed that in the select list the marks have been manipulated and overwritten by the Chief Medical Officer. In the marks given in the interview overwriting has been

done and there are other irregularities. It is further stated that the selection committee was constituted on 05.03.2016 and comprised of;

1. Dr. Ajeet Kumar Jaiswal, C.M.O. Jalaun (President)
2. Sri P.K. Saxena, City Magistrate, Orai at Jalaun (Member)
3. Dr. Sunita Banodha, C.M.O. District Womens Hospital, Orai (Member)
4. Dr. B.M. Khair Additional C.M.O. (Member)
5. Dr. Sugreev Babu, District Tuberculosis Officer (Member)

7. It is not in dispute that the select list was published on 31.03.2016 but thereafter considering the complaints made by local M.L.A. Sri Daya Shanker Verma and Member of Parliament Sri Bhanu Pratap regarding irregularities in the selection an inquiry was ordered in the matter. The allegations made in paragraph 45 and 46 of the writ petition that the select list was cryptic and was not even pasted on the notice board has been denied in paragraph 17 of the counter affidavit since Priti Soni, petitioner no.19, Babi Sabina, petitioner no.17, Renu Verma, petitioner no.16, Kaushal Kishor, petitioner no.8, Devendra Singh Bhadauriya, petitioner no.5, Santosh Devi, petitioner no.20, R.K. Sharma, petitioner no.11, Ekta Singh, petitioner no.18 have themselves submitted an application before the District Magistrate, Jalaun at Orai (Annexure-14 to the writ petition) stating that when they went to the office of the C.M.O. on 13.07.2016 they saw that the order of cancellation dated 07.05.2016 was pasted on the notice board therefore the averments in paragraph 45 and 46 of the writ petition are false averments.

8. A perusal of the impugned order of cancellation dated 07.05.2016 clearly mentions the reasons for cancellation of the selection based upon the report of the enquiry committee. The reasons may be encapsulated as under:

1. The selection did not have the approval of the erstwhile District Magistrate.
2. The photographs of the selected candidates were not verified.
3. The original tabulation sheets were tampered with by the C.M.O. and members of the Selection Committee.
4. There was overwriting in the marks given during interview.
5. All the members of the selection committee had not signed the final result of the interview.
6. Non verification of the documents of the selected candidates.
7. Candidates did not possess the documents regarding requisite eligibility qualifications for the post for which they applied.

9. These irregularities were pointed out by the Member of Parliament and the local M.L.A. upon which the Enquiry Committee was constituted.

10. Alongwith the counter affidavit the respondents have filed the result which was earlier prepared on 14.03.2016 before the allegations and complaints started pouring in. The manipulations in the marks awarded to the candidates by Dr. Sunita Banaudha may be summarized as under :

Sl. No.7, Guru Devi had obtained 2 marks which has been shown to read as 3 marks through overwriting.

Sl.No.11, Smt. Vijay Laxmi Vajpai was also initially given 2 marks which has been made to read as 3 marks through overwriting.

Sl.No.12, Smt. Minakshi Tiwari was given 2 marks manipulated to read as 3 marks.

Sl.No.27, Shazia Afreen has been given 6 marks but overwriting is clear.

Sl.No.32, Deepak Goswami was also given 5 marks but thereafter marked 'A'
(Absent)

Sl.No.34, Avita Sachan was given 4 marks which has been made to read as 'A'
(Absent)

Sl.No.35, Nitisha Budhauriya has been given 5 marks but there is overwriting.

Sl.No.41, Radha Katiyar was given 4 marks which has been made to read as 'A'
(Absent)

Sl.No.42, Dinesh Singh was given 4 marks which has been made to read as 5 marks through overwriting.

Sl.No.43, Amit Kumar was given 3 marks through overwriting.

Sl.No.50, Manoj Kumar Rajpoot has been given 4 marks after scoring out 7 originally given.

Sl.No.52, Nikita Verma was given 3 marks which has made to read as 6 marks.

Sl.No.55, Jitendra Yadav has been given 6 marks through overwriting.

S.No.57, Shalini Devi 2 marks has been overwritten to read as 3 marks.

Sl.No.62, Archana Yadav there is overwriting to read as 4 marks.

Sl.No.69, Smt. Beena Khare (petitioner no.13) 7 marks has been made to read as 4 marks.

Sl.No.70, Sonam Devi Sachan 2 marks has been made to read as 3 marks by overwriting.

- Sl.No.77, Neeta Singh, 4 marks has been made to read as 'A' (Absent)
- Sl.No.78, Taj Khan, 2 marks has been made to read as 3 marks.
- Sl.No.85, Nidhi Devi, 5 marks has been made to read as 6 marks through
overwriting.
- Sl.No.88, Lata Dohre, there is overwriting in the marks 6.
- Sl.No.89, Subhash Chandra, 2 marks has been made to read as 3 marks.
- Sl.No.92, Sangeeta Soni, 3 marks has been made to read as 5 marks.
- Sl.No.98, Archana Singh, 5 marks has been made to read as 6 marks.
- Sl.No.100, Amit Kumar, 1 mark has been made to read as 7 marks.
- Sl.No.106, Ramkumari Pal, 2 marks has been made to read as 5 marks.
- Sl.No.108, Kumari Jyoti Katiyar, 1 mark has first been cancelled and then made to
read as 4.
- Sl.No.111, Manu Pal, 4 marks has been made to read as 7 marks.
- Sl.No.112, Shweta Devi, 1 mark has been made to read as 7 marks.
- Sl.No.115, Ajeet Kumar, 2 marks has been made to read as 5 marks.
- Sl.No.118, Anita Verma, 4 marks has been made to read as 'A' (Absent)
- Sl.No.132, Nand Kishor Rajpoot, 1 mark has been made to read as 5 marks.
- Sl.No.133, Smita Sachan, 4 marks has been made to read as 'A' (Absent)
- Sl.No.134, Pinki Rani, 1 mark has been made to read as 4 marks.
- Sl.No.141, Narendra Kumar Goswami, 1 mark has been made to read as 4 marks.
- Sl.No.144, Bharti, 2 marks has been made to read as 3.5 marks.
- Sl.No.147, Sandhya Tripathi, 1 mark has been made to read as 4 marks.
- Sl.No.154, Divankshi Trivedi, 4 marks has been made to read as 6 marks.

- Sl.No.161, Akansha Yadav, 1 mark has been made to read as 6 marks.
- Sl.No.162, Rachna Sengar, 1 mark has been made to read as 7 marks.
- Sl.No.165, Snehlata, 7 marks has been made to read as 02 marks.
- Sl.No.167, Anuj Kumar, 1 mark has been made to read as 7 marks.
- Sl.No.168, Sabana Fatma, 5 marks has been made to read as 6 marks.
- Sl.No.170, Upasana Kushwaha shown 'A' (Absent) with overwriting.
- Sl.No.171, Mandvi Sharma, 2 marks has been made to read as 5 marks.
- Sl.No.182, Jorge S. Dix, 4 marks has been made to read as 'A' (Absent)
- Sl.No.183, Nilesh, 1 mark has been made to read as 5 marks.
- Sl.No.190, Arjani Devi, 1 mark has been made to read as 7 marks.
- Sl.No.192, Swati Verma, 1 mark has been made to read as 7 marks.
- Sl.No.197, Sandhya Kashyap, 1 mark has been made to read as 4 marks.
- Sl.No.198, Samata has been given 5 marks through overwriting.
- Sl. No.199, Nitin Kumar has been given 6 marks through overwriting.
- Sl.No.200, Ramkant has been given 7 marks through overwriting.
- Sl.No.202, Kranti Devi, 1 mark has been made to read as 4 marks.
- Sl.No.205, Sunil Kumari has been given 4 marks through overwriting.
- Sl.No.209, Kumari Jharna Helen James, 1 mark has been made to read as 6 marks.
- Sl.No.212, Manju Lata Sahu, 5 marks has been made to read as 6 marks.
- Sl.No.213, Varsha Parihar, 2 marks has been made to read as 5 marks.

11. In addition to the irregularities noted above from Annexure-CA-1 to the counter affidavit a perusal of the report dated 30.04.2016 submitted to the District Magistrate (Annexure-2 to the counter affidavit) mentions that so far as the candidates for the post of Sick Newborn Care

Unit Staff Nurse the Committee found that the educational testimonials/documents of the following candidates were not verified;

1. Mamta Khan
2. Pratiksha Sharma (petitioner no.12)
3. Shiromani Vajpai
4. Jyoti Jha
5. Yashpal Singh (petitioner no.14)
6. Pallavi Sakyavar
7. Rachana Dwivedi

12. For the post of A.N.M. the educational testimonials/documents of the following selected candidates were not verified;

1. Rinki Devi
2. Santoshi Devi
3. Bina Kumari
4. Chandravati Pal
5. Kalpana Devi
- 6 Sadhan
7. Kumari Chandani
8. Pratibha Sakya

13. For the post of Chaukidar/Sweeper the educational testimonials/documents of the following selected candidates were not verified;

1. Ram Siya
2. Pradeep Kumar

14. For the post of Senior Treatment Supervisor (S.T.S) the educational testimonials/documents of Mohd. Irfan (petitioner no.1) were not verified.

15. For the post of Lab Technician Blood Bank the candidates were required to have diploma in Lab Technician as well as registration certificate under the Central Government or the U.P. State Medical Faculty + Six months working experience + Knowledge of Computer. Petitioner no.5, Devendra Singh Bhadauriya's Lab Technician Diploma was not from the Central Government or the U.P. State Medical Faculty. For the same post the educational testimonials/ documents of the selected candidate Sri Pavnesh Gautam (petitioner no.9) were never verified.

16. For the post of Lab Attendant Blood Bank the educational requirement was High School. For this post selected candidate Sri Ravindra Kumar Sharma's (petitioner no.11) educational testimonials/documents were never verified.

17. For the post of Staff Nurse Nutrition Rehabilitation Centre the educational qualification was required to have G.N.M. Diploma + Registration with the Medical Faculty, Lucknow but in the case of following selected candidates there was no registered G.N.M. Certificates and their educational testimonials were also not verified.

1. Sahnaj Bano
2. Guru Devi
3. Jeevan Lal

18. For the post of District Leprosy Adviser under N.L.E.P. Programme the requisite educational qualification was M.B.B.S./B.A.M.S./B.H.M.S. + three years registered experience in Health under the U.P. Medical Council with Knowledge of Computer. The candidates were required to submit their educational testimonials alongwith their application forms. The form of Dr. Praveen Kumar Paliwal (petitioner no.16) selected candidate was not supported with his educational testimonials.

19. For the post of Block Data-cum-Account Assistant under B.P.M.U. the two selected candidates Naresh Chandra, (petitioner no.21) and Sumit Kumar Yadav did not file their educational testimonials alongwith their application forms.

20. Similarly for the post of Computer Assistant the selected candidate (petitioner no.17) Babi Sabina's educational testimonials were never verified. She was awarded 2 marks which through overwriting was made to read as 7.

21. For the post of Staff Nurse under the NPCDCS Programme the selected candidates Mohan Kumar Pathak and Rubi Verma did not file their educational testimonials/documents alongwith their application forms.

22. For the post of Data Entry Operator, Blood Bank the requisite qualification is Graduation from a recognised University + PGDCA Diploma from a recognised Institution and one year working experience in M.S. Office. The selected candidate for this post Sri Dhiraj Singh Chauhan has done B.E. in Computer Science Diploma certificate of which has been filed but his working experience has been issued from some Ram Ausadhi Bhandar, Sipri Bazar, Jhansi which makes it a suspicious document.

23. For the 6 posts of Rehabilitation Worker under the N.P.H.C.E. Programme the candidates were required to submit the photocopies of their educational testimonials alongwith their application forms. None of the 6 selected candidates have submitted their educational testimonials alongwith their application forms. The names of the 6 candidates are as under:

- Manoj Kumar Tiwari
Naveen Kumar Srivastava
Shyam Sunder

Deepak Rai
Premendra
Jitendra Singh

24. In the case of Jitendra Singh his photograph is not attached with his application form and in his application form he has not filled the date or place. The application form is also filed incomplete.

25. For the one post of Staff Nurse under the N.P.H.C.E. Programme the requisite eligibility qualification was G.N.M. Diploma from a recognised Institution + Registration with Medical Faculty, Lucknow and two years of working experience. The candidate selected for this post Smt. Kumkum Devi did not file her two years experience certificate and instead filed only a one year experience certificate which shows that she did not have the requisite qualification for selection.

26. From a perusal of the application forms of the selected candidates it was noticed that large number of candidates had not affixed their photographs alongwith their application forms nor were there any marks in the various testimonials to show that the same were cross checked with the original testimonials and even where the marks were cross checked there was no signature of any authority to that effect to show that the documents have been cross checked with the original testimonials.

27. With regard to selection of Contract Care Taker for the Nutrition Rehabilitation Centre on random checking of the applications and the marks obtained by the candidates it was noticed that there were serious irregularities in the marks given by the Chief Medical Officer, Jalaun when compared with the comparative chart.

28. The candidate at Sl.No.23, Smt. Priti Soni (petitioner no.19) was given only 6 marks in the comparative chart whereas the members of the selection committee in their original sheets had given her 8 marks.

29. The candidate at Sl.No.26, Sri Sunil Kumar Pal was given only 5 marks in the comparative chart whereas the Chief Medical Officer, Jalaun in the original marksheet had given 4 marks.

30. The candidate at Sl.No.28, Smt. Sunita Devi was given 5 marks in the comparative chart whereas in the original marksheet she was given only 4 marks.

31. Similarly for the post of Contract Staff Nurse the candidate at Sl.No.11, Yogendra Kumar was given 7 marks by the Additional C.M.O. but in the original marksheet he was given only 4 marks. Thus, it was noticed that the marks given were deliberately increased or decreased through manipulation and overwriting.

32. In the selection for the post of Nutrition Counselor it was noticed that Smt. Sunita Badhauna member of the Selection Committee, had committed overwriting in the marks awarded to the candidates at Sl.Nos. 9, 16, 37 and 39 which brings the selection process under a cloud of suspicion.

33. In the selection for the post of Contract Staff Nurse under the N.P.H.C.E. Programme, Km. Kumkum (petitioner no.6) has been shown selected having secured 30 marks in the total. She has been given 8 marks by one examiner. In the individual marksheet of the committee members the father's name of Km.Kumkum has been mentioned as Rajendra Kumar Anuragi whereas in the other sheets the same candidate Km. Kumkum having the same date of birth, her father's name has been shown as Chhote Lal. By another examiner she has been given 6 marks and in both these marksheets her name has been subsequently added by handwriting. Another examiner has recorded her correct date of birth and father's name and given her 7 marks but her name has been added subsequently by handwriting. Another examiner has given her 4 marks and her name has also been added subsequently by handwriting.

34. So far as the petitioner no.7 Manish Kumar Pathak son of Virendra Kumar is concerned, from the original records it is noticed that his working experience which was mentioned as 1 year and 3 months in typed copy has been changed by overwriting to 2 years and 2 months. In the individual marksheet of other examiners, Manish Kumar's working experience in the typed copy still shows one year and 3 months.

35. So far as the petitioner no.8, Kamal Kishor is concerned, in one of the marksheets 2 marks has been made to read as 3 marks.

36. So far as Rajendra Singh son of Badam Singh is concerned, he was initially given 2 marks but by overwriting the same has been shown as 'A' (Absent).

37. Similarly one Ram Kumari Pal daughter of Laxmi Prasad for the post of Staff Nurse N.P.C.D.C.S. was initially given 5 marks which has been scored out and she has been given 'A' (Absent) through overwriting.

38. So far as the petitioner no.15, Renu Verma is concerned, she was initially given 2 marks which through overwriting has been made to read as 4 marks.

39. In the rejoinder affidavit it has been stated by the petitioners that in the case of some of the petitioners who were selected there was no use of Whitener or overwriting. The averments of the rejoinder affidavit are belied by the findings which have been recorded by the Court hereinabove and which are borne out from the original records and overwriting is clearly established.

40. Where the entire selection is tainted with mass irregularities and its cancellation is imperative in such a case giving of opportunity of hearing to the individual selected candidates

does not arise. This principle of law was profound by the Supreme Court in **1970 (1) SCC 648, *The Bihar School Examination Board vs. Subhas Chandra Sinha and others.***

"14. Reliance was placed upon Ghanshyam Das Gupta's case (*supra*) to which we referred earlier. There the examination results of three candidates were cancelled, and this Court held that they should have received an opportunity of explaining their conduct. It was said that even if the inquiry involved a large number of persons, the Committee should frame proper regulations for the conduct of such inquiries but not deny the opportunity. We do not think that that case has any application. Surely it was not intended that where the examination as a whole was vitiated, say by leakage of papers or by destruction of some of the answer books or by discovery of unfair means practised on a vast scale that an inquiry would be made giving a chance to every one appearing at that examination to have his say? What the Court intended to lay down was that if any particular person was to be proceeded against, he must have a proper chance to defend himself and this did not obviate the necessity of giving an opportunity even though the number of persons proceeded against was large. The Court was then not considering the right of an examining body to cancel its own examination when it was satisfied that the examination was not properly conducted or that in the conduct of the examination the majority of the examinees had not conducted themselves as they should have. To make such decisions depend upon a full-fledged judicial inquiry would hold up the functioning of such autonomous bodies as Universities and School Board. While we do not wish to whittle down the requirements of natural justice and fair play in cases where such requirement may be said to arise, we do not want that this Court should be understood as having stated that an inquiry with a right to representation must always precede in every case, however different. The universities are responsible for their standards and the conduct of examinations. The essence of the examinations is that the worth of every person is appraised without any assistance from an outside source. If at a centre the whole body of students receive assistance and manage to secure success in the neighbourhood of 100% when others at other centres are successful only at an average of 50%, it is obvious that the university or the Board must do something in the matter. It cannot hold a detailed quasi-judicial inquiry with a right to its alumni to plead and lead evidence etc. before the results are withheld or the examinations cancelled. If there is sufficient material on which it can be demonstrated that the university was right in its conclusion that the examinations ought to be cancelled then academic standards require that the university's appreciation of the problem must be respected. It would not do for the Court to say that he should have examined all the candidates or even their representatives with - a view to ascertaining whether they had received assistance or not. To do this would encourage indiscipline if not also perjury."

41. On the question of giving an opportunity of hearing to the candidates of select list the Supreme Court in **(1993) 1 SCC 154, *Union Territory of Chandigarh vs. Dilbagh Singh and others*** in paras 8 and 11 thereof has held as under:-

"9. Coming to the contentions of the learned counsel for respondents (selectees in the cancelled select list) that the Chandigarh Administration when had found no direct evidence which could establish charges of corruption levelled against the members of the Selection Board in the

matter of preparation of select list of conductors for appointments as conductors in its CTU, it should not have made an order cancelling the select list, all that could be said is, that failure on the part of complainants to establish charges of corruption levelled against the members of the Selection Board could not have saved the select list, if it was otherwise found to be dubious. The select list, which was cancelled by the Chandigarh Administration was found by it to have been prepared in unfair and injudicious manner, in that the interview marks purported to have been awarded by the members of the Selection Board for the performance of candidates at their interview were either inflated to push up the candidates who had got poor marks for their educational qualifications or deflated to pull down the candidates who had got high marks for their educational qualifications. That select list was also found to have been prepared without adopting common eligibility criteria, for all candidates. When the said reasons formed the basis for the Chandigarh Administration to cancel the select list of the Selection Board, the fact that charges of corruption levelled against the members to the Selection Board in the preparation of that select list had not been established by direct evidence produced in that regard, can make no difference."

12.If we have regard to the above enunciation that a candidate who finds a place in the select list as a candidate selected for appointment to a civil post, does not acquire an indefeasible right to be appointed in such posting the absence of any specific Rule entitling him for such appointment and he could be aggrieved by his non-appointment only when the Administration does so either arbitrarily or for no bona fide reasons, it follows as a necessary concomitant that such candidate even if has a legitimate expectation of being appointed in such posts due to his name finding a place in the select list of candidates, cannot claim to have a right to be heard before such select list is cancelled for bona fide and valid reasons and not arbitrarily: In the instant case, when the Chandigarh Administration which received the complaints about the unfair and injudicious manner in which select list of candidates for appointment as conductors in CTU was prepared by the Selection Board constituted for the purpose, found those complaints to be well founded on an enquiry got made in that regard, we are unable to find that the Chandigarh Administration had acted either arbitrarily or without bona fide and valid reasons in cancelling such dubious select list. Hence, the contentions of the learned counsel for the respondents as to the sustainability of the judgment of CAT under appeal on the ground of non-affording of an opportunity of hearing to the respondents (candidates in the select list) is a misconceived one and is consequently rejected."

42. In **1995 Supp (1) SCC 188, Gurdeep Singh vs. State of J. & K. and others** the Supreme Court has held as under:-

"12. What remains to be considered is whether the selection of respondent No. 6 should be quashed. We are afraid, unduly lenient view of the courts on the basis of human consideration in regard to such excesses on the part of the authorities, has served to create an impression that even where an advantage is secured by stratagem and trickery, it could be rationalised in courts of law. Courts do and should take human and sympathetic view of matters. That is the very essence of justice. But considerations of judicial policy also dictate that a tendency of this kind where advantage gained by illegal means is permitted to be retained will jeopardise the

purity of selection process itself; engender cynical disrespect towards the judicial process and in the last analyses embolden errant authorities and candidates into a sense of complacency and impunity that gains achieved by such wrongs could be retained by an appeal to the sympathy of the court. Such instances reduce the jurisdiction and discretion of courts into private benevolence. This tendency should be stopped. The selection of respondent No. 6 in the sports category was, on the material placed before us, thoroughly unjustified. He was not eligible in the sports category. He would not be entitled on the basis of his marks, to a seat in general merit category. Attribution of eligibility long after the selection process was over, in our opinion, is misuse of power. While we have sympathy for the predicament of respondent No. 6, it should not lose sight of the fact that the situation is the result of his own making. We think in order to uphold the purity of academic processes, we should quash the selection and admission of respondent No. 6. We do so though, however, reluctantly."

43. In (1996) 5 SCC 365 **Biswa Ranjan Sahoo and others vs. Sushanta Kumar Dinda and others** the Supreme Court has held that in a case of mass malpractice notice to selected candidates and opportunity of hearing is not required.

44. The judgment being reproduced in its entirety and reads as under:-

"1. Leave granted.

2. These appeals by special leave arise from the order of Central Administrative Tribunal Cuttack Bench made on 10.10.1994 and 20.3. 1996 in O.A.No.137 of 1993 and Review Application No.7 of 1995 respectively. The orders disclose the alarming state of affairs regarding lack of integrity and sincerity in the selection process, which is expected to assess merit and recommend for appointment of competent and meritorious persons according to the list prepared by the competent Selection Board. Reverse is the result shown in the process of selection. Pursuant to the advertisement No.6 of 1992 for filling up of six posts of Chargemen, 'B' Grade in Mechanical Electrical Division, the fake selection process appears to have been gone by and some persons came to be appointed including the petitioners. When the selection was questioned, the Tribunal had called for the record and on the perusal of the record, noted as under:

"The perusal of the Answer Book of the candidates with Roll No.001078 (Umakanta Panigrahi) shows that though at Sl.No.3, in the first page of the answer book, his marks were shown as '00' it was change to '20'. At Serial Number 11, there has been correction of the original marks to 25, the original marks appearing to be 20. This is how the total was brought to 95. In second page of the answer book though the mark given for Question No.11 B were 10, later 5 has been added by someone to make it 15. In page No.4, after the answer 1/8 written by the candidate, there could be seen some alternation to 0.8 by someone. The facing page or the Answer Book of the of candidate 001235 (Sri Biswa Ranjan Sahoo) show over writing at three places. At Sl. No.2, original marks 16 appears to have been changed to 18 and total 91 appears to have been changed to 94. It is not possible to mark out how and why answer book 001567 of candidate Rajani Kanta Guru was evaluated by different examiner and marks noted in pencil as also his signature as

apparently initials on this answer book are totally different from the initials of the other examiner. There is practically no explanation coming forth as to how and why this examiner was different from this paper alone. We have perused the original tabulation which reveals that the marks obtained by the petitioner in the interview were altered and then total made of the marks obtained in the written test as well as the interview. Even with a naked eye, it appears that the marks obtained by the petitioner were originally 24 and the same reduced to 22 by subsequent correction and totally with this correction total was also brought down to 117 from 119. "

3. A perusal thereof would indicate the enormity of mal practices in the selection process. The question, therefore, is: whether the principle of natural justice is required to be followed by issuing notice to the selected persons and hearing them? It is true, as contended by Mr. Santosh Hedge, the learned senior counsel appearing for the petitioners, that in the case of selection of an individual if his selection is not found correct in accordance with law, necessarily, a notice is required to be issued and opportunity be given. In a case like mass mal-practice as noted by the Tribunal, as extracted hereinbefore, the question emerges: whether the notice was required to be issued to the persons affected and whether they needed to be heard? Nothing would become fruitful by issuance of notice. Fabrication would obviously either be not known or no one would come forward to bear the brunt. Under these circumstances, the Tribunal was right in not issuing notice to the persons who are said to have been selected and given selection and appointment. The procedures adopted are in flagrant breach of the rules offending Articles 14 and 16 of the Constitution.

4. It is needless to mention that the General Manager of the Railways should personally conduct the enquiry and find the persons who are responsible for this mal-practice and take appropriate disciplinary action against those persons and submit the result of the report of the action to this Court expeditiously.

The appeals are accordingly dismissed. No costs".

45. In **2001 (3) ESC Allahabad 939, Dilip Kumar Goswami and others vs. Central Administrative Tribunal, Allahabad and others** the Division Bench of this Court in para-7 thereof has held as under:-

"7. The decision to cancel an examination is an administrative decision and there is very little scope of judicial review of the same unless it is wholly arbitrary. In the present case, it cannot be said that the decision of the Railway Board was arbitrary, rather it was based on an inquiry by the Chairman who found irregularities in the same. No doubt the Chairman of the Railway Recruitment Board has given a different opinion in one of his affidavits in another petition, but this Court cannot in writ Jurisdiction weigh the evidence and come to a different conclusion. The scope of Judicial review has been considered at length by the Supreme Court in *Tata Cellular v. Union of India*, AIR 1996 SC 11. As held in that decision, it is not for the Court to consider whether a policy or decision is fair. The

Court is only concerned with the manner in which the decision has been taken. The Court does not sit as a court of appeal to review the administrative decision, and hence the scope of interference under Article 226 of the Constitution in such matters is limited. In *Pramod Kumar Rai v. L.I.C.* 2000 (1) ESC 389 (All) this Court dismissed a similar petition, relying on its own decision In *Union of India a. Akchhay Kumar Singh* 1999 (4) AWC 3564."

46. In **(2002) 3 SCC 146, Union of India and others vs. O. Chakradhar** has held as under :-

47. Paras 8 and 12 read as under:-

"8. in our view the nature and the extent of illegalities and irregularities committed in conducting a selection will have to be scrutinized in each case so as to come to a conclusion about future course of action to be adopted in the matter. If the mischief played is no widespread and all pervasive, affecting the result, so as to make it difficult to pick out the persons who have been unlawfully benefited or wrongfully deprived of their selection, in such cases it will neither be possible nor necessary to issue individual show cause notices to each selectee. The only way out would be to cancel the whole selection. Motive behind the irregularities committed also has its relevance.

12. As per the report of the CBI whole selection smacks of mala fide and arbitrariness. All norms are said to have been violated with impunity at each stage viz. right from the stage of entertaining applications, with answer-sheets while in the custody of Chairman, in holding typing test, in interview and in the end while preparing final result. In such circumstances it may not be possible to pick out or choose any few persons in respect of whom alone the selection could be cancelled and their services in pursuance thereof could be terminated. The illegality and irregularity are so inter-mixed with the whole process of the selection that it becomes impossible to sort out right from the wrong or vice versa. The result of such a selection cannot be relied or acted upon. It is not a case where a question of misconduct on the part of a candidate is to be gone into but a case where those who conducted the selection have rendered it wholly unacceptable. Guilt of those who have been selected is not the question under consideration but the question is, could such selection be acted upon in the matter of public employment? We are therefore of the view that it is not one of those cases where it may have been possible to issue any individual notice of misconduct to each selectee and seek his explanation in regard to the large scale, widespread and all-pervasive illegalities and irregularities committed by those who conducted the selection which may of course possibly be for the benefit of those who have been selected but there may be a few who may have deserved selection otherwise but it is difficult to separate the cases of some of the candidates from the rest even if there may be some. The decision in the case of Krishna Yadav applies to the facts of the present case. The Railway Board's decision to cancel the selection cannot be faulted with. The appeal therefore deserve to be allowed."

48. The documents on record as well as the original documents relating to the entire selection which have been produced by the respondents show that irregularities have been committed on a mass scale. Not only selected candidates where their marks which were earlier low were enhanced through overwriting but in respect of other candidates also, after awarding them marks they have been marked (A) absent, and in the case of non selected candidates also it is observed that higher marks earlier awarded were reduced through overwriting. In the case of selected candidates it is noticed that in some cases their application forms were incomplete. They did not contain the date or place required to be mentioned. Photocopy of the educational testimonials were not filed along with application forms and even if filed there is no signature of the Committee showing that they had been checked and cross checked with the original as there was no signature of any such authority. It was also noticed that in the case of one candidate the requisite two years working experience which in the printed result was mentioned as one year and three months was later altered through overwriting to read as two years and two months to make such candidate eligible for selection. Therefore considering mass scale of irregularities in the selection, in my opinion, the respondents had no option but to cancel the entire selection. So far as the petitioners were concerned in each of their cases irregularities were discovered and has been noted hereinabove, therefore, the question of saving such a selection does not arise. It is therefore not open for the petitioners to claim an opportunity of hearing before cancellation of the selection. The irregularities in the selection being wide spread and rampant, the question of giving any show cause notice to the petitioners before its cancellation does not arise in view of the law laid down by the Supreme Court herein above.

49. Learned Single Judge had interfered in the matter where the entire selection was cancelled on grounds of malpractice. The Supreme Court in **(2003) 11 SCC 768 Union of India and others v.s Tarun K. Singh and others** has held as under:-

"4. The question for consideration is whether the learned single Judge of Allahabad High Court was justified in interfering with an order of cancellation passed by the competent authority and direct that the process of selection should be completed. Needless to mention that subsequent to the order of cancellation, in view of the allegation of malpractice, the departmental authorities had held an enquiry into the matter and the result of that enquiry revealed gross irregularities and illegalities as referred to in the judgment of the Division Bench of Allahabad High Court. Consequently the process of selection to a public office, which stands vitiated by adoption of large scale malpractice, cannot be permitted to be sustained by a court of law. That apart, an individual applicant for any particular post does not get a right to be enforced by a Mandamus unless and until he is selected in the process of selection and gets the letter of appointment. In the case in hand, much before the so-called list of selection was approved by the Railway Board, the order of cancellation had emanated on the basis of complaints received from so many quarters. In view of the subsequent findings of the enquiry committee which has gone into the matter, we have no hesitation in coming to the conclusion that the learned single Judge of Allahabad High Court was wholly in error in issuing the direction in question and, therefore, the

Division Bench of the Allahabad High Court was fully justified in interfering with the said order of learned single Judge of Allahabad High Court. The Division Bench of Calcutta High Court committed error in following the judgment of learned Single Judge of Allahabad High Court. The judgment of Division Bench of the Calcutta High Court is set aside and the judgment of Division Bench of Allahabad High Court is upheld. In the circumstances, we allow the Union's appeals and dismiss the appeals filed on behalf of the individual candidates. The appeals are disposed of accordingly. Any other question of law remains open."

50. In **2004 1 ESC Allahabad 444, Arvind Kumar Pipal and others vs. Commissioner, Trade Tax, U.P. Lucknow and others** the Division Bench of this Court while upholding the cancellation of entire selection of Class-IV employees has held as under:-

51. Paras-12,13 and 14 read as under:-

"12. The judgment of Basudeo Tiwary's case (supra), relied by learned counsel for the appellant was also a case of an individual lecturer whose appointment was sought to be cancelled on allegation that Syndicate was not competent to appoint him at the relevant time. The above case is not applicable in the facts of the present case where serious allegation regarding the entire selection process has been made. The case of Shrawan Kumar Jha (supra), was a case on its own facts, The Apex Court specifically said in that judgment that "in the facts and circumstances of this case, we are of the view that the appellants should have been given an opportunity of hearing before cancelling their appointments". The Division Bench judgment of this Court in Vishwamitra Yadav's case (supra) was a case of cancellation of promotion of an individual who was working as Play Organizer in Observation Home at Basti and was promoted vide order dated 28th June, 1994. The said case is not applicable in the present case. The case of Muneshwar Dayal (supra), decided by learned single Judge of this Court was also a case of Class IV employee who was regularised by order dated 25th October, 1994 but subsequently by order dated 2nd January, 1996 his services were terminated. The said case is also not attracted in the facts of the present case. In Jawed Ahmad's case (supra) a learned Judge of this Court had held that petitioners were selected for appointment on the post in question after following the procedure prescribed under Rules, they were lawfully appointed on the post and were discharging their duties and in that background of the abovesaid observations, this Court held that cancellation of the appointment without notice was bad. Sanjeev Kumar's case (supra) is again a judgment by learned single Judge of this Court. In the aforesaid case services of the petitioners were terminated 'as no longer required'. The above case was not a case of cancellation of entire selection process on any ground.

13. The order dated 3rd January, 2003 which was impugned in the writ petition gives detail reasons for cancelling the entire selection. The order notices that although 3559 applications were received but only 2209 candidates were called and there was no decision of the selection committed for rejecting the applications of 1350 candidates. The order further

records that in the board sheet marks were not given to 66 candidates by the Chairman/ appointing authority whereas other members of the Selection Committee gave marks to them. There was difference of marks with regard to several candidates. The board sheet with regard to several candidates was also changed. The order records that no merit list after compiling the marks of all the candidates secured in the interview was prepared and there are no signatures of the members of selection committee. The impugned order further notes that a review selection committee was constituted on 2nd January, 2003 and the selection committee after reviewing the selection process and considering all relevant facts recommended for cancellation of entire selection process and appointment. The selection committee which has earlier recommended the appointment having itself taken a decision to cancel the appointment after reconsidering the entire fact, it is clearly established that entire selection process was vitiated. The irregularities and illegalities committed in the selection process pertain to the entire selection process and were not confined to any individual candidate. In view of the above facts, in the present case, the decision of the respondents to cancel the appointments in pursuance of illegal and irregular selection process cannot be termed to be as arbitrary based on no valid reasons. No grounds have been made out to interfere with the decision of the competent authority to cancel all the appointments in exercise of jurisdiction of this Court under Article 226 of the Constitution. The learned single Judge rightly refused to interfere with the impugned order.

14. In above view of the matter, we are satisfied that in facts of the present case, individual notice was not required to be given to all the selected candidates and the decision of the authority cancelling all the appointments was based on valid reasons. The learned single Judge has rightly refused to interfere with the decision of authorities to cancel all the appointments."

52. Large scale irregularities and mass malpractices in the selection in question having been established from the documents on record and the documents in original, produced by the respondents, the allegations of malafides, merely because complaints against the selection were made by an M P and an MLA, are wholly frivolous and have no legs to stand and are rejected.

53. Therefore on a conspectus of facts and law, I find no illegality or irregularity in the impugned orders.

54. The writ petition lacks merit and is accordingly dismissed.

55. No order as to cost.

56. Let the original records be returned to the learned standing counsel.

(2016) 8 ILRA 194
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.08.2016

BEFORE

THE HON'BLE DILIP GUPTA, J.
THE HON'BLE MANOJ KUMAR GUPTA, J.

Writ A No.- 26173 Of 2014

State Of U.P. & Ors.

...Petitioners

Versus

State Public Service Tribunal, U.P. & Anr.

...Respondents

Counsel for Petitioners:

Ms. Meenakshi Singh and Sri V.K. Chandel

Counsel for Respondents:

Sri D.S.Pandey, Sri Manish Goyal and Sri Siddharth Singhal

Held

The respondent (Virendra Singh) was **not entitled to regularisation** under the Circular dated 07.02.1997 as:

He had **not worked for 240 days as on 01.01.1993**, and

He had **not worked continuously up to 07.02.1997**.

The respondent made **false and contradictory claims**:

Earlier admitted employment only from **1995 onwards**,

Later falsely claimed employment from **1990 to 1999**.

The respondent **concealed material facts**, including:

Filing and dismissal of the earlier writ petition (17.05.2001),

Rejection of his claim for regularisation in that petition.

Orders dated **18.01.2008 and 21.01.2008 (regularisation)** were:

Passed without proper verification,

Based on **misrepresentation**,

Hence **validly cancelled** by order dated 17.03.2008.

The order dated **19.03.2008 rejecting representations** was:

Based on **record verification**,

Legally valid.

The Tribunal committed **serious errors**:

Ignored earlier High Court judgment (2001),

Ignored contradictory pleadings,

Relied on irrelevant material,

Failed to examine evidence properly.

The Tribunal's order dated **07.10.2013 is unsustainable** and liable to be set aside.

A person who **obtains relief by concealment and false statements** is **not entitled to equitable relief**.

The writ petition is **allowed** and:

Tribunal order set aside,

Claim petition dismissed.

Costs of ₹25,000 imposed on respondent for:

Misleading the Department,
Misleading the Court,
Abuse of process of law.

CASE LAW CITED

NONE

(Delivered by Hon'ble Dilip Gupta, J.
&
Hon'ble Manoj Kumar Gupta, J.)

1. The petition seeks the quashing of the order dated 7 October 2013 passed by the State Public Services Tribunal¹ in Claim Petition No. 1436 of 2008 that was filed by Virendra Singh, who has been impleaded as respondent no.2 in this petition. The claim petition was filed for setting aside the orders dated 17 March 2008 and 19 March 2008 passed by the Superintending Engineer and the Executive Engineer respectively posted at Etawah in the Irrigation Department of the State Government. A further direction that was sought in the claim petition was that Virendra Singh should be treated to be in continuous service on a class IV post and for payment of arrears of salary with consequential benefits. The claim petition was allowed by the Tribunal and the orders dated 17 March 2008 and 19 March 2008 were set aside. The Department was also directed to treat Virendra Singh to be in continuous service on a Class IV post with all consequential benefits.

2. The order dated 17 March 2008 passed by the Superintending Engineer seeks to cancel the earlier orders dated 18 January 2008 and 21 January 2008. The former order granted appointment to Virendra Singh on a class IV post in the work-charge establishment by giving him the benefit of a Circular dated 7 February 1997 that deals with regularization of daily wage workers on fulfillment of certain conditions, while the latter order seeks to appoint Virendra Singh in the regular establishment.

3. The Circular dated 7 February 1997 provides for regularisation of muster roll/daily wage workers engaged in the work-charge establishment of the Irrigation Department. It *inter-alia* provides that muster roll/daily wage employees working in the work-charge establishment who have worked for more than 240 days as on 1 January 1993 and have also worked regularly upto the date of issuance of the Circular shall be considered for regularisation on the basis of seniority by a Committee consisting of the Superintending Engineer as the Chairman, an Executive Engineer nominated by the Superintending Engineer and three Assistant Engineers.

4. Virendra Singh had earlier filed **Writ Petition No.28366 of 1999²** with an allegation that he had been engaged as a daily wage employee on the post of a driver on 6 March 1995 and had worked upto 12 September 1995, whereafter he was appointed by an order dated 2 September 1998 for three months but he was not permitted to work thereafter. In this said petition, Virendra Singh also claimed the benefit of regularisation of his services in terms of the Circular dated 7 February

1997. This petition was dismissed on 17 May 2001 and the benefit of the Circular dated 7 February 1997 was denied to Virendra Singh for the reason that he had not worked for more than 240 days as on 1 January 1993 nor had he worked continuously upto the date of issuance of the Circular.

5. However, concealing the filing of the first petition and its dismissal on 17 May 2001, Virendra Singh filed **two representations dated 4 January 2006 and 10 June 2006** before the Department claiming the benefit of the Circular dated 7 February 1997. It was alleged that he had worked on daily wage basis on the post of driver in the Department from 1 April 1990 to 18 May 1999. Virendra Singh thereafter filed **Writ Petition No.54749 of 2006³** with a prayer that he may be regularized as a Class-IV employee in the Irrigation Department on the basis of the Circular dated 7 February 1997. This petition was disposed of by the High Court on 13 November 2007 with a direction that the said representations filed by Virendra Singh should be decided.

6. It is as a consequence of the aforesaid direction of the High Court that by order dated 18 January 2008 the services of Virendra Singh were regularised in the work-charge establishment and by order dated 21 January 2008 he was posted in the regular establishment. However, immediately on 22 January 2008 when the correct facts were placed, these two orders dated 18 January 2008 and 21 January 2008 were kept in abeyance and ultimately by the order dated 17 March 2008, these two orders were set aside by the Superintending Engineer. Subsequently, the two representations dated 4 January 2006 and 10 June 2006 filed by Virendra Singh were examined and rejected by the Executive Engineer by the order dated 19 March 2008.

7. These orders dated 17 March 2008 and 19 March 2008 were assailed by Virendra Singh in the claim petition before the Tribunal. The Tribunal allowed the claim petition by order dated 7 October 2013. The Tribunal found that the order dated 17 March 2008 was based on incorrect facts for the reason that the regularisation of Virendra Singh on the post of Beldar in the work charge establishment and appointment on the post of Chaukidar in the regular establishment had been made by orders dated 18 January 2008 and 21 January 2008 in compliance of the order passed by the High Court on 13 November 2007 in the second petition filed by Virendra Singh, but the order dated 17 March 2008 refers to the dismissal of the first petition on 17 May 2001, which petition related to the post of driver and not to the post of Beldar or Chaukidar. The Tribunal also observed that the orders dated 18 January 2008 and 21 January 2008 were not in existence when the High Court passed the order on 17 May 2001 and so there could have been no occasion for quashing these two orders pursuant to a judgment rendered by the High Court on 17 May 2001. Insofar as the order dated 19 March 2008 is concerned, all that has been mentioned by the Tribunal is that it was apparent that Virendra Singh had worked for more than 240 days and the claim of the Department that he had not worked for more than 240 days was not correct in view of the letter dated 14 September 2005 written by the Executive Engineer to the Superintending Engineer. The Tribunal, accordingly, set aside the orders dated 17 March 2008 and 19 March 2008.

8. Ms. Meenakshi Singh, learned Standing Counsel appearing for the writ petitioners has submitted that :

(i) the Tribunal committed a patent illegality in setting aside the order dated 17 March 2008 passed by the Superintending Engineer and the order dated 19 March 2008 passed by the Executive Engineer as Virendra Singh was not entitled to the benefit of the Circular dated 7 February 1997;

(ii) the Circular dated 7 February 1997 confers benefit of regularisation of services to a muster roll employee/daily wage employee in the work-charge establishment of the Irrigation Department provided he had worked for more than 240 days as on 1 January 1993 and had thereafter continuously worked upto the issuance of the Circular on 7 February 1997. In view of the specific averments made by Virendra Singh in the first petition that he was engaged as a jeep driver on daily wage basis on 6 March 1995 and continued to work only upto 12 September 1995 prior to the issuance of the Circular, the claim of Virendra Singh that he was engaged even prior to 1 January 1993 or even before 6 March 1995 on daily wage basis and continued to work as such upto 7 February 1997 was absolutely false and even otherwise, there was no documentary evidence to substantiate this claim;

(iii) Virendra Singh in his representations dated 4 January 2006 and 10 June 2006 did not mention the filing of the first petition nor did he state that his claim for regularisation on the basis of the Circular dated 7 February 1997 had been rejected in that writ petition that was dismissed on 17 May 2001. Virendra Singh, therefore, concealed material facts in his representations and obtained the benefit of the Circular dated 7 February 1997 by deliberately stating false facts;

(iv) in the two representations dated on 4 January 2006 and 10 June 2006, Virendra Singh stated that he had worked as a daily wager on the post of a jeep driver from 1 April 1990 to 18 May 1999 whereas, in fact, in the first petition he specifically stated that prior to 6 March 1995 he was unemployed and was engaged in the Department only on 6 March 1995 on daily wage basis as a jeep driver and had worked upto 12 September 1995. Thus, the total period of engagement of Virendra Singh as a daily wager in the Department on the post of jeep driver was from 6 March 1995 upto 12 September 1995 and he could not have been given the benefit of Circular dated 7 February 1997;

(v) the order dated 19 March 2008 was passed by the Executive Engineer after examining the records and as Virendra Singh did not satisfy the terms of the Circular dated 7 February 1997, the representations were rightly rejected;

(vi) the Tribunal in a very casual manner dealt with the orders dated 17 March 2008 and 19 March 2008. The order dated 17 March 2008 has been completely misinterpreted by the Tribunal and the order dated 19 March 2008 which was passed after examining the entire records has been set aside merely on the basis of a note put up by the Executive Engineer, whereas by a specific order passed in 2006, the claim of Virendra Singh had earlier been rejected;

(vii) even in the second petition, Virendra Singh did not bring to the notice of the Court the judgment dated 17 May 2001 by which the first petition filed by him had been dismissed; and

(viii) Virendra Singh had, therefore, not only misled the Department by filing the two representations but also misled the Tribunal and the High Court and heavy costs should be imposed upon Virendra Singh for this act.

9. Sri Siddharth Singhal, learned counsel appearing for the respondent-Virendra Singh, however, defended the order passed by the Tribunal and submitted :

(i) the Tribunal committed no illegality in allowing the claim petition and quashing the orders dated 17 March 2008 and 19 March 2008;

(ii) the order dated 18 January 2008 correctly conferred the benefit of the Circular dated 7 February 1997 upon Virendra Singh by appointing him in the work-charge establishment and thereafter the order dated 21 January 2008 placed him in the regular establishment;

(iii) Virendra Singh had in the second petition disclosed the filing of the first petition and, therefore, it cannot be said that he had concealed any material fact from the Court and that it was incumbent upon the Department to have established that fraud had been committed by Virendra Singh.

10. We have considered the submissions advanced by learned counsel for the parties.

11. The basic issue that arises for consideration in this petition is whether Virendra Singh who had been engaged as a daily wage employee in the Department was entitled to the benefit of regularisation under the Circular dated 7 February 1997.

12. This benefit was claimed by Virendra Singh in the first petition that was filed by him and, therefore, it is necessary to refer to what was stated by Virendra Singh in the said petition. This petition was filed by Virendra Singh for a direction to the respondents to permit him to work on the post of a jeep driver in view of the order dated 2 September 1998 issued by the Executive Engineer. In the said petition, Virendra Singh stated that he possessed a valid driving licence and being unemployed was in search of a job either in government or private service and when he came to know in 1995 that a post of jeep driver was vacant in the Irrigation Department at Etawah, he met the Executive Engineer who informed him that a post of a driver was vacant due to long leave of Pyare Lal and he could be appointed on the post of jeep driver on daily wage basis. Virendra Singh further stated that he accepted the offer and was given charge of a jeep on 6 March 1995 whereafter he worked regularly upto 12 September 1995. Subsequently, in the year 1998 he came to know that a temporary vacancy had been notified so he again met the Executive Engineer for being provided engagement on daily wage basis and he was given charge of the jeep on 1 January 1998. Thereafter, he worked regularly upto 31 August 1998 without break. Subsequently, an order

dated 2 September 1998 was passed appointing him as jeep driver for a period of three months but from 1 July 1999 he was not permitted to work. The relevant paragraphs of the said petition are reproduced below :

"2. That briefly facts stated are that petitioner has a valid Driving Licence for driving Heavy Four Wheel vehicle such as Trucks, Buses, Jeeps and cars. **Being an unemployed youth petitioner was in search of some job either in Government service or in private services.**

3. **That during search in the year 1995, he came to know that a post of Jeep Driver is lying vacant in the office of respondents,** as such petitioner personally met with respondent no.2 in march 1995 and requested him to appoint petitioner on the post of Jeep Driver. The respondent no.2 told petitioner that the post is not a substantive post and the same is lying vacant due to long leave of a permanent employee as such petitioner could be appointed on the post of Jeep Driver on daily wages basis.

4. **That being unemployed petitioner accepted the offer of respondent no.2 and he was given charge of the jeep on 6 March 1995. Since 6 March 1995 to 12 September 1995 petitioner has regularly worked as a Jeep Driver under respondent no.2 on daily wage basis. In all petitioner worked for 188 days regularly without any break."**

5.

6. That thereafter in the year 1998 since January a temporary vacancy was again notified and as and when the petitioner has come to know about the said vacancy, petitioner at once met with respondent no. 2 personally and requested him to appoint on the said vacancy of Jeep Driver. The petitioner was again appointed on the post of Jeep Driver on daily wages basis and he was given charge of Jeep No. UP 82/8587 on 1 January 1998.

7. That since 1 January 1998 to 31 August 1998 petitioner has regularly worked on the post of Jeep Driver without any break.

.....

18. That when on 1 July 1999 petitioner has gone to his duty the respondent no.2 has not permitted him either to sign the log book of the jeep or to take charge of the jeep".

(emphasis supplied)

13. This petition was dismissed by a detailed order dated 17 May 2001. The Court held that Virendra Singh had never been given an appointment on a regular basis and even the appointment order dated 2 September 1998 which he had enclosed indicated that his appointment was for a period of three months only on temporary basis after which, it was stated, that his services would automatically come to an end. The Court also noted that he had never been appointed by following

any process of recruitment and that he had no right to continue on the post nor was he entitled to any mandamus to continue on the post. The Court noted that in the counter affidavit filed by the respondents it was also stated that the order dated 2 September 1998 had subsequently been cancelled on 19 September 1998 since the Executive Engineer was not the competent authority to issue the appointment order. The claim of Virendra Singh based on a communication for implementation of the Circular dated 7 February 1997 for regularisation of such daily wage employees who had completed 240 days as on 1 January 1993 and were continuously working in the work-charge establishment upto the date of issue of the circular was also rejected as Virendra Singh had not worked prior to 1 January 1993 on daily wage basis. Accordingly, the benefit of the said Circular was not given to Virendra Singh and the first petition was dismissed.

14. Virendra Singh filed **Special Appeal No. 521 of 2003** to challenge the aforesaid order. The Special Appeal was dismissed on 4 August 2010 for non-prosecution.

15. It transpires that Virendra Singh thereafter filed two representations dated 4 January 2006 and 10 June 2006 for regularisation of his services. The representation dated 4 January 2006 filed before the Principal Secretary (Irrigation) states that Virendra Singh had been working in the Lower Ganga Canal, Etawah on a daily wage basis on the post of a driver continuously from 1 April 1990 to 18 May 1999 and to support this plea he enclosed the certificates issued by the then Executive Engineer showing his working from 1 April 1990 to 30 September 1994, from 6 March 1995 to 12 September 1995 and thereafter from 1 January 1996 upto 18 May 1999. The representation further states that in view of the Circular dated 7 February 1997, Virendra Singh was entitled to be appointed in the work-charge establishment but the then Superintending Engineer did not grant him appointment. In this connection, he stated that the Superintending Engineer in his communication dated 20 January 2005 had called for report from the Executive Engineer who made a recommendation for appointment of Virendra Singh on a Class IV post in the work-charge establishment/regular establishment in view of the Circular dated 7 February 1997 but the Superintending Engineer constituted a Committee by order dated 10 October 2005 for consideration of his case for regularisation of his services. However, as this Committee did not include the Chairman, the Superintending Engineer constituted another Committee by order dated 26 November 2005 but this order was cancelled by a subsequent order dated 23 December 2005. A request was, therefore, made in the representation to regularise his services in view of the Circular dated 7 February 1997. The subsequent representation dated 10 June 2006 filed by Virendra Singh to the Chief Engineer mentions the same facts.

16. What needs to be noticed is that these two representations do not mention the filing of the first petition in which Virendra Singh had claimed that he started working as a daily wage employee in the Department on the post of a driver from 6 March 1995 upto 12 September 1995 and thereafter from 1 January 1998 to 31 August 1998, nor did Virendra Singh mention that his claim for regularisation on the basis of the Circular dated 7 February 1997 had been rejected in the judgment delivered in the aforesaid writ petition on 17 May 2001.

17. It also needs to be noted that when no decision was taken on the two representations, Virendra Singh filed the second petition in 2006 with the following reliefs :-

"a. issue a writ, order or direction in the nature of mandamus commanding the respondents to regularise the petitioner's services as class IV employee in the irrigation department in work charge establishment or in regular establishment since the date of Government Order dated 07.02.1997;

b. issue a writ, order or direction in the nature of mandamus directing the respondents as to pay salary to the petitioner in the department.

c. issue any writ, order or direction which the Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

d. to allow the writ petition and award the cost in favour of the petitioner".

18. This second petition was filed claiming regularisation on a Class IV post in the Irrigation Department. It was stated that Virendra Singh had filed representations dated 4 January 2006 and 10 June 2006 for regularisation of his services on a class IV post but no decision had been taken. The said petition was disposed of on 13 November 2007 with the following observations :-

"Heard learned counsel for the petitioner and learned Standing Counsel for the respondents.

The petitioner is claiming regularisation in service on the post of class IV employee in the irrigation department on the basis of the Regularisation of Daily Wagers Rules, 2001 and the Government Orders issued from time to time the petitioners already submitted his representation in this regard to the authority concerned i.e. the Executive Engineer on 4.1.2006 and again on 10.10.2006 but no action or decision is taken.

Learned Standing counsel submits that since the representation of the petitioner for regularisation of service is already pending before the Executive Engineer, the same shall be considered and decided by the authority concerned.

In view of the submissions made, no fruitful purposes shall be served in keeping the writ petition pending. It is accordingly, disposed of with a direction to the respondent No.5 Executive Engineer, Etawah Prakhanda, Nichli Ganga Nahar, Etawah to consider and decide the representation of the petitioner for regularising his services strictly in accordance with the Rules and the Government Orders as expeditiously as possible, preferably within a period of three months from the date of production of certified copy of this order before him.

With the above observations, the writ petition is disposed of."

19. The order dated 18 January 2008 was then passed by the Superintending Engineer pursuant to the aforesaid direction that was issued by the High Court on 13 November 2007. The order mentions that since Virendra Singh had worked as a daily wage employee for more than 240 days as on 1 January 1993 in the work-charge establishment and was working as a daily wager upto the date of the issuance of the Circular dated 7 February 1997, he was being regularised on the post of a Beldar in the work-charge establishment from the date he would join the post.

20. A subsequent order dated 21 January 2008 was thereafter issued. This order refers to the regularisation of Virendra Singh by order dated 18 January 2008 and seeks to appoint him on a temporary post of a Chaukidar in the regular establishment with posting in the Etawah Division, Nichali Ganga Nahar, Etawah.

21. Immediately thereafter an order dated 22 January 2008 was issued by the Superintending Engineer to keep in abeyance the orders dated 18 January 2008 and 21 January 2008. Virendra Singh then filed **Writ Petition No.5711 of 2008⁴** to assail the said order dated 22 January 2008 passed by the Superintending Engineer. This petition was dismissed as being premature as a final decision had not been taken. However, an observation was made that the Executive Engineer should take a decision by a speaking order after affording an opportunity of hearing to Virendra Singh.

22. The Superintending Engineer then passed a detailed order dated 17 March 2008 for cancellation of the orders dated 18 January 2008 and 21 January 2008. After making reference to the earlier orders dated 18 January 2008, 21 January 2008 and 22 January 2008, the Superintending Engineer noted that on examination of the records and the files available in the Division it was clear that the Divisional Office had sent a detailed note dated 20 April 2006 to the Chief Engineer stating that the appointment of Virendra Singh in the work-charge establishment/regular establishment would not be justified. The Superintending Engineer also noted that the first petition earlier filed by Virendra Singh had been dismissed. It is for this reason that the Superintending Engineer cancelled the earlier orders dated 18 January 2008 and 21 January 2008.

23. On cancellation of the orders dated 18 January 2008 and 21 January 2008, the Executive Engineer proceeded to decide afresh the two representations dated 4 January 2006 and 10 June 2006 that had been filed by Virendra Singh for regularisation of his services. This exercise was undertaken pursuant to the direction issued by the High Court on 13 November 2007 in the second petition filed by Virendra Singh as the earlier order dated 18 January 2008 deciding the representations had been cancelled by the Superintending Engineer. The two representations were decided by the order dated 19 March 2008. The Executive Engineer, after noticing the three writ petitions that had been filed by Virendra Singh, observed that for deciding the two representations, the documents submitted by Virendra Singh were required to be verified from the office of the Division. It was found that for the years 1990, 1991 and 1992, there were no records regarding the work performed by the daily wagers. However, muster roll was available for 26 days in 1994 and two months in 1995, and for the months from January 1999 to May 1999, log book was available. The order mentions that there was no evidence on the record which could substantiate the claim of

Virendra Singh that he had worked for 240 days prior to 1 January 1993 or had worked as a daily wage employee upto the issuance of the Circular dated 7 February 1997. The order thereafter considers the documents submitted by Virendra Singh namely, (i) the experience certificate dated 11 September 1995 issued by J.N. Rawat, the then Executive Engineer regarding the work performed by Virendra Singh as a jeep driver from 1 April 1990 to 30 September 1994; (ii) the experience certificate given by J.N. Rawat, the then Executive Engineer regarding work performed by Virendra Singh for 188 days in the year 1995; and (iii) the experience certificate given by A.R. Fatmi, the then Executive Engineer regarding the work performed by Virendra Singh as a Driver from 1 January 1996 to 18 May 1999. The Executive Engineer found that copies of these three certificates were not available in the office nor they appeared to have been issued from the office and the documents maintained in the office did not also substantiate the claim set up by Virendra Singh that he had ever worked for 240 days or more in one calendar year. In fact, the Government Orders relating to engagement of workers on muster roll gave power to the Executive Engineer for engagement only for a period of one month, to the Superintending Engineer for engagement upto three months and to the Chief Engineer for engagement for any period above that. The certificates produced by Virendra Singh nor the documents maintained in the office indicated that prior approval had ever been given to the appointment of Virendra Singh. In such circumstances, the Executive Engineer concluded that the certificates relied upon by Virendra Singh were of no benefit to him. The Executive Engineer also noticed that the first petition filed by Virendra Singh was dismissed on 17 May 2001 and under the Circular dated 7 February 1997 regularisation could be done only if a daily wage employee had worked for 240 days as on 1 January 1993 and was continuously working upto the date of issuance of the Circular. The Executive Engineer did not accept the claim of Virendra Singh that he had worked for 240 days as on 1 January 1993 and had continuously been working for more than 240 days upto 7 February 1997. The Executive Engineer also noted that the contention of Virendra Singh that the then Superintending Engineer had constituted a Committee for regularisation of the services of Virendra Singh but the constitution of the Committee had been cancelled and the next Committee had not passed any order for regularisation in the absence of any document on record. The representations dated 4 January 2006 and 10 June 2006 filed by Virendra Singh were, accordingly, rejected by the Executive Engineer by the order dated 19 March 2008.

24. The claim petition was filed by Virendra Singh before the Tribunal to assail the two orders dated 17 March 2008 and 19 March 2008 with the following averments :

"That the petitioner, who was having requisite qualification for appointment to the post of driver was appointed on the post of driver on 1 April 1990 in the office of Executive Engineer, Lower Ganga Canal, Division, Etawah on daily wage basis and the petitioner was allowed to work, as such upto 18 May 1999. The petitioner has worked on daily wage basis as driver of Jeep No. UTC/1325, UPT/8824, UP75/ 2433, UP75/9256 and UP82/8587. The petitioner was issued certificates regarding his work and conduct as driver by the respondent no.5, which make explicit that the petitioner has satisfactorily worked as jeep driver with effect from 1 April 1990 to 30 September 1994.

That thereafter the petitioner was also allowed to work as jeep driver on daily wage/muster roll and he was accordingly paid salary for 188 days for the period 6 March 1995 to 12 September 1995 and a certificate in this regard was duly issued by the Executive Engineer, Ganga Canal Division, Etawah on 6 December 2005".

(emphasis supplied)

25. The Tribunal allowed the claim petition by order dated 7 October 2013 and the relevant portion is as follows:

"On consideration of arguments, facts and records put up by both the parties, we found that main contention of the petitioner is that the regularisation of the petitioner on the post of Beldar and Chaukidar has been made by the opposite parties by impugned orders dated 18.1.2008 and 21.1.2008 (Annexure-25 and 27) respectively and the impugned order dated 17.3.2008 has been passed in compliance of the Hon'ble High Court's order, which has been passed on 17.5.2001 (Annexure-13) pertaining to the matter for the post of driver and not to the post of Beldar and Chaukidar, therefore, this impugned order dated 17.3.2008 (Annexure-1) is based on incorrect facts. The main contention of the opposite parties is that petitioner has not worked for 240 days, therefore, the impugned orders dated 17.3.2008 and 19.3.2008 (Annexure-1 and 2) have been passed. Now the point for consideration is whether the Hon'ble High Court has decided the regularisation of the petitioner by its judgment dated 17.05.2001 (Annexure-13) or not? Whether petitioner has worked for 240 days or not? While considering these two points, we found that Hon'ble High Court has passed the order on 17.5.2001 (Annexure-13) in writ petition no.28366 of 1999 pertaining to the working of the petitioner on the post of Jeep driver, whereas the regularisation of the petitioner has been done by the opposite parties later on dates 18.1.2008 and 21.1.2008 (Annexure-25 and 27). The opposite parties while passing the impugned order dated 17.3.2008 (Annexure-1) to cancel the regularisation of the petitioner made on the post of Beldar and Chaukidar vide orders dated 18.1.2009 and 21.1.2008 (Annexure-25 and 27) has mentioned the Hon'ble High Court's order dated 17.5.2001. In fact these two orders dated 18.1.2008 and 21.1.2008 (Annexures-25 and 27) were not in existence when Hon'ble High Court has passed its order on 17.5.2001 (Annexure-13), therefore, there is no question of considering these two orders by the Hon'ble High Court. Thus impugned order dated 17.3.2008 (Annexure-13) is based on incorrect fact, the correct position is that opposite parties have passed the order dated 18.1.2008 and 21.1.2008 after a gap of seven years of the Hon'ble High Court's order dated 17.5.2001 (Annexure-13).

So far as the impugned order dated 19.3.2008 (Annexure-2) is concerned, the reliability of Annexure-8, which is a letter dated 14.9.2005 written by the Executive Engineer to the Superintending Engineer clearly proves that petitioner has performed his duties more than 240 days, therefore, his regularisation on the post of Beldar and Chaukidar done by the opposite parties is correct and the arguments of the opposite parties that he has not worked for 240 days is not sustainable in the light of these facts mentioned in Annexure-8, which is a letter written by the Executive Engineer to Superintending Engineer on 14.9.2005."

26. The main issue that arises for consideration is whether Virendra Singh, who had been working as a daily wager in the work-charge establishment of the Irrigation Department, fulfilled the conditions set out in the Circular dated 7 February 1997 for regularisation of his services.

27. In order to get the benefit of the said Circular, it was incumbent upon Virendra Singh to have substantiated that he had worked as a daily wager for more than 240 days as on 1 January 1993 in the work-charge establishment and thereafter continuously as a daily wage employee upto the date of issuance of the Circular on 7 February 1997.

28. The averments made by Virendra Singh in the first petition, therefore, assume importance. Virendra Singh specifically stated in the said writ petition that he held a valid driving licence and being an unemployed youth was in search of a Government job and when he came to know in 1995 that a post of jeep driver was vacant in the Irrigation Department, he met the Executive Engineer who informed him that a post of driver was lying vacant and he could be appointed on daily wage basis. Virendra Singh specifically stated that being unemployed, he accepted the offer and was given charge of a driver on 6 March 1995 and he worked regularly as a jeep driver on daily wage basis upto 12 September 1995. After that, he was again, on 1 January 1998, engaged as a jeep driver on daily wage basis and he worked regularly upto 31 August 1998. This clearly establishes that prior to 6 March 1995, Virendra Singh was unemployed and was not working on daily wage basis in the work-charge establishment of the Irrigation Department. This petition was dismissed on 17 May 2001 and the claim of Virendra Singh on the basis of the the Circular dated 7 February 2016 was also rejected for the reason that he was not working as a daily wage basis in the work-charge establishment as on 1 January 1993 and in fact had been engaged only on 6 March 1995. Virendra Singh filed Special Appeal No.521 of 2003 which was also dismissed in default on 4 August 2010.

29. What appears is that in order to avail of the benefit of the Circular dated 7 February 1997 despite his claim having been rejected in the first petition, Virendra Singh filed a representation dated 4 January 2006 before the Principal Secretary (Irrigation) alleging that he had worked on daily wage basis in the Lower Ganga Canal continuously from 1 April 1990 to 18 May 1999 on the post of a driver and for this purpose, he enclosed certain certificates said to have been issued by the then Executive Engineer showing his working from 1 April 1990 to 30 September 1994, from 6 March 1995 to 12 September 1995 and thereafter from 1 January 1996 upto 18 May 1999. On the basis of these certificates, Virendra Singh claimed regularisation on the basis of the Circular dated 7 February 1997. The subsequent representation dated 10 June 2006 submitted to the Chief Engineer also mentions the same facts. There is no manner of doubt that the averments made by Virendra Singh in the aforesaid two representations that he had worked as a daily wager from 1 April 1990 to 18 May 1999 continuously on the post of a driver were false and made with the sole object of getting the benefit of Circular dated 7 February 1997. Virendra Singh in the first petition, as noted above, had come out with a categorical case that prior to 6 March 1995 he was unemployed though he had a valid driving licence. He also specifically stated that he had worked on daily wage basis only from 6 March 1995 upto 12 September 1995 and thereafter from 1 January 1998 to 31 August 1998. What is important to note is that in the representations, Virendra

Singh did not disclose to the Department that he had filed the first petition and that the said petition had been dismissed on 17 May 2001. He also did not disclose that his claim for regularisation under the Circular dated 7 February 1997 had been rejected by the High Court in its judgment dated 17 May 2001 for the reason that he was not working on daily wage basis on 1 January 1993 as he had been engaged as a daily wage employee only on 6 March 1995 as a jeep driver. Even in the second petition that Virendra Singh subsequently filed in which a direction was issued to decide the two representations dated 4 January 2006 and 10 June 2006, he did not place on record the judgment delivered by the High Court on 17 May 2001 in the first petition. What also needs to be noticed is that though a prayer had been made in the writ petition for regularising his services as a Class IV employee in the Irrigation Department in the work-charge establishment/regular establishment in view of the Circular dated 7 February 1997, what was submitted before the High Court, as is clear from the judgment, is that his services should be regularised under the U.P. Regularisation of Daily Wages Appointment on Group 'D' Posts Rules, 2001.

30. The Superintending Engineer, to ensure compliance of the directions of the High Court, issued the order dated 18 January 2008. This order merely refers to the order dated 13 November 2007 passed by the High Court in the second petition filed by Virendra Singh and then mentions that since he had worked for 240 days as a daily wager as on 1 January 1993 in the work-charge establishment and had been regularly working as a daily wage employee upto the date of issuance of the Circular dated 7 February 1997, he was being regularised on the post of Beldar in the work-charge establishment. The order does not refer to any record on the basis of which the Superintending Engineer could conclude that Virendra Singh had completed 240 days in the work-charge establishment as on 1 January 1993 and had been continuously working as such upto 7 February 1997. The subsequent order dated 21 January 2008 merely appoints Virendra Singh as a Chaukidar on a temporary basis in the regular establishment. These two orders were, however, immediately kept in abeyance on 22 January 2008 and were ultimately cancelled by the Superintending Engineer by order dated 17 March 2008. The said order was passed after examination of the entire records including the order dated 20 April 2006 which found that Virendra Singh was not entitled to be regularised. The order dated 17 March 2008 also refers to the filing of the first petition and its dismissal by the order dated 17 May 2001.

31. Thereafter, to ensure compliance of the direction issued by the High Court on 13 November 2007 in the second petition for deciding the two representations dated 4 January 2006 and 10 June 2006, as the order dated 18 January 2008 which decided the representations was cancelled, the Executive Engineer passed a detailed order dated 19 March 2008. This order examines in detail the records that were available in the Department as also the three writ petitions that were filed by Virendra Singh. A categorical finding of fact has been recorded in the order that there was no record available in the Department to substantiate the claim of Virendra Singh that he had worked as a daily wager for more than 240 days as on 1 January 1993 and then continuously upto the issuance of the Circular on 7 February 1997. The certificates, on which reliance was placed by Virendra Singh, except the

certificate which indicated that he had worked from 6 March 1995 to 12 September 1995 were not relied upon as copies were neither available in the Department nor were they factually correct. These two orders dated 17 March 2008 and 19 March 2008 were assailed before the Tribunal.

32. At this stage, it is necessary to emphasise on the contrary stand taken by Virendra Singh in the first petition and the averments made by him in the claim petition. In the first petition, Virendra Singh stated :

"..... Being an unemployed youth petitioner was in search of some job either in Government service or in private services.

That during search in the year 1995, he came to know that a post of Jeep Driver is lying vacant in the office of respondents.

That being unemployed petitioner accepted the offer of respondent no.2 and he was given charge of the jeep on 6 March 1995. Since 6 March 1995 to 12 September 1995 petitioner has regularly worked as a Jeep Driver under respondent no.2 on daily wage basis. In all petitioner worked for 188 days regularly without any break."

33. However, in the claim petition he stated that he was appointed on daily wages on the post of a jeep driver on 1 April 1990 and was allowed to work upto 18 May 1999. The averment is reproduced :-

"That the petitioner, who was having requisite qualification for appointment to the post of driver was appointed on the post of driver on 1 April 1990 in the office of Executive Engineer, Lower Ganga Canal, Division, Etawah on daily wage basis and the petitioner was allowed to work, as such upto 18 May 1999"

34. The Tribunal, however, found fault with the order dated 17 March 2008 passed by the Superintending Engineering for cancellation of the earlier orders dated 18 January 2008 and 21 January 2008 for the reason that both the orders were not in existence when the High Court decided the first petition on 17 May 2001 and that the regularization was done on the post of Beldar and not on the post of a Jeep Driver. Accordingly, the Tribunal held that the judgment dated 17 May 2001 passed in the first petition filed by Virendra Singh could not have been made the basis for cancelling the orders dated 18 January 2008 and 21 January 2008. The Tribunal completely failed to notice that the order dated 17 March 2008 also refers to the order dated 20 April 2006 by which the claim of Virendra Singh for regularisation was not found to be correct and that in the two representations Virendra Singh had stated that he was working as a jeep driver on daily wage basis and not as a beldar. The Tribunal also failed to consider that the judgment delivered on 17 May 2001 in the first petition rejected the claim of Virendra Singh for regularisation of his services in the work-charge establishment on the basis of the Circular dated 7 February 1997. Infact the Tribunal

did not even consider it appropriate to refer to the judgment though it was referred to in the order impugned before the Tribunal. In the written statement filed to the claim petition, the Department had also clearly denied the averments made in the claim petition but there is no mention of the averments made in the written statement. While dealing with the order dated 19 March 2008 passed by the Executive Engineer to reject the two representations dated 4 January 2006 and 10 June 2006, the Tribunal completely failed to examine the facts stated in the order. It appears that the Tribunal was only concerned with the recommendation made by the Executive Engineer to the Superintending Engineer in the communication dated 14 September 2005. The said recommendation was of no benefit as the Superintending Engineer had thereafter constituted a Committee to examine the claim as was required under the Circular and the Committee did not make any recommendation. The Executive Engineer had in the order dated 19 March 2008 found as a fact that Virendra Singh was not working as a daily wager as on 1 January 1993 nor was there any evidence to substantiate that he had worked regularly on a daily wage basis upto 7 February 1997 when the Circular was issued. The Tribunal also completely failed to examine the averments made by Virendra Singh in the first petition and the judgment delivered in that petition on 17 May 2001. It is clear that in his anxiety to claim the benefit of the Circular dated 7 February 1997, Virendra Singh set up an absolutely false claim in the two representations dated 4 January 2006 and 10 June 2006 that he had been engaged as a jeep driver on daily wage basis in the work-charge establishment of the Irrigation Department from 1 April 1990 to 18 May 1999. Virendra Singh deliberately and for ulterior motives did not mention the filing of the first petition and its dismissal by the judgment dated 17 May 2001 because in that case, he would not have been able to claim the benefit of the Circular dated 7 February 1997 as this benefit had clearly been denied to him in the judgment delivered in the said petition. Even in the subsequent second petition, Virendra Singh did not mention that the first petition that he had filed, had been dismissed by judgment dated 17 May 2001 and that his claim for regularisation on the basis of the Circular dated 7 February 1997 had been rejected. In the second petition, Virendra Singh again sought the benefit of the Circular dated 7 February 1997 for regularisation of his services and obtained an order for disposal of the two representations. The Superintending Engineer, while passing the order dated 18 January 2008, as noted above, failed to examine the document on the basis of which Virendra Singh was claiming regularisation and only a bald statement was made in the order that Virendra Singh had worked for more than 240 days as on 1 January 1993 and was regularly working on daily wage basis upto the issuance of the Circular dated 7 February 1997.

35. What also needs to be noted is that Virendra Singh had placed reliance on certificates alleged to have been issued by the then Executive Engineer regarding his engagements. Neither did he bring on record any document to show that he had received wages for the said period nor any such statement was made either in the representations or in the writ petition. On the contrary, the specific averment that was made by Virendra Singh in the first petition was that he was engaged as a jeep driver on daily wage basis on 6 March 1995 and worked on daily wage basis upto 12 September 1995. A deliberate false statement

was, therefore, made in the two representations and the claim petition that he was engaged as a jeep driver from 1 April 1990 to 18 May 1999.

36. The order of the Tribunal, therefore, cannot be sustained and deserves to be set aside.

37. What is also important is that while entertaining this writ petition, the Division Bench on 9 May 2014 directed Virendra Singh to file his personal affidavit to indicate whether he had disclosed the judgment dated 17 May 2001 passed in the first petition in the representations before the Authority and as to whether such facts were disclosed before the High Court in the second petition. In the affidavit filed by Virendra Singh in response to the said directions of the High court, a copy of the second second petition has been enclosed. In paragraph 10 of the affidavit, all that has been stated is that the first petition had been filed against the order dated 19 September 1998 that cancelled the order dated 2 September 1998 and this petition was dismissed on 17 May 2001 against which a Special Appeal was preferred. Virendra Singh has, therefore, not only misled the Department but also the High Court for securing the benefit of the Circular dated 7 February 1997. It is, therefore, a case where not only the order passed by the Tribunal on 7 October 2013 should be set aside but costs should also be imposed upon Virendra Singh for deliberately concealing material facts and also stating incorrect facts before the Department as well as before the Tribunal and this Court.

38. Thus, for all the reasons stated above, the order dated 7 October 2013 passed by the Tribunal is set aside and the claim petition shall stand dismissed. As Virendra Singh had deliberately mislead the Department and this Court, we consider it appropriate to impose costs of Rs.25,000/- on Virendra Singh which shall be deposited by him before the Registrar General of the Court within a period of two months from today. On deposit of such cost, it shall be transmitted to the account of the Allahabad High Court, Mediation and Conciliation Centre. If Virendra Singh fails to deposit the cost, the Registrar General of the Court shall inform the District Magistrate, Etawah for recovery of the said amount as arrears of the land revenue and after recovering the said amount, it shall be transmitted to the Registrar General of the Court for depositing it in the account of the Allahabad High Court, Mediation and Conciliation Centre.

39. The writ petition is, accordingly, allowed with the aforesaid directions.

(2016) 8 ILRA 210
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.08.2016

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ A No.- 30763 Of 2016

Jitendra Kumar Sharma

...Petitioner

Versus

State Of U.P. & Ors.

...Respondents

Counsel for Petitioner:

Seemant Singh

Counsel for Respondents:

C.S.C., Ashok Kumar Yadav, Santosh Kumar

Present writ is filed for quashing the impugned Government Order dated 13.5.2016, impugned Circular dated 17.5.2016 and impugned show cause notice dated 18.6.2016. 1932 candidates under the physically disabled candidates quota, were selected for Special B.T.C. Training Course, 2007, Special B.T.C. Training Course, 2008 (Special Selection) and Special B.T.C. Training Course, 2008 out of which 1121 candidates appeared before the Medical Board alongwith their original certificates for physical verification. The physical disability of 234 candidates were not found certified. The medical examination of 811 candidates were yet to be done but in the meantime a WritA No.53152 of 2010 (Ravindra Kumar Sharma vs. State of U.P. and others) was filed in which an order dated 3.8.2010 was passed dismissing the writ petition. The aforesaid order dated 3.8.2010 was challenged in Special Appeal No.811 of 2010 before the Lucknow Bench of this Court, which was disposed of by order dated 9.9.2010. As a consequence of the order passed in the aforesaid Special Appeal, the verification of certificates as well as physical verification were stopped. The aforesaid order dated 9.9.2010 passed in the Special Appeal was challenged by the State Government in Special Leave Petition No.8880 of 2011 (State of U.P. and others vs. Ravindra Kumar Sharma and others), which was allowed by Hon'ble Supreme Court by order dated 3.2.2016.

Learned counsel for the petitioner admits that petitioner is one of the candidate amongst 234 candidates, whose physical disability was not found certified as mentioned in the Government letter dated 13.5.2016. However he submits that earlier the medical certificate of the petitioner was examined by the Basic Shiksha Adhikari and no discrepancy was found. He submits that the Committee constituted under the Government letter dated 13.5.2016, does not consists of any medical expert, and as such, the entire proceeding against the petitioner is wholly arbitrary. The medical examination with regard to the physical discrepancy of the petitioner was an arbitrary action of the State Government.

After considering the facts court observed that when the verification of disability certificate and medical examination began and disability certificate of 234 candidates out of 1121 were not found certified and 811 candidates were yet to be examined, a Writ Petition No.53152 of 2010 was filed, which was dismissed by order dated 3.8.2010. This order was challenged before the Division Bench of this Court in Special Appeal No.811 of 2010, which was disposed of by order dated 9.9.2010. The order of the Division Bench was challenged by the State Government before the Supreme Court in Special Leave Petition no.8880 of 2011,

which was allowed by order dated 3.2.2016. The relevant portion of the aforesaid order of Hon'ble Supreme Court has already been reproduced above, which clearly indicates that the action of the respondents is not in conflict with the order of Hon'ble Supreme Court. The impugned show cause notice has been issued requiring the petitioner to submit reply within 15 days. Admittedly, the petitioner, instead of submitting reply; has filed the present writ petition.

It is settled law that normally a writ petition against a show cause notice is not maintainable. Proper course for the noticee is to submit reply before the authority concerned. The exception is that if the show cause notice itself is wholly without jurisdiction then a writ petition against it may be entertainable, which is not the case of the petitioner. Under the circumstance, the writ petition is not entertainable.

The writ petition fails and is, therefore, dismissed.

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Seemant Singh, learned counsel for the petitioner, Sri Avinash, learned Standing Counsel for the respondent nos.1 to 4 and Sri Santosh Kumar, learned counsel for the respondent nos.5 and 6.

2. This writ petition has been filed praying for the following reliefs:

a) Issue a writ, order or direction in the nature of Certiorari calling upon the records of the case and to quash the impugned Government Order dated 13.5.2016 (Annexure No.15 to the writ petition), impugned Circular dated 17.5.2016 (Annexure no.16 to the writ petition) and impugned show cause notice dated 18.6.2016 (Annexure No.17 to the writ petition) being illegal, arbitrary and in violation of principles of natural justice as the same are based on no medical report which could have been prepared by the earlier Medical Board at the time of examining the petitioner and the copy of which could have been supplied to the petitioner for giving him a due opportunity under law to challenge the same before the other authorities under law.

b) Issue any other suitable writ, order or direction as this Court may deem fit and proper in the facts and circumstances of the case.

c) Award cost of petition to the petitioner.

3. Briefly stated facts of the present case are that 1932 candidates under the physically disabled candidates quota, were selected for Special B.T.C. Training Course, 2007, Special B.T.C. Training Course, 2008 (Special Selection) and Special B.T.C. Training Course, 2008 out of which 1121 candidates appeared before the Medical Board alongwith their original certificates for physical verification. The physical disability of 234 candidates were not found certified. The medical examination of 811 candidates were yet to be done but in the meantime a Writ-A No.53152 of 2010 (Ravindra Kumar Sharma vs. State of U.P. and others) was filed in which an order dated 3.8.2010 was passed dismissing the writ petition.

4. The aforesaid order dated 3.8.2010 was challenged in Special Appeal No.811 of 2010 (Ravindra Kumar Sharma vs. Stat of U.P. and others) before the Lucknow Bench of this Court, which was disposed of by order dated 9.9.2010. As a consequence of the order passed in the aforesaid Special Appeal, the verification of certificates as well as physical verification were stopped. The aforesaid order dated 9.9.2010 passed in the Special Appeal was challenged by the State Government in Special Leave Petition No.8880 of 2011 (State of U.P. and others vs. Ravindra Kumar Sharma and others), which was allowed by Hon'ble Supreme Court by order dated 3.2.2016. The relevant portion of the order of Hon'ble Supreme Court is reproduced below:

10. The Division Bench of the High Court has ignored and overlooked the material fact that verification has already been done by the Medical Board and it has been found that certificates of 21% were fraudulently obtained. The High Court has issued a direction in the impugned order for physical verification of the candidate by the authorities and in case he does not suffer from disability so certified candidate can be subjected to fresh medical test. The High Court has overlooked that on mere physical verification it may not be possible to know various kinds of disabilities such as that of eyes, ear impairment etc. That can only be done by the medical examination and particularly when the High Court itself has observed that in case there is genuine suspicion and fraud has been committed medical certification can be reopened. Direction issued in this regard has not been questioned by the respondents and in fact process of re-verification was already over when High Court issued aforesaid directions.

11. In our considered opinion in the peculiar facts of this case of such a fraud and genuine suspicion raised in the representation lodged by the Viklang Sangh and when 21% of such certificates have been found to be fraudulently obtained there was no scope for the Division Bench to interfere and issue order to perpetuate fraud, writ is to be declined in such a scenario and no equity can be claimed by the respondents.

12. In the circumstance we set aside the impugned judgment and order passed by the Division Bench of the High Court and dismiss the writ petition. However before taking any action against the individuals they shall be issued show cause in the matter and thereafter decision will be rendered in accordance with law. Let this exercise be completed within a period of four months. The appeal is allowed to the aforesaid extent.

5. After referring the above quoted paragraphs of the order of Hon'ble Supreme Court, the State Government issued the impugned letter dated 13.5.2016 quoting therein the relevant portion of the orders of the learned Single Judge and the Division Bench of this Court as well as judgment of Hon'ble Supreme Court dated 3.2.2016 and directed the authorities concerned to complete necessary exercise in respect of left over 811 candidates.

6. Consequent to the aforesaid Government letter dated 13.5.2016, the Director, State Council for Education Research and Training, U.P. Lucknow (respondent no.2) issued the impugned letter dated 17.5.2016 to the authorities concerned for compliance.

7. It appears that thereafter the impugned show cause notice dated 18.6.2016 has been issued to the petitioner by the Principal, District Education and Research Institute, Shahjahanpur mentioning therein that in the verification report submitted by the Medical Board, the physical disability of the petitioner has not been found certified. By the aforesaid impugned show cause notice, the petitioner has been required to submit his reply within 15 days.

8. Aggrieved with the aforesaid Government letter dated 13.5.2016, letter of Director, State Council for Education Research and Training, U.P. Lucknow (respondent no.2) dated 17.5.2016 and show cause notice dated 18.6.2016, the present writ petition has been filed.

9. Learned counsel for the petitioner admits that petitioner is one of the candidate amongst 234 candidates, whose physical disability was not found certified as mentioned in the Government letter dated 13.5.2016. However he submits that earlier the medical certificate of the petitioner was examined by the Basic Shiksha Adhikari and no discrepancy was found, and as such, it was not open for the respondents to inquire into the matter and to verify physical disability of the petitioner. He submits that the Committee constituted under the Government letter dated 13.5.2016, does not consists of any medical expert, and as such, the entire proceeding against the petitioner is wholly arbitrary. The medical examination with regard to the physical discrepancy of the petitioner was an arbitrary action of the State Government. The State Government has already taken decision to punish the petitioner, and as such, the impugned show cause notice is wholly invalid.

10. It is admitted by the petitioner that the petitioner has not submitted any reply pursuant to the impugned show cause notice.

11. Learned counsel for the respondents supports the impugned letters and the show cause notice.

12. I have carefully considered the submissions of learned counsel for the parties.

13. I do not find any substance in the submission of learned counsel for the petitioner. The Government letter dated 13.5.2016 merely refers to the orders passed by Hon'ble Single Judge, the Division Bench of this Court and the order dated 3.2.2016 passed by Hon'ble Supreme Court and issued certain directions, which are not in conflict with the order of Hon'ble Supreme Court. The Committee, referred in the impugned Government letter dated 13.5.2016, has been constituted for the purpose of considering and taking

decision on reply which may be submitted by candidates pursuant to show cause notices, which is in compliance to the order of Hon'ble Supreme Court dated 3.2.2016.

14. The facts of the present case, as briefly noted above, clearly indicates that when the verification of disability certificate and medical examination began and disability certificate of 234 candidates out of 1121 were not found certified and 811 candidates were yet to be examined, a Writ Petition No.53152 of 2010 was filed, which was dismissed by order dated 3.8.2010. This order was challenged before the Division Bench of this Court in Special Appeal No.811 of 2010, which was disposed of by order dated 9.9.2010. The order of the Division Bench was challenged by the State Government before the Supreme Court in Special Leave Petition no.8880 of 2011, which was allowed by order dated 3.2.2016. The relevant portion of the aforesaid order of Hon'ble Supreme Court has already been reproduced above, which clearly indicates that the action of the respondents is not in conflict with the order of Hon'ble Supreme Court. The impugned show cause notice has been issued requiring the petitioner to submit reply within 15 days. Admittedly, the petitioner, instead of submitting reply; has filed the present writ petition.

15. It is settled law that normally a writ petition against a show cause notice is not maintainable. Proper course for the noticee is to submit reply before the authority concerned. The exception is that if the show cause notice itself is wholly without jurisdiction then a writ petition against it may be entertainable, which is not the case of the petitioner. Under the circumstance, the writ petition is not entertainable.

16. In view of the aforesaid, I do not find any merit in this writ petition.

17. The writ petition fails and is, therefore, dismissed.

(2016) 8 ILRA 215
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.08.2016

BEFORE

THE HON'BLE TARUN AGARWALA, J.
THE HON'BLE VIPIN SINHA, J.

Writ C No.- 11171 Of 2016
&
Connected With Other Cases

Ayodhya Prasad Mishra

...Petitioner
Versus

State Of U.P. & Ors.

...Respondents

Counsel for Petitioner:

Syed Mohd. Fazal, S.G. Hasnain

Counsel for Respondents:

C.S.C.

In the present writ petition the petitioners have questioned the veracity of the Government Order dated 15th October 2015 and its competence to demand royalty on minor minerals and cost of minor minerals to the extent of five times the royalty which the contractors supply to the Government Department and public undertakings pursuant to the contract entered between the parties. For facility, the facts of Writ-C No. 11171 of 2016 is being taken into consideration.

Submission made by the learned counsel for the petitioner is that the royalty is payable by the holder of the mining lease as per the Mines and Minerals (Regulation and Development) Act, 1957 (hereinafter referred to as the Act of 1957) read with Uttar Pradesh Minor Minerals Concession Rules, 1963 (hereinafter referred to as the Rules of 1963). The petitioner contends that he is neither a holder of the mining lease nor carrying any mining operation and therefore, the realisation of royalty on purchase of minor minerals is wholly arbitrary and illegal. Similarly the Government Order charging cost of the mineral equivalent to five times the royalty was also illegal.

Court observed that it would be essential to dwell upon the impugned Government Order dated 15.10.2015. The impugned Government Order states that earlier the Government Order dated 02.02.2001 directed all the Principal Secretaries and Secretaries to the Government of U.P. to ensure that minor minerals supplied to the Government Departments/public undertakings for use in construction works or are transported only after payment of royalty and that the suppliers should ensure evidence of payment of royalty. The Government Order further stated that in case the royalty was not paid, requisite amount of royalty would be deducted from their bills and that the royalty amount would be deposited in the appropriate Government's head. The impugned Government Order further states that it has come to the knowledge of the Government that the contractors were still purchasing minor minerals from unauthorized sources without obtaining Form MM-11 and were getting the royalty deducted from their bills, which was in violation of Section 4 (1-A) of the Act of 1957 and Rule 3 of the Rules of 1963. The Government Order further indicates that the procedure adopted by

the contractors only increased the sale of illegal minor mineral, which was also in violation of Section 21 (5) of the Act of 1957. The Government, therefore, issued the impugned Government Order directing that if Form MM-11 was not filed evidencing payment of royalty, in which case, the amount of royalty would be deducted from the bills of the contractors and further cost of material would also be charged from the contractor, which would be five times the royalty. The said Government order was issued in order to stop illegal mining and sale of unauthorized minor minerals. To understand the impact of the Government Order dated 15.10.2015, it would be appropriate to refer to certain provisions of the Act of 1957 and the Rules of 1963.

Court observed that as per provision of Section 9 read with Rule 21 of the Rules, the royalty is required to be paid by the holder of a mining lease. A question arose as to whether royalty can be paid by a contractor, who is supplying minor minerals for execution of the contract entered by him with the Government Department. This issue was examined by a Division Bench of this Court in J.K. Construction Engineers and Contractor and others Vs. Union of India and Others 2006 (3) ADJ 471

The Division Bench held that the liability to pay royalty is primarily on the person holding a mining lease or a mining permit. The Division Bench further held that if a person does not hold any mining lease or mining permit, the liability would not cease and that any person holding any minor mineral was required to maintain and keep documents to show that the royalty had been paid. The Division Bench also held that such restriction can not be said to be unreasonable nor could it be said that it was issued without any authority of law. The said decision of the Division Bench of this Court in J. K. Construction Engineers and Contractor (supra) was affirmed by the Supreme Court in Som Datt Builders Ltd. Vs. Union of India and others 2010 (1) SCC 311.

Court held that The Government Order dated 15th October 2015 only provides for obtaining Form MM-11. Court is of the opinion that if a contractor purchases royalty paid minor minerals from a licence holder for storage of minerals against Form-C, the same should be accepted by the authority as an evidence depicting the payment of royalty.

The Government Order dated 15th October, 2015 should be read accordingly, namely, that if the contractors produces Form MM-11 or Form-C evidencing payment of royalty, the same should be accepted by the authority while processing the bills of the contractors. Court directed the Chief Secretary to issue a clarification in this regard to all the Principal Secretaries and the Secretaries of the Government of U.P. and to the Divisional Commissioners and the District Magistrates in the State of U.P. immediately within four weeks from the date of production of a certified copy of this order. The learned Standing Counsel will ensure that a certified copy of this order is sent to the Chief Secretary within two weeks.

Court do not find any merit in the writ petitions. All the writ petitions fail and are hereby dismissed.

(Delivered by Hon'ble Tarun Agarwala, J.)

1. In this group of writ petitions, the petitioners have questioned the veracity of the Government Order dated 15th October 2015 and its competence to demand royalty on minor minerals and cost of minor minerals to the extent of five times the royalty which the contractors supply to the Government Department and public undertakings pursuant to the contract entered between the parties. For facility, the facts of Writ-C No. 11171 of 2016 is being taken into consideration.

2. The petitioner is a registered contractor in Category-D with the Public Works Department (PWD). The petitioner was awarded a contract for reconstruction of a road from Shiv Marg to Kali Theeka, Mau. A contract was executed in this regard. For execution of the work, the petitioner purchased ballast/grits, sand, moram, etc. from stone crushers and from other sources.

3. The petitioner contends that the State of U.P. was deducting royalty on the raw-material used by the contractors, who failed to produce form MM-11 but, pursuant to the Government Order dated 15th October 2015, in addition to the royalty to be charged for non-production of Form-MM-11, the Government is now realising the cost of material to the extent of five times the royalty. The petitioners, being aggrieved by the charging of royalty and cost of the material upto five times the royalty, have filed the present writ petitions.

4. The contention of the petitioner in this regard is, that the royalty is payable by the holder of the mining lease as per the Mines and Minerals (Regulation and Development) Act, 1957 (hereinafter referred to as the Act of 1957) read with Uttar Pradesh Minor Minerals Concession Rules, 1963 (hereinafter referred to as the Rules of 1963). The petitioner contends that he is neither a holder of the mining lease nor carrying any mining operation and therefore, the realisation of royalty on purchase of minor minerals is wholly arbitrary and illegal. Similarly the Government Order charging cost of the mineral equivalent to five times the royalty was also illegal.

5. In support of their submissions, the petitioners have relied upon the decision in **M.P. Contractors Sangh Indore and others Vs. State of M.P. And others** reported in **AIR 1987 Madhya Pradesh 74**, **Ahmedabad Urban Development Authority Vs. Sharad Kumar Jayanti Kumar Pasawalla and others** reported in **AIR 1992 Supreme Court 2038**, **Virendra Giri Vs. State of U.P. and others** reported in **AIR 2008 Allahabad 75**, **M/s. Om Contractors Vs. State of U.P. and others** reported in **2008 (2) ALJ 438** and the decision dated 14th March, 2016 of the Division Bench of this Court in **Abhimanyu Singh and 12 others Vs. State of U.P. and 9 others**.

6. On the other hand, the respondents have submitted that earlier a Government Order dated 2nd February 2001 was issued directing the Principal Secretaries and the District Magistrate to ensure that minor minerals are supplied to the Government Departments and public undertakings for use in construction works or are transported only after payment of royalty and that the suppliers should ensure evidence of the payment of royalty, failing which, the amount of royalty would be deducted from their bills.

7. The respondents contended that this imposition was made in order to ensure that contractors purchased minor minerals from authorized sources and to ensure that royalty was paid. The respondents submitted that in spite of the Government Order, the contractors were purchasing the minor minerals from unauthorized sources and were getting the royalty deducted from their bills, which has only increased the sale of illegal minor minerals. Consequently, in order to curb this menace, the Government Order dated 15.10.2015 was issued to ensure that the registered contractors, who were awarded a government contract, should purchase minor minerals from authorized sources, failing which, they would not only pay the amount of royalty but would also

pay the cost of the material, which would be equivalent to five times the royalty. It was contended that the Government Order has been issued in public interest and in consonance with the provisions of the Act and the Rules.

8. In support of their submissions, the respondents have placed reliance upon a decision of a Division Bench of this Court in M/s. **J. K. Construction Engineers and Contractor and others Vs. Union of India and Others** reported in **2006 (3) ADJ 471** and the decision of the Supreme Court in **Som Datt Builders Ltd Vs. Union of India and others** reported in **2010 (1) SCC 311**.

9. We have heard Sri Syed Mohd Fazal Advocate, Sri Amit Khanna Advocate, Sri Ram Kishore Gupta Advocate and Sri Om Prakash Chaudhary Advocate for the petitioners and Sri Vishnu Pratap, the learned Standing Counsel for the respondents.

10. In order to appreciate the submissions of the rival parties, it would be essential to dwell upon the impugned Government Order dated 15.10.2015. The impugned Government Order states that earlier the Government Order dated 02.02.2001 directed all the Principal Secretaries and Secretaries to the Government of U.P. to ensure that minor minerals supplied to the Government Departments/public undertakings for use in construction works or are transported only after payment of royalty and that the suppliers should ensure evidence of payment of royalty. The Government Order further stated that in case the royalty was not paid, requisite amount of royalty would be deducted from their bills and that the royalty amount would be deposited in the appropriate Government's head. The impugned Government Order further states that it has come to the knowledge of the Government that the contractors were still purchasing minor minerals from unauthorized sources without obtaining Form MM-11 and were getting the royalty deducted from their bills, which was in violation of Section 4 (1- A) of the Act of 1957 and Rule 3 of the Rules of 1963. The Government Order further indicates that the procedure adopted by the contractors only increased the sale of illegal minor mineral, which was also in violation of Section 21 (5) of the Act of 1957. The Government, therefore, issued the impugned Government Order directing that if Form MM-11 was not filed evidencing payment of royalty, in which case, the amount of royalty would be deducted from the bills of the contractors and further cost of material would also be charged from the contractor, which would be five times the royalty. The said Government order was issued in order to stop illegal mining and sale of unauthorized minor minerals.

11. To understand the impact of the Government Order dated 15.10.2015, it would be appropriate to refer to certain provisions of the Act of 1957 and the Rules of 1963.

12. Section 4 (1- A) of the Act of 1957 provides as under:

" (1-A) No person shall transport or store or cause to be transported or stored any mineral otherwise than in accordance with the provisions of this Act and the rules made thereunder."

13. The aforesaid provision makes it clear that no person shall transport or store any mineral otherwise in accordance with the provisions of the Act and Rules made thereunder.

14. Section 21 (5) of the Act of 1957 provides as under:-

" (5) Whenever any person raise without any lawful authority, any, mineral from any land, the State Government may recover from such person the mineral so raised, or where such mineral has already been disposed of, the price thereof, and may also recover from such person rent, royalty or tax as the case may be, for the period during which the land was occupied by such person without any lawful authority"

15. The aforesaid provision provides that any person who raise without any lawful authority, any, mineral from any land in which case the State Government may recover from such person the price of such minerals and may also recover from such person the royalty.

16. Section 15 of the Act of 1957 gives power to the State Government to make Rules in respect of minor minerals pursuant to which the **Uttar Pradesh Minor Minerals (Concession) Rules 1963** was enacted. Rule 3 of the said Rules provides as under:

"3. Mining operations to be under a mining lease or mining permit-- (1) No person shall undertake any mining operations in any area within the State of any minor mineral to which this rules are applicable except under and in accordance with the terms and conditions of a mining lease or mining permit granted under these rules:

Provided that nothing shall affect any mining operations undertaken in accordance with the terms and conditions of a mining lease or permit duly granted before the commencement of these rules.

(2) No mining lease or mining permit shall be granted otherwise than in accordance with the provisions of these rules."

17. A perusal of the aforesaid provision indicates that no person shall undertake any mining operation except in accordance with the terms and conditions of the mining lease or mining permit granted under the Rules.

18. Rule 70 of the Rules of 1963 places restrictions on transport of minerals. For facility, the said provision is extracted hereunder:-

" 70. Restrictions of transport of minerals-- (1) The holder of mining lease or permit or a person authorised by him in this behalf may issue a pass in Form MM-11 to every person carrying a consignment of minor mineral by a vehicle, animal or any other mode of transport. The State Government may, through the District Officer, make arrangements for the supply of printed MM-11 Form books on payment basis.

(2) No person shall carry, within the State, a minor mineral by a vehicle, animal or any other mode of transport, excepting railway, without carrying a pass in From MM-11 issued by Sub-rule (1).

(3) Every person carrying any minor mineral shall, on demand by any officer authorised under Rule 66 or such officer as may be authorised by the State government in this behalf, show the said pass to such officer and allow him to verify the correctness of the particulars of the pass with reference to quantity of the minor mineral.

(4) The State Government may establish a check post for any area included in any mining lease or permit, and when a check post is so established public notice shall be given of this fact by publication in the Gazette and in such other manner as may be considered suitable by the State Government.

(5) No person shall transport a minor mineral for which these rules apply from such area without first presenting the mineral at the check post established for that area for verification of the weight or measurement of the mineral.

(6) Any person found to have contravened any provision of this rule shall, on convictions, be punishable with imprisonment of either description for a term which may extend to six months or with fine which may extend to one thousand rupees or with both."

19. The aforesaid Rule indicates that the holder of a mining lease or mining permit is authorised to issue a pass in Form MM-11 to every person carrying a consignment of minor minerals. Sub-clause (2) of the Rule 70 provides that no person shall carry minor minerals without carrying a pass in Form MM-11.

20. Section 23-C of the Act of 1957 gives power to the State Government to make Rules for preventing illegal mining, transportation and storage of minerals. In exercise of powers provided under Section 23-C of the Act of 1957, the State Government enacted the **Uttar Pradesh Minerals (Prevention of Illegal Mining, Transportation and Storage) Rules, 2002** (hereinafter referred to as the Rules of 2002.) Rule 3, 4 and 5 of the Rules of 2002, being relevant to the issue, are extracted hereunder:

"3. Prohibition Section 23.C (1)-- No person shall transport, carry or cause to be transported, carried any mineral by any means from its raising place to any other place without a valid transit pass issued by the holder of mining lease or mining permit or prospecting licence as the case may be.

4. Supply of transit passes and fee therefor.-(1) The holder of mining lease or mining permit or prospecting licence or licence for storage of minerals, as the case may be, shall make an application to the district officer or the officer authorised by the State Government in this behalf along with fee and in the manner, as determined by the State Government from time to time for obtaining book of transit pass for transportation of any mineral.

(2) The book of transit pass will be supplied by the District Officer of the respective district or any other officer authorised by the State Government in this behalf by notification under these rules or the Act or any other rules made thereunder.

(5) Issue of Transit Pass.—(1) *The transit pass shall be issued by the holder of mining lease or mining permit or prospecting licence for major minerals in 'Form G' appended to these rules and for minor minerals in 'Form MM-11' appended to Rules 1963.*

(2) *The holder of licence for storage of minerals shall issue the transit pass in 'Form C' for lawful transportation of minerals from the store."*

21. Rule 3 of the Rules of 2002 provides that no person shall transport any mineral unless it is accompanied by a valid transit pass issued by a holder of mining lease or mining permit or prospecting licence or licence for storage of minerals as the case may be. Rule 4 of the Rules of 2002 provides that the holder of a mining lease or holder of a licence for storage of minerals shall make an application for obtaining a book of transit pass for transportation of any mineral. Rule 5 of the the Rules of 2002 provides that transit form in Form MM-11 would be issued by the holder of a mining lease or mining permit and Form C would be issued by the holder of licence for storage of minerals.

22. Section 9 of the Act of 1957 and Rule 21 of the Rules of 1963 provides that royalty is required to be paid by a holder of a mining lease. For facility, Section 9 of Act 1957 and Rule 21 of the Rule of 1963 are extracted hereunder:

"9. Royalties in respect of mining lease.— (1) *The holder of a mining lease granted before the commencement of this Act shall, notwithstanding anything contained in the instrument of lease or in any law in force at such commencement, pay royalty in respect of [any mineral removed by or consumed by him or by his agent, manager, employee, contractor or sub-lease] from the leased area after such, commencement, at the rate for the time being specified in the Second Schedule in respect of that mineral.*

(2) *The holder of a mining lease granted on or after commencement of this Act shall pay royalty in respect of [any mineral removed by or consumed by him or by his agent, manager, employee, contractor or sub-lessee] from the leased area at the rate for the time being specified in the Second Schedule in respect of that mineral.*

[(2-A) The holder of a mining lease, whether granted before or after the commencement of the Mines and Minerals (Regulations and Development) Amendment Act, 1972 shall not be liable to pay any royalty in respect of any coal consumed by a workman engaged in a colliery provided that such consumption by the workman does not exceed one third of a tonner per month.]

(3) *The Central Government may, by notification in Official Gazette amend the Second Schedule so as to enhance or reduce the rate at which royalty shall be payable in respect of any mineral with effect from such date as may be specified in the notification:*

[Provided that the Central Government shall not enhance the rate of royalty in respect of any mineral more than once during any period of three years.

21. Royalty.-- (1) *The holder of a mining lease granted on or after the commencement of these rules shall pay royalty in respect of any mineral removed by him from the leased area at the rates for the time being specified in the First Schedule to these rules.*

(2) *The State Government may, by notification, in the Gazette amend the First Schedule so as to include therein or exclude therefrom or enhance or reduce the rate of royalty in respect of any mineral with effect from such date as may be specified in the notification:*

Provided that the State Government shall not enhance the rate of royalty in respect of any mineral for more than once during any period of three years and shall not fix the royalty at the rate of more than 20 percent of the pit's mouth values.

(3) *Where the royalty is to be charged on the pit's mouth value of the mineral the State Government may assess such value at the time of the grant of the lease and the rate of royalty will be mentioned in the lease deed. It shall be open to the State Government to re-assess not more than once in a year the pit's mouth value, if it considers that an enhancement is necessary."*

23. No doubt under the aforesaid provision of Section 9 read with Rule 21 of the Rules, the royalty is required to be paid by the holder of a mining lease. A question arose as to whether royalty can be paid by a contractor, who is supplying minor minerals for execution of the contract entered by him with the Government Department. This issue was examined by a Division Bench of this Court in **J.K. Construction Engineers and Contracor and others Vs. Union of India and Others 2006 (3) ADJ 471** wherein the Division Bench in paragraph 101 held as under:

" 101. Now coming to the question as to whether the amount of royalty can be recovered from the petitioners who are the contractors and suppliers of ordinary earth and other minor minerals, we are of the considered opinion that the royalty is payable on excavation of any minor minerals. The liability is primarily of the person holding the mining lease or a mining permit but if a person does not hold any mining lease or mining permit, the liability does not cease. Any person dealing in a minor mineral is required to maintain and keep documents to show that the royalty has been paid and in order to ensure that due royalty or minor minerals has been paid within the State of U.P., the State Government by the three Government Orders have provided for producing copies of declaration in form MM 11 and treasury challan evidencing deposit of royalty. It cannot be said that any undue restrictions have been placed upon the right to carry on trade or business or it is without the authority of law."

24. The Division Bench held that the liability to pay royalty is primarily on the person holding a mining lease or a mining permit. The Division Bench further held that if a person does not hold any mining lease or mining permit, the liability would not cease and that any person holding any minor mineral was required to maintain and keep documents to show that the royalty had been paid. The Division Bench also held that such restriction can not be said to be unreasonable nor could it be said that it was issued without any authority of law. The said decision of the Division Bench of this Court in **J. K. Construction Engineers and Contractor (supra)** was affirmed by the Supreme Court in **Som Datt Builders Ltd. Vs. Union of India and**

others 2010 (1) SCC 311. The Supreme Court held that the view taken by the High Court does not call for any interference.

25. In the light of the aforesaid, the issue with regard to payment of royalty stands concluded. It is no longer open to the petitioners to contend that they are not liable to pay the royalty. The decisions cited by the petitioners are distinguishable and are not applicable inasmuch as the Court did not consider the provisions of the Rules of 2002 and Section 21 (5) of the Act of 1957.

26. The purpose of issuance of impugned Government Order is just and valid and has been issued in public interest. The Government Order has been issued to ensure that royalty is paid and that the royalty paid material is used for construction work in the government department. Such intention is laudable. The requirement of Form MM-11/Form-C is a proof that royalty has been paid and the material is purchased from an authorized source either from a holder of a mining lease or from a licence storage holder. The Government Order imposing such conditions is required only for the purpose of undertaking of that work, which is awarded by the Government and its department, for which purpose, the conditions imposed in the Government Order is fair and reasonable and is not arbitrary. The purpose is to ensure that no mineral is excavated/transported and used without payment of royalty. The purpose of providing Form MM-11/Form-C is to ensure that the material and minerals etc. used by the contractors in the construction works, are royalty paid. It only indicates that such material, which is purchased by the contractors, is legally mined on which royalty has been paid. The object behind the issuance of the Government Order is to see that illegally mined material is not purchased by the contractors and used in the construction works, which is awarded by the Government and its department. This, in our view, is a laudable object and such a stipulation contained in the Government Order is to check the illegal mining. Consequently, the Government Order dated 15th of October 2015 directing further that if mineral is not purchased from a valid source and without production of Form MM-11, the cost of material to the extent of five times royalty would become payable by the contractors. This imposition is in terms of Section 21 (5) of the Act of 1957. The said provision clearly indicates that where any person raise without any lawful authority, any mineral from any land, then such person would be liable to pay not only the royalty but also the price thereof. The word 'raise' means 'move' and therefore, if any person moves any mineral without a valid Form MM-11 or Form-C in which case the person would not only be liable to pay royalty but would also be liable to pay the price of the material. In the instant case, by the Government Order, the price of the material is equivalent to five times the royalty, which is not arbitrary.

27. The submission of the learned counsel for the petitioners that they are purchasing raw-material from the stone crushers, who are purchasing the same from the holders of a mining lease/mining permit through Form MM-11 and that these stone crushers cannot further issue any Form MM-11 to the petitioners is misconceived inasmuch as the stone crushers are liable to take a licence for storage of minerals under the Rules of 2002. Once the stone crushers obtain a licence for storage of minerals, they would be obliged to issue Form-C under Rule 5 of the Rules of 2002 after obtaining necessary book of transit pass from the appropriate authority under Rule 4.

28. We find that a similar circular was issued by the State of Rajasthan for deduction of royalty from the bills of contractors, who were using minerals without submitting proof of the fact that royalty was paid on

such minerals. The said circular was held to be a valid circular issued in public interest by the Supreme Court in **State of Rajsthan and another Vs. Deep Jyoti Company and another** reported in (2016) 6 SCC 120. In paragraph 11, the Supreme Court held as under:-

"11. The minor minerals removed from the quarries, admittedly are the property of the Government and the same cannot be removed and used without payment of royalty. It is, therefore, the duty of the Government to ensure that only royalty paid minerals are used in the work and the purpose of issuing such Circular was to avoid pilferage/leakage of revenue because royalty can be very conveniently evaded by the contractors either by not purchasing the material from the mining leaseholders or obtaining it from unauthorised excavators. In case, if the contractor purchases the material from unauthorised person who has not paid royalty, there would be loss to the public exchequer and the circular was issued to check evasion or loss to the public exchequer. Such condition cannot be said to be unreasonable and arbitrary and therefore, no prejudice could be said to have been caused to the contractors."

29. In the light of the aforesaid, reliance placed by the petitioners of the decision of the Division Bench of this Court in Abhimanyu Singh and 12 others (supra) is misconceived. The contention that the Division Bench held that the payment of royalty to the extent of five times is illegal, is misconceived. The Division Bench had only noted the submission of the petitioner and held that there was no illegality in the Government Order and that it would be the responsibility on the part of the contractors to ensure that minerals are purchased through the authorized mining lease holder/suppliers on which royalty has been paid. The Division Bench also held that the petitioner of that writ petition should ensure that the royalty has been paid and copy of the Form MM-11 should be provided, failing which, they would have to pay the penalty. The Government Order dated 15th October 2015 only provides for obtaining Form MM-11. We are of the opinion that if a contractor purchases royalty paid minor minerals from a licence holder for storage of minerals against Form-C, the same should be accepted by the authority as an evidence showing the payment of royalty.

30. The Government Order dated 15th October 2015 only provides for obtaining Form MM-11. We are of the opinion that if a contractor purchases royalty paid minor minerals from a licence holder for storage of minerals against Form-C, the same should be accepted by the authority as an evidence depicting the payment of royalty. The Government Order dated 15th October, 2015 should be read accordingly, namely, that if the contractors produces Form MM-11 or Form-C evidencing payment of royalty, the same should be accepted by the authority while processing the bills of the contractors. We, accordingly, direct the Chief Secretary to issue a clarification in this regard to all the Principal Secretaries and the Secretaries of the Government of U.P. and to the Divisional Commissioners and the District Magistrates in the State of U.P. immediately within four weeks from the date of production of a certified copy of this order. The learned Standing Counsel will ensure that a certified copy of this order is sent to the Chief Secretary within two weeks.

31. For the reasons stated aforesaid, we do not find any merit in the writ petitions. All the writ petitions fail and are hereby dismissed. There shall be no order as to cost.

(2016) 8 ILRA 225
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.08.2016

BEFORE

THE HON'BLE V.K. SHUKLA, J.
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Writ C No.- 20805 Of 2011

Janta Chini Mill Mazdoor Sangh & Anr.	Versus	...Petitioners
Industrial Finance Corporation Of India & Ors.		...Respondents

Counsel for Petitioners:

Manish Kumar Nigam, Arun Kumar Gupta, Ashok Kumar

Counsel for Respondents:

SC, Anoop Trivedi, Chandan Sharma, Gyan Prakash, O.P.Misra, Praveen Shukla, Ravindra Singh, Santosh Kumar Singh, Santosh Kumar Srivastava, Satish Chaturvedi, Vr Tiwari

Held

SARFAESI Act is a complete code for enforcement of security interest, and secured creditors can enforce rights **without court intervention**.

Section 13(9) SARFAESI Act already incorporates Sections 529 & 529A of the Companies Act, thereby protecting workmen's dues in cases of liquidation.

Workmen and cane growers cannot claim pari passu distribution of sale proceeds under SARFAESI proceedings **unless the company is in liquidation**.

Where **no winding up proceedings are pending**, workmen and other claimants **do not attain status of secured creditors** and cannot seek distribution from SARFAESI sale proceeds.

In absence of liquidation, **workmen and cane growers are treated as unsecured creditors**, and their dues must be recovered through statutory mechanisms provided under respective laws.

The High Court **cannot expand statutory provisions or legislate** by extending Companies Act provisions (Sections 529, 529A) to SARFAESI proceedings beyond what is expressly provided.

Remedy against SARFAESI proceedings lies under **Section 17 of the SARFAESI Act**, not by invoking writ jurisdiction directly in such disputes.

Sale proceedings under SARFAESI Act cannot be quashed merely to protect workmen's dues when statutory framework already governs distribution.

Secured creditors are **entitled to utilize sale proceeds**, subject to statutory provisions; courts cannot impose additional distribution mechanisms.

Workmen and cane growers are **free to recover dues through appropriate statutory forums**, such as recovery as arrears of land revenue.

Court may issue **equitable directions** (e.g., asking company to frame scheme for payment of dues), but cannot override statutory scheme.

CASE LAW CITED

Transcore v. Union of India, (2008) 1 SCC 125

Pegasus Assets Reconstruction Pvt. Ltd. v. Haryana Concast Ltd., (2016) 4 SCC 47
United Bank of India v. Satyawati Tandon, (2010) 8 SCC 110
Bank of Maharashtra v. Pandurang Keshav Gorwardkar, (2013) 7 SCC 754
Central Bank of India v. Siriguppa Sugars & Chemicals Ltd., (2007) 8 SCC 353
Union of India v. Deoki Nandan Aggarwal, AIR 1992 SC 96
District Mining Officer v. Tata Iron & Steel Co., (2001) 7 SCC 358
State of M.P. v. Jaora Sugar Mills Ltd.

(Delivered by Hon'ble V.K. Shukla, J.
 &
 Hon'ble Mahesh Chandra Tripathi, J.)

1. Janta Chini Mill Mazdoor Sangh Gauri Bazar, Deoria through its Secretary is before this Court, assailing the validity of the proceedings so undertaken under SARFAESI Act, 2002 wherein steps have been undertaken for sale of two Units of the Company i.e. Gauri Bazar, District Deoria and Kathkuiyan, District Kushi Nagar in following terms:-

"(I) Issue a writ, order or direction in the nature of certiorari quashing the notice dated 13.01.2011 published in newspaper (Annexure No.4 to this writ petition), notice dated 03.03.2011 published in Hindi Daily Dainik Jagaran dated 08.03.2011 (Annexure-5 to this writ petition) and notice dated 15.03.2011 published in Hindi Daily Dainik Jagaran dated 16.03.2011 (Annexure-6 to this writ petition).

(II) Issue a writ, order or direction in the nature of mandamus commanding the respondent no.1 to restrain from proceedings under the provision of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 for realization of its alleged dues against the company.

(II-A) Issue a writ, order or direction in the nature of mandamus commanding the respondent no.1 to make the payment of the worker dues which has already been quantified and adjudicated and finally decide amounting of Rs. 14.9034.

(II-B) Issue a writ, order or direction in the nature of mandamus directing the Deputy Labour Commissioner, Gorakhpur to realise (execute) and distribute the amount which has already been adjudicated by him in different cases to the workers.

(III) Issue any other suitable writ, order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case.

(IV) to award costs of the writ petition to the petitioners".

2. Brief background of the litigation in question is that M/s Kanpur Sugar Works Ltd was incorporated in the year 1894 as Joint Stock Company and in 1896 a Sugar Refinery Unit was also set up at Kanpur by M/s Beg Sutherland and Company Ltd. Later on M/s Beg Sutherland and

Company Ltd. merged with M/s British India Corporation Ltd. on 14.08.1960 referred to hereinafter as B.I.C. B.I.C. was having control over the Company in question. M/s Kanpur Sugar Works Ltd (hereinafter referred to as the Company) was having four units viz. Marhowrah (Bihar), Padrauna, Gauri Bazar and Kathkuiyan (U.P.). The financial condition of the Company was bad and in this background company was registered with the Board for Industrial and Financial Reconstruction, New Delhi (hereinafter referred as BIFR) bearing Case No. 99/92 under Sick Industrial Companies (Special Provisions) Act 1985 (hereinafter after referred to as SICA). The BIFR in its turn proceeded to sanction 1st scheme viz. SS-98 under which the management of all the four units was to be transferred in favour of M/s Gangotri Enterprises Ltd. (GEL). On account of non-infusion of funds, SS-98 was declared as "Failed" by BIFR in the year 2000 and BIFR directed OA/MA(IFCI) to re-advertise for change of Management of the Company. Subsequently, BIFR sanctioned another revival scheme viz sanctioned scheme-2003 (SS-03) under which management of only two units viz Mahrowarh (Bihar) and Padrauna (U.P.) was transferred in the name of M/s JHV Distilleries and Sugar Mills Ltd (JDSML). Therefore, possession of these two units was handed over by M/s Gangotri Enterprises Ltd to M/s JHV Distilleries and as far as Gauri Bazar and Kathkuiyan units are concerned, BIFR directed that the assets of these units be sold for the payment of balance liabilities of company. In the year 2008, due to non -implementation of SS-03 fully, BIFR vide order dated 08.08.2008, declared the SS-03 as failed.

3. Petitioners are submitting that two units namely Khatkuniya and Padrauna have already been sold and given to JHVD SML and JVH and they have taken possession of the Company and dues of IFCI and other secured creditors have already been settled on OTS basis and secured creditors including IFCI have acknowledged of payment being made.

4. This much fact is also reflected that IFCI who was secured creditor proceeded to initiate proceeding under SARFAESI Act for sale of two units of the company i.e. Gauri Bazar and Kathkuiyan. Petitioners' at this juncture came to this Court, complaining therein that large scale workers dues is outstanding against the Company in question and their interest would be seriously prejudiced, if the amount in question fetched from the sale is permitted to be lifted, without settling the workers dues. The aforementioned writ petition was heard by this Court on 16.04.2011. Relevant extract of order passed is as follows:-

"Heard Shri Manish Kumar Nigam for the petitioners. Shri O.P. Misra appears for Industrial Finance Corporation of India (IFCI).

The petitioners are the workmen of Gauri Bazar Unit of Kanpur Sugar Works Ltd. By this writ petition they have challenged the sale of the mortgaged assets of the Gauri Bazar Unit pursued by IFCI, as secured creditor for realisation of their secured loans under SARFAESI Act, 2002.

A preliminary objection has been raised by Shri O. P. Misra appearing for IFCI, on the maintainability of the writ petition in view of the alternative remedy of filing an appeal under Section 17 of the SARFAESI Act. He relies upon judgments in Mardia Chemicals Ltd. Vs. Union of India, (2004) 4 SCC 311, and Union Bank of India Vs. Satyawati Tandon, (2010) 8 SCC 110. He

submits that the Supreme Court had taken objection to the interference of the High Court in recoveries initiated under the SARFAESI Act, 2002 as special act for realisation of the dues from the mortgaged assets without taking recourse to the Court. It was held that any objection to the recovery under the SARFAESI Act, 2002 may be taken in appeal under Section 17. Any person interested in the mortgaged property can take recourse to the provisions of the appeal under the SARFAESI Act, 2002.

Shri Manish Kumar Nigam, learned counsel for the petitioner submits that Kanpur Sugar Works Ltd. has four units. The company fell into losses and was declared as sick industrial company under the Sick Industrial Companies (Special Provisions) Act, 1985. The IFCI was appointed as operating agency. The IFCI prepared a rehabilitation scheme in terms of which two of the units of the company were rehabilitated by providing OTS of the dues of the secured creditors and also providing for the dues of the workmen and other dues. The rehabilitation scheme in respect of remaining two units namely Gauri Bazar and Kathkuiyan did not succeed. It is submitted that the proceedings are still pending in BIFR. Shri Om Prakash Misra submits that the proceedings have since abated in pursuance to the amendment in Section 51 (1) of the Sick Industrial Company (Special Provisions) Act, 1985.

The IFCI is proceeding to sell the mortgaged assets of the two remaining units under the SARFAESI Act purportedly with the consent of majority of the secured creditors.

Shri Manish Kumar Nigam submits that in none of the cases decided by the Supreme Court the question of workmen's interest in sale of assets of the company even if they are mortgaged under the SARFAESI Act has been considered in terms of Sections 529, 530, 531 and 531A of the Companies Act, 1956 by which right of the workmen to realise their dues has been recognised to be at par with secured creditors and that amount received by sale of the assets have to be shared *pari pasu* between the secured creditors and the workmen and thereafter the Government dues are to be realised. He submits that in the present case the workmen of two units of which dues were worked out in the Draft Rehabilitation Scheme approved in the order of BIFR dated 28.1.2003 to be Rs.483.90 lacs for Gauri Bazar Unit and 325.26 lacs for Kathkuiyan Unit, and cane arrears at Rs.161.30 lacs for Gauri Bazar Unit and Rs.569.55 lacs for Kathkuiyan unit, as against secured loans of IFCI, IDBI, ICICI of Rs.3277.20 lacs of all the four units, Rs.473 lacs of SBI and Rs.220.60 of Sugar Development Fund. Shri Manish Kumar Nigam further submits that the State Government is also under statutory liability under the U.P. Sugarcane (Supply) Act for realisation of the arrears of sugarcane dues and commission of the Cane Cooperative Unions.

The sale of the two units has been advertised and fixed for 18th April, 2011.

In this writ petition the other secured creditors, workmen of the Kathkuiyan unit and the State Government through the Cane Commissioner and the Cane Development Societies are not parties. Since there is nothing to show that they have also challenged the sale, while directing that they should be impleaded as parties, we propose to protect the interest of all the secured creditors, workmen and Government dues.

Shri O. P. Misra states that IFCI has written to Shri Rama Shankar Singh, Secretary, Janta Chini Mill Mazdoor Sangh, Gouri Bazar, Deoria, U.P. (the petitioner) on 18.3.2011 that after sale of the assets of the two units the dues of secured creditors, workmen and other statutory dues will be settled as per the provisions of law.

Shri Manish Nigam objects and states that the assurance is entirely vague, and that the secured creditors even if they are proceeding to sell two units, treating the proceedings in BIFR to have abated, must provide for workmen's dues to be paid.

Prima facie we find substance in the contention of the workmen that even after sale under the SARFAESI Act, 2002 the amount realised has to be given same treatment, which is provided under the Companies Act, 1956, which is Central Act and is the general act governing the field recognising the rights of the workers in terms of Part IV of the Constitution of India.

Section 37 of the SARFAESI Act, 2002 provides that application of other laws shall not be barred and that the provisions of the Act shall be in addition to and not in derogation to the Acts specified in Section 37 and any other laws for the time being enforced. These other laws will include the Companies Act, 1956.

Let Shri Manish Nigam implead all the concerned parties including other secured creditors, workmen of the Kathkuiyan unit and the State of U.P. through the Secretary, Sugarcane; Commissioner of Sugarcane, Government of U.P. and the concerned Cane Development Societies within ten days.

In the meantime, the sale under the SARFAESI Act, 2002 may be held; the entire amount realised from sale may be retained by IFCI, and will be kept in no lien account to be disbursed in accordance with the orders to be passed by the Court.

All the respondents will file their reply in three weeks.

List on May 10th, 2011".

5. Thereafter, again this Court has considered the matter on 09.05.2012 and has passed following order.

"The two units of the company, which is subsidiary of British India Corporation Ltd. have since been sold to consortium of the secured creditors with IFCI Ltd. as lead creditor for a sum of Rs.17.26 crores and Rs.7 crores and odd respectively. The entire amount under the orders of the Court passed on 16th April, 2011 has been deposited in no lien account with IFCI to await its distribution.

The impleadment application of Rajendra Ispat Pvt. Ltd., the highest bidder of both the units, which has deposited the amount is allowed.

The intervention applications of Cooperative Cane Development Union Ltd., Dudhai, Baitalpur and Katkuiyan, Distt. Kushi Nagar filed through Shri Ravindra Singh dated 4.8.2011 are allowed.

The application filed by Rajendra Ispat Pvt. Ltd. shows that both the units of the company at Gauri Bazar, and Kathkuiyan, Distt. Deoria are under attachment for recovery of the workmen's dues. Due to these attachment orders the sale deed of the property has not been executed in its favour.

Prima facie we find that as only two units of the company namely Kanpur Sugar Works Ltd., which is subsidiary of these BIC have been sold, some arrangements should be made to protect the interest of the secured creditors and workmen, who have pari passu charge, as well as the EPF Commissioner and Cane Unions, who have first charge over the assets.

We are informed that the workmen have not allowed Rajendra Ispat Pvt. Ltd. to enter the units of which sale deeds have not been executed as yet. We are also informed that the Deputy Labour Commissioner has sent orders for recovery of the workmen's dues, to the IFCI.

The amount realised from the sale of the units under the SARFAESI Act, 2002 has to be distributed in accordance with the provisions of Section 13 (9) of the Act. The distribution, however, has to be made in accordance with the principles of distributing the dividend under Companies Act, 1956 for which the dues of all stake holders have to be ascertained.

In order to pass any further orders, it is necessary to implead the British India Corporation, which is the promoter of the unit. Let the petitioner implead British India Corporation (BIC) as party respondent and take steps to serve it. Notices will be sent by registered post as well as by Dasti summons, returnable on 29th May, 2012.

In the meantime, we direct that the amount realised by the IFCI from sale under the Securitisation Act, 2002, kept in no lien account will be deposited in an interest bearing fix deposit, subject to same condition that the account will continue to be a no lien account.

List on 29.5.2012".

6. Matter has once again been considered by this Court on 07.09.2012 and following order has been passed.

"Shri Satish Chaturvedi has filed an application on behalf of the British India Corporation Ltd. for recalling the order dated 9.5.2012 by which the Court directed the British India Corporation Ltd. to be impleaded as party respondent as the promotor in majority shareholder

in Kanpur Textile Ltd. of which two units have been sold under the SARFAESI Act giving rise to this writ petition by the workmen claiming their dues.

From the proceedings of BIFR we find that the first scheme in which British India Corporation was required to divest its shareholding failed; the second scheme also failed. In the third scheme shares were to be sold to JSV Sugar of JSL Group. The sale has not yet materialised as 38.43% of the total shares of 47.10% held by British India Corporation in Kanpur Textiles Ltd. are pledged with the State Bank of India.

From the order of BIFR dated 23rd April, 2012 filed along with the application filed by British India Corporation, we find that BIFR was unable to find out (para 12) as to who was the Chairman of the Company at the relevant period and his address. The IFCI was required to file reply within two weeks. The BIFR issued notice to the Controller of Accounts, Ministry of Textiles, New Delhi, and had fixed 9.8.2012 for hearing.

We are unable to appreciate as to why the BIFR is keeping the proceedings pending, when two schemes have already failed and that two out of four sugar units have been sold under the SARFAESI Act. Without entering into the merits of the case, we may observe that the BIFR must consider the facts stated in its orders to make up its mind and to consider to recommend the company for winding up under Section 20 of the Sick Industrial Companies (Special Provisions) Act, 1985 to the High Court.

In the facts and circumstances, we reject the application of British India Corporation Ltd. to recall the order dated 9.5.2012 by which it was directed to be impleaded as party respondent and direct it to file detailed counter affidavit considering that the assets of the two units, have been sold under the SARFAESI Act to IFCI.

Shri Manish Nigam appearing for the petitioner will give details of the workmen's dues. Shri Ravindra Singh appearing for the cane unions is also required to give details of the dues of the Cane Unions. We also direct the State respondents to give details of its dues vis-a-vis the two units, which have been sold.

List for orders on 8th October, 2012.

Shri Chandan Sharma representing M/s Rajindra Ispat Pvt. Ltd., the purchaser of the two units states that sale deed has not been executed by the IFCI so far, and that workmen are not allowing them to enter the premises.

We do not propose to enter into the issue with regard to the execution of the sale deed as it is the matter between the secured creditor and purchaser. We have been informed that the auction has not been challenged and that amount is still lying in no lien account with the IFCI under the interim orders passed in this writ petition.

So far as obstructions created by the workmen are concerned, we are prima facie of the opinion that at this stage, if the attachment orders have been passed on the orders of the Labour Commissioner regarding workmen's dues and the purchaser has no intention to run the sugar mills, no directions are required to be issued, regarding possession".

7. Before this Court, by means of amendment application, details of workers dues as quantified has been specified and further intervention application has been moved on behalf of Co-operative Cane Development Union giving therein full details of the fact in reference of outstanding cane dues i.e. required to be realised by the Company in question. This is accepted position that the property that has been put to sale under the SARFAESI Act, qua the same, sale deed has been executed and as workmen on the spot are not permitting the auction purchaser to enter into the units of which sale deeds have been executed for lifting of the scrap etc, they have moved an application for giving protection for lifting of scrap in question.

8. On the basis of pleadings that have come forward, present writ petition has been taken up for final hearing/disposal with the consent of the parties.

9. Sri Arun Kumar Gupta, learned counsel for the petitioners submitted with vehemence that in the present case interest of the workers should be protected by this Court in all eventuality and all the dues of secured creditors including IFCI and other Banks have already been paid and settled, then there is no occasion/reason for proceeding under SARFAESI Act, 2002, in this background workers interest be protected and workers be treated as secured creditor and dues should be ensured to be paid in consonance with the provision as contained under Sections 529-A of the Companies Act.

10. Sri Ravindra Singh, learned counsel for the Cooperative Cane Development Union Ltd. Baitalpur, Deoria submitted with vehemence that in view of the judgement of Apex Court rendered in the case ***State of Madhya Pradesh Vs Jaora Sugar Milks Ltd and others (1996) INSC 1285*** interest of sugar cane grower be protected by all means and entire outstanding sugarcane dues be ensured by asking IFCI to release the outstanding cane dues payment from the realised amount of M/S. Kanpur Sugar Works.

11. Sri O.P. Mishra, learned counsel for the I.F.C.I Ltd. and the Asset Reconstruction Company submitted before this Court that as far as rights of secured creditor is concerned, once there is no liquidation proceeding pending and two of the units are still in operation, then recovery in question as claimed by the petitioners as well as intervenors should be pressed and brought to its logical conclusion in accordance with law and in proceeding under SARFAESI Act prayer that has been so made, cannot be accorded and it is wrong to say that entire amount under OTS stands paid, accordingly writ petition be dismissed as it has been framed and drawn and petitioner as well as intervenor should avail the remedy as is provided for under the relevant statutory forum.

12. Sri Anurag Khanna, Senior Advocate, assisted by Sri Syed Fahim Ahmad, Advocate submitted that relief as asked for cannot be accorded by this Court, the petitioners as well as

intervenor for recovery of their dues will have to invoke the remedial forum provided for under the statutory provision holding the field. Apart from this he submitted that in the garb of pendency of proceedings, on the spot they are not being permitted to remove the scrap and accordingly on this aspect of the matter this Court should intervene and proceed to issue requisite directives.

13. After respective arguments have been advanced, issue that is engaging our attention is as to when proceeding under SARFAESI Act, 2002 have been undertaken, can in such proceeding dues of the workmen as well as sugar cane grower from debtors company can be directed to be discharged from the sale proceeds so realised under the SARFAESI Act, 2002.

14. Here undisputed factual situation that is so emerging in the present case is that initially company in question has been subjected to the proceeding under the provision of SICA, 1985 and thereafter scheme in question for making the company viable has been framed from time to time and as scheme in question framed was not found viable time and again, same has been dropped and ultimately this much fact is reflected that on initiation of proceedings under SARFAESI Act, 2002 in terms of the provision as contained under the proviso to Section 15 of SARFAESI Act, 2002, proceedings have abated.

15. Thus, situation as of now on the ground is there are no proceedings pending either under Company Act or under the provision of SICA, 1985 and proceedings under SARFAESI Act, 2002 have been undertaken by putting the property to auction wherein M/s Rajendra Ispat Pvt. Ltd. has participated in the auction proceeding and its bid has been accepted and transaction/document has also been executed in its favour. The issue as already mentioned above is that once proceedings under SARFAESI Act, 2002 have been undertaken, can in such proceeding dues claimed by the workers as well as of sugar cane grower be adjusted from the sale proceeds in question, said issues can be more conveniently answered in the light of statutory provisions, namely Recovery of Debts Due to Bank and Financial Institutions Act 1993; Companies Act 1956; SARFAESI Act, 2002, keeping in view of the fact that as far as claim of workmen is concerned, their claim have been settled by the competent authority under U.P. Industrial Peace (Timely Payment of Wages) Act, 1978 and as far as claim of Sugar Cane grower are concerned, their claim has been settled under U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 and under both the provisions, once there are dues outstanding that has been so determined, said amount can be recovered by taking recourse to coercive measures by way of arrears of land revenue. Relevant provisions are being looked into:-

DRT Act 1993

Section 2(d) of the 1993 Act, defines "bank', which, inter alia, means a banking company. Under Section 2(e) "banking company' has the meaning assigned to it in clause (c) of Section 5 of the Banking Regulation Act, 1949. "Financial institution' is defined in Section 2(h). The "tribunal' established under Section 3 is known as Debts Recovery Tribunal. Under Section 17, the tribunal (DRT) has been conferred jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions. Section 18 bars the jurisdiction of all other courts and other authorities except

the Supreme Court and High Court exercising jurisdiction under Articles 226 and 227 of the Constitution in relation to the matters specified in Section 17.

Section 19 provides a comprehensive procedure before the DRT for making an application where a bank or a financial institution has to recover any debt from any person. It also enables DRT to issue certificate of recovery, its execution and all such orders and directions as may be necessary to give effect to its orders or to prevent abuse of its process or to secure the ends of justice. Section 19 is reproduced as under:

"Section 19. Application to the Tribunal.--(1) Where a bank or a financial institution has to recover any debt from any person, it may make an application to the Tribunal within the local limits of whose jurisdiction--

Where a certificate of recovery is issued against a company registered under the Companies Act, 1956 (1 of 1956) the Tribunal may order the sale proceeds of such company to be distributed among its secured creditors in accordance with the provisions of section 529A of the Companies Act, 1956 and to pay the surplus, if any, to the company.

The Presiding Officer shall issue a certificate under his signature on the basis of the order of the Tribunal to the Recovery Officer for recovery of the amount of debt specified in the certificate.

The Tribunal may make such orders and give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice."

Section 22, inter alia, empowers the DRT to regulate its own procedure. It is not bound by the procedure laid down by the Code of Civil Procedure, 1908 ("CPC") but is guided by the principles of natural justice and subject to the provisions of the 1993 Act and the rules framed thereunder. It has same powers as are vested in a civil court under the CPC in respect of the matters set out in Section 22(2).

Section 25 provides the modes of recovery of debts. The Recovery Officer on receipt of the copy of the recovery certificate is required to proceed to recover the amount of debt specified in the certificate by one or more of the modes set out in that Section which includes attachment and sale of the movable or immovable property/properties of the certificate debtor. Under Section 28, the Recovery Officer may recover the amount of debt under the certificate by one or more of the modes provided thereunder without prejudice to the modes of recovery specified in Section 25. Section 28(4) provides that the Recovery Officer may apply to the court in whose custody there is money belonging to the certificate debtor for payment to him of the entire amount of such money, or if it is more than the amount of debt due an amount sufficient to discharge the amount of debt so due.

Section 34 gives the 1993 Act overriding effect. Sub-section(1) thereof provides that the provisions of the 1993 Act shall have the effect notwithstanding anything inconsistent therewith contained in any other law or in any instrument having effect by virtue of any law. Sub-section (2) of Section 34 provides that the provisions of the 1993 Act or the rules made thereunder shall be in addition to and not in derogation of the enactments stated therein.

Section 36 empowers the central government to make rules to carry out the provisions of the 1993 Act. In exercise of the powers conferred under Section 36, the central government has framed the Debts Recovery Tribunal (Procedure) Rules, 1993.

Companies Act, 1956

The Companies Act has undergone substantial amendments by the Companies (Second Amendment) Act 2002 (11 of 2003) but no notification has been issued so far bringing Act 11 of 2003 into effect. Though Section 441 has been substituted by Section 56 of the above Amendment Act but since it has not come into force, we reproduce Section 441 as it stood prior to amendment:

"441. Commencement of winding up by Court-(1) Where, before the presentation of a petition for the winding up of a company by the Court, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the Court, on proof of fraud or mistake, thinks fit to direct otherwise, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

(2) In any other case, the winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up."

Section 443 provides for powers of Court on hearing petition which, inter alia, enables it to make an order for winding up the company and also make an interim order that it thinks fit.

The effect of the winding up order is provided in Section 447. Accordingly, an order for winding up a company operates in favour of all the creditors and all the contributories of the company as if it has been made on the joint petition, of a creditor and of a contributory.

The appointment of official liquidator so far as it relates to winding up of a company is dealt with in Section 448. Section 451 deals with general provisions as to liquidators. Inter alia, it provides that the liquidator shall conduct the proceedings in winding up the company and perform such duties in reference thereto as the court may impose.

Section 456 provides that where a winding up order has been made or where a provisional liquidator has been appointed the liquidator or the provisional liquidator, as the case

may be, shall take into his custody or under his control all the properties, effects and actionable claims to which

the company is or appears to be entitled.

Section 457 empowers the liquidator to do acts stated in paragraphs (a) to (e) of sub-section (1) with the sanction of the court. In a winding up by the court, the liquidator has power to do all acts set out in clauses (i) to (v) of sub-section (2).

Section 529, to the extent it is relevant, reads as follows:

"Section 529 - Application of insolvency rules in winding up of insolvent companies. (1) In the winding up of an insolvent company, the same rules shall prevail and be observed with regard to-

(c) the respective rights of secured and unsecured creditors; as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent:

Provided that the security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen to the extent of the workmen's portion therein, and, where a secured creditor, instead of relinquishing his security and proving his debt, opts to realise his security,- (a) the liquidator shall be entitled to represent the workmen and enforce such charge;

(b) any amount realised by the liquidator by way of enforcement of such charge shall be applied rateably for the discharge of workmen's dues; and

(c) so much of the debt due to such secured creditor as could not be realised by him by virtue of the foregoing provisions of this proviso or the amount of the workmen's portion in his security, whichever is less, shall rank pari passu with the workmen's dues for the purposes of section 529A.]

(2)

(3) For the purposes of this section, section 529A and section 530.

(a) "workmen", in relation to a company, means the employees of the company, being workmen within the meaning of the Industrial Disputes Act, 1947 (14 of 1947);

(b) "workmen's dues", in relation to a company, means the aggregate of the following sums due from the company to its workmen, namely:-

(i) to (iv)

(c) "workmen's portion", in relation to the security of any secured creditor of a company, means the amount which bears to the value of the security the same proportion as the amount of the workmen's dues bears to the aggregate of-

(i) the amount of workmen's dues; and

(ii) the amounts of the debts due to the secured creditors.

SARFAESI Act, 2002

The SARFAESI Act, which came into force from 21.06.2002, was enacted to provide procedures to the Banks to recover their security interest from the debtors and their collateral security assets as provided under the provisions of the Act. The scope of the Act was explained by Apex Court in the case of *Transcore vs. Union of India & another 2008(1) SCC 125* as under:

"12. The NPA Act, 2002 is enacted to regulate securitization and reconstruction of financial assets and enforcement of security interest and for matters connected therewith. The NPA Act enables the banks and FIs to realize long-term assets, manage problems of liquidity, asset-liability mismatch and to improve recovery of debts by exercising powers to take possession of securities, sell them and thereby reduce non-performing assets by adopting measures for recovery and reconstruction. The NPA Act further provides for setting up of asset reconstruction companies which are empowered to take possession of secured assets of the borrower including the right to transfer by way of lease; assignment or sale. The said Act also empowers the said asset reconstruction companies to take over the management of the business of the borrower....

13. Non-performing assets (NPA) are a cost to the economy. When the Act was enacted in 2002, the NPA stood at Rs1.10 lakh crores. This was a drag on the economy. Basically, NPA is an account which becomes non-viable and non-performing in terms of the guidelines given by RBI. As stated in the Statement of Objects and Reasons, NPA arises on account of mismatch between asset and liability. The NPA account is an asset in the hands of the bank or FI. It represents an amount receivable and realizable by the banks or FIs. In that sense, it is an asset in the hands of the secured creditor. Therefore, the NPA Act, 2002 was primarily enacted to reduce the nonperforming assets by adopting measures not only for recovery but also for reconstruction. Therefore, the Act provides for setting up of asset reconstruction companies, special purpose vehicles, asset management companies, etc. which are empowered to take possession of secured assets of the borrower including the right to transfer by way of lease, assignment or sale. It also provides for realization of the secured assets. It also provides for takeover of the management of the borrower company.

24." Thus, it becomes clear that the SARFAESI Act is meant to operate as a tool for banks and ensures a smooth debt recovery process. The provisions of SARFAESI Act make its

purport amply clear, specifically under the provisions of Sections 13(2) and 13(4) of the Act, which read as under:

13. Enforcement of security interest

(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under subsection (4).

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

(3A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

PROVIDED that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A.

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:--

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

PROVIDED that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

PROVIDED FURTHER that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt.

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

(5) Any payment made by any person referred to in clause (d) of sub-section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.

(6) Any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

(7) Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

(8) If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset.

(9) In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth

in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

PROVIDED that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956):

PROVIDED FURTHER that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of section 529A of that Act:

PROVIDED ALSO that the liquidator referred to in the second proviso shall intimate the secured creditors the workmen's dues in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

PROVIDED ALSO that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

PROVIDED ALSO that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

Explanation : For the purposes of this sub-section,--

(a) "record date" means the date agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding on such date;

(b) "amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

(10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.

(11) Without prejudice to the rights conferred on the secured creditor under or by this section, the secured creditor shall be entitled to proceed against the guarantors or sell the

pledged assets without first taking any of the measures specified in clauses (a) to (d) of sub-section (4) in relation to the secured assets under this Act.

(12) The rights of a secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.

(13) No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor.

16. Based on these statutory provisions, the interplay of these statutory provisions vis-a-vis the workers dues has been subject matter of consideration before the Apex Court, and as there has been divergence of opinion, the Apex Court in the case of **Bank of Maharashtra Vs. Pandurang Keshav Corwardkar and others (2013)7 SCC 754** has dealt with the issue and answered as follows:-

67. In light of the above discussion, we sum up our conclusions thus:

67.1 If the debtor company is not in liquidation nor any provisional liquidator has been appointed and merely winding up proceedings are pending, there is no question of distribution of sale proceeds among secured creditors in the manner prescribed in Section 19(19) of the 1993 Act.

67.2 Where a company is in liquidation, a statutory charge is created in favour of workmen in respect of their dues over the security of every secured creditor and this charge is pari passu with that of the secured creditor. Such statutory charge is to the extent of workmen's portion in relation to the security held by the secured creditor of the debtor company.

67.3 The above position is equally applicable where the assets of the debtor company have been sold in execution of the recovery certificate obtained by the bank or financial institution against the debtor company when it was not in liquidation but before the proceeds realized from such sale could be fully and finally disbursed, the company had gone into liquidation. In other words, pending final disbursement of the proceeds realized from the sale of security in execution of the recovery certificate issued by the debt recovery tribunal, if debtor company becomes company in winding up, Section 529A read with Section 529(1)(c) proviso come into operation and statutory charge is created in favour of workmen in respect of their dues over such proceeds.

67.4. The relevant date for arriving at the ratio at which the sale proceeds are to be distributed amongst workmen and secured creditors of the debtor company is the date of the winding up order and not the date of sale.

67.5. The conclusions (ii) to (iv) shall be mutatis mutandis applicable where provisional liquidator has been appointed in respect of the debtor company.

67.6 Where the winding up petition against the debtor company is pending but no order of winding up has been passed nor any provisional liquidator has been appointed in respect of such company at the time of order of sale by DRT and the properties of the debtor company have been sold in execution of the recovery certificate and proceeds of sale realized and full disbursement of the sale proceeds has been made to the concerned bank or financial institution, the subsequent event of the debtor company going into liquidation is no ground for reopening disbursement by the DRT.

67.7. However, before full and final disbursement of sale proceeds, if the debtor company has gone into liquidation and a liquidator is appointed, disbursement of undisbursed proceeds by DRT can only be done after notice to the liquidator and after hearing him. In that situation if there is claim of workmen's dues, the DRT has two options available with it. One, the bank or financial institution which made an application before DRT for recovery of debt from the debtor company may be paid the undisbursed amount against due debt as per the recovery certificate after securing an indemnity bond of restitution of the amount to the extent of workmen's dues as may be finally determined by the liquidator of the debtor company and payable to workmen in the proportion set out in the illustration appended to Section 529(3)(c) of the Companies Act. The other, DRT may set apart tentatively portion of the undisbursed amount towards workmen's dues in the ratio as per the illustration following Section 529(3)(c) and disburse the balance amount to the applicant bank or financial institution subject to an undertaking by such bank or financial institution to reconstitute the amount to the extent workmen's dues as may be finally determined by the liquidator, falls short of the amount which may be distributable to the workmen as per the above illustration. The amount so set apart may be disbursed to the liquidator towards workmen's dues on ad hoc basis subject to adjustment on final determination of the workmen's dues by the liquidator.

67.8. The first option must be exercised by DRT only in a situation where no application for distribution towards workmen's dues against the debtor company has been made by the liquidator or the workmen before the DRT.

67.9. Where the sale of security has been effected in execution of recovery certificate issued by the DRT under the 1993 Act, the distribution of sale proceeds has to be made by the DRT alone in accordance with Section 529A of the Companies Act and by no other forum or authority.

67.10 The workmen of the company in winding up acquire the standing of the secured creditors on and from the date of winding up order (or where provisional liquidator has been appointed, from the date of such appointment) and they become entitled to the distribution of sale proceeds in the ratio as explained in the illustration appended to Section 529(3)(c) of the Companies Act.

67.11. Section 19(19) of the 1993 Act does not clothe DRT with jurisdiction to determine the workmen's claim against the debtor company. The adjudication of workmen's dues against the debtor company in liquidation has to be made by the liquidator. In other words, once the company is in winding up the only competent authority to determine the workmen's dues is the liquidator who obviously has to act under the supervision of the company court and by no other authority.

67.12 Section 19 (19) is attracted only where a debtor company is in winding up or a provisional liquidator has been appointed in respect of such company. If the debtor company is not in liquidation or if in respect of such company no order of appointment of provisional liquidator has been made and merely winding up proceedings are pending, the question of distribution of sale proceeds among secured creditors in the manner prescribed in Section 19(19) of the 1993 Act does not arise.

17. Bare perusal of the relevant para **67.1** of judgement would go to show that if the debtor company is not in liquidation nor any provisional liquidator has been appointed and merely winding up proceedings are pending, there is no question of distribution of sale proceeds among secured creditors in the manner prescribed in Section 19(19) of the 1993 Act. **Para 67.2** deals with where a company is in liquidation, a statutory charge is created in favour of workmen in respect of their dues over the security of every secured creditor and this charge is pari passu with that of the secured creditor. Such statutory charge is to the extent of workmen's portion in relation to the security held by the secured creditor of the debtor company. **Para 67.9** deals with where the sale of security has been effected in execution of recovery certificate issued by the DRT under the 1993 Act, the distribution of sale proceeds has to be made by the DRT alone in accordance with Section 529A of the Companies Act and by no other forum or authority. **Para 67.10** deals with the workmen of the company in winding up acquire the standing of the secured creditors on and from the date of winding up order (or where provisional liquidator has been appointed, from the date of such appointment) and they become entitled to the distribution of sale proceeds in the ratio as explained in the illustration appended to Section 529 (3)(c) of the Companies Act. **Para 67.11** deals with that Section 19(19) of the 1993 Act does not clothe DRT with jurisdiction to determine the workmen's claim against the debtor company. The adjudication of workmen's dues against the debtor company in liquidation has to be made by the liquidator. In other words, once the company is in winding up the only competent authority to determine the workmen's dues is the liquidator who obviously has to act under the supervision of the company court and by no other authority. **Para 67.12** deals with that Section 19 (19) is attracted only where a debtor company is in winding up or a provisional liquidator has been appointed in respect of such company. If the debtor company is not in liquidation or if in respect of such company no order of appointment of provisional liquidator has been made and merely winding up proceedings are pending, the question of distribution of sale proceeds among secured creditors in the manner prescribed in Section 19(19) of the 1993 Act does not arise.

18. Apex Court once again in the case of ***Pegasus Assets Reconstruction Private Limited Vs. Haryana Concast Limited and another (2016) 4 SCC 47*** has held that Sections 9 and 13 of the

SARFAESI Act leaves no manner of doubt that for enforcement of its security interest, a secured creditor has been not only vested with powers to do so without the intervention of the Court or tribunal but detailed procedure has also been prescribed to take care of various eventualities such as when the borrower company is under liquidation. Further there is no lacuna or ambiguity in the SARFAESI Act to warrant reading something more into it. Thus, there is no plausible reason to take recourse to any provisions of the Companies Act and permit interference in proceedings under SARFAESI Act either by Company Judge or liquidator. Section 13(9) of SARFAESI Act fully protects workmen's interests by incorporating scheme of Sections 529 and 529-A of Companies Act, 1956. Relevant para **30 and 31** are extracted below:-

30. Since we have held earlier in favour of views of Delhi High Court, it is not necessary to burden this judgment with the case laws which support that view and have been noted by the High Court. We are in agreement with the submissions advanced on behalf of respondent Kotak Mahindra Bank as well as respondent No.2 that there is no lacuna or ambiguity in the SARFAESI Act to warrant reading something more into it. For the purpose it has been enacted, it is a complete code and the earlier judgments rendered in the context of SFC Act or RDB Act vis-à-vis the Companies Act, cannot be held applicable on all force to the SARFAESI Act. There is nothing lacking in the Act so as to borrow anything from the Companies Act till the stage the secured assets are sold by the secured creditors in accordance with the provisions in the SARFAESI Act and the Rules. At the post sale stage, the rights of the persons or parties having any stake in the sale proceeds are also taken care of by sub-section (9) of Section 13 and its five provisos (not numbered). It is significant that as per sub-section (9) a sort of consensus is required amongst the secured creditors, if they are more than one, for the exercise of rights available under sub-section (4). If borrower is a company in liquidation, the sale proceeds have to be distributed in accordance with the provisions of Section 529A of the Companies Act even where the company is being wound up after coming into force of the SARFAESI Act, if the secured creditor of such company opts to stand out of the winding up proceedings, it is entitled to retain the sale proceeds of its secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of Section 529A of the Company Act. The third proviso is also meant to work out the provisions of Section 529A of the Companies Act, in case the workmen's dues cannot be ascertained, by relying upon communication of estimate of such dues by the liquidator to the secured creditor, who has to deposit the amount of such estimated dues with the liquidator and then it can retain the sale proceeds of the secured assets. The other two provisos also are in aid of the liquidator to discharge his duties and obligations arising under Section 529A of the Companies Act. Thus, it is evident that the required provisions of the Companies Act have been incorporated in the SARFAESI Act for harmonizing this Act with the Companies Act in respect of dues of workmen and their protection under Section 529A of the Companies Act. In view of such exercise already done by the legislature, there is no plausible reason as to take recourse to any provisions of the Companies Act and permit interference in the proceedings under the SARFAESI Act either by the Company Judge or the liquidator. As noted earlier, the Official Liquidator as a representative of the borrower company under winding up has to be associated, not for supplying any omission in the SARFAESI Act but because of express provisions therein as well as in the Rules. Hence the

exercise of harmonizing that this Court had to undertake in the context of SFC Act or the RDB Act is no longer warranted in respect of SARFAESI Act vis-à-vis the Companies Act.

31. The aforesaid view commends itself to us also because of clear intention of the Parliament expressed in Section 13 of the SARFAESI Act that a secured creditor has the right to enforce its security interest without the intervention of the court or tribunal. At the same time, this Act takes care that in case of grievance, the borrower, which in the case of a company under liquidation would mean the liquidator, will have the right of seeking redressal under Sections 17 and 18 of the SARFAESI Act.

19. Apex Court in Pegasus (supra) has clarified that there is no lacuna or ambiguity in the SARFAESI Act to warrant reading something more in it, there is no plausible reason to take recourse to any provisions of Companies Act and accordingly permit interference in proceeding under SARFAESI Act either by Company Judge or by liquidator. For enforcement of security interest, a secured creditor has been vested with the authority to do so without the intervention of the Court or Tribunal but various procedure has been provided for to take care when borrower company is under liquidation and section 13(9) of SARFAESI Act fully protects workmen interest by incorporation of section 529 and 529A of Companies Act.

20. Once such is the preposition of law and such are the statutory provisions that hold the field wherein property that is being dealt with, has been pledged by way of secured interest, and secured creditor under the provision of SARFAESI Act has proceeded to enforce its security interest by undertaking proceedings under Section 13(4) of SARFAESI Act, 2002, and at the post sale stage, the rights of persons or parties having any stake in the sale proceeds has been taken care of by sub-section (9) of Section 13 as required provisions of Companies Act namely section 529 and Section 529-A have already been incorporated in the provisions of SARFAESI Act. Under the provisions of SARFAESI Act, 2002, in terms of Section 13(9) interest of such workmen has been protected where the Company is under liquidation and in case company is not under liquidation then workmen have no right to claim their dues by distribution of sale proceeds in proceeding under SARFAESI Act and have no right to resist the proceedings so undertaken under the provision of SARFAESI Act for their dues. Coupled with this in proceedings under the SARFAESI Act, in case challenge is to be maintained qua the validity of proceeding so undertaken, then as per the judgement of the Apex Court in the case of **United Bank of India Vs. Satyawati Tandon and others, 2010 (8) SCC 110**, proceedings under section 17 of SARFAESI Act will have to be undertaken, as in the present case for instance submission has been made that interest of secured creditor stood satisfied as such there was no occasion for invoking the provision of SARFAESI Act, whereas this particular situation was vehemently disputed by the secured creditor in the backdrop of the fact that scheme in question so finalised itself has failed.

21. Admittedly this is accepted position that till today Company in question continues to exist under the provision of Company Act and two unit of Company i.e. Marhowrah (Bihar) and Padrauna are still in possession of Company and are being run by the Company. The workmen and sugar cane grower are insisting for their dues in SARFAESI Act proceeding and in pith and

substance they want legislative business to be performed by this Court by proceeding to make declaration that in reference of sale proceeds that has been so received in spite of the fact that there is no initiation of winding up proceeding in terms of Sections 529 and 529-A of the Companies Act even then said provisions be pressed for disbursement of the amount that has been so received by way of sale proceed.

22. Law on the subject is clear and categorical that Court can only fill up the gap, if any, are there, but Court cannot take upon itself legislative business. Apex Court in the case of ***Union of India Vs. Deoki Nandan Agarwala AIR 1992 SC 96*** observed as follows:-

"It is not the duty of Court either to enlarge the scope of legislation. The Court cannot rewrite, recast or re-frame the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred upon the Court".

23. Apex Court in the case of ***District Mining Officers Vs. Tata Iron & and Steel Company 2001 (7) SCC 358*** has taken the view that function of Court is only to expound the law and not to legislate.

24. In this backdrop once from the statutory provisions in question, it is clear that in proceedings under SARFAESI Act, at the post sale stage, the rights of person or parties having any stake in the sale proceeds due care has been taken under section 13(9) of Act and its five proviso. Once required provisions of Company Act have been incorporated under SARFAESI Act, then but for the contingency mentioned in Section 13(9) of the Act, there is no question of distribution of sale proceeds amongst the creditors. Wish of petitioners and cane growers is that even through winding up proceedings are not there, even then the principle of Section 529 and 529-A be pressed in SARFAESI proceeding. We at our level cannot enlarge the scope of proceedings and proceed to provide forum i.e. not otherwise provided for specially in the backdrop that is so emerging before us that provision of Section 529 and 529-A of the Companies Act cannot be invoked for the simple reason that Company is not at all for winding up and no proceedings have been undertaken for liquidation, then in case there are any dues that are outstanding towards company then such amount has to be recovered from the Company as per proceeding that has been so prescribed. Both under the provisions of U.P. Industrial Peace (Timely Payment of Wages) Act, 1978 as well as under U.P. Sugar Cane (Regulation of Supply and Purchase) Act 1953, full fledged mechanism has been provided for effectuating recovery of workmen's due as well as sugar cane dues respectively and as such the respective forum provided for under both the aforesaid Act can be invoked for realisation of the dues as arrears of land revenue on the principle that where there is a right there is a remedy.

25. Apex Court in the case of ***Central Bank of India Vs. Siriguppa Chemicals Ltd 2007(8) SCC 353***, wherein directives were issued by the High Court for disbursement of amount realised on sale of stocks of sugar owned by company and pledged to the Bank for satisfying claimed of workmen dues as well as dues of cane growers, took the view that such a directive could not have been issued for satisfying the order passed by Labour Commissioner under Section 33-C of Industrial Disputes Act, and for ensuring compliance of order passed by Cane Commissioner for recovery of sugar cane dues as the

goods were validity pawned to the Bank, the right of the Bank cannot be effected by the orders of Cane Commissioner or on the demands made by workmen. Both the Cane Commissioner and the Workmen, in the absence of liquidation, stand only as unsecured creditors and their rights cannot prevail over the rights of the pawnee of goods. Petitioner and Cane growers accordingly in the absence of winding up proceedings in terms of Section 529 and 529-A of the Companies Act, cannot claim as a matter of right for distribution of sale proceeds received on invocation of security interest and as per the principle mentioned above their status would be of unsecured creditor and the amount due could be realised by invoking the statutory forum provided for under the respective statutory provision wherein liability has been determined and is enforceable in law on the legal principle that where a statute requires to do a certain thing in a certain way, the thing must be done in that way or not at all. Other method of performance are necessarily forbidden.

26. Apex Court in the case of **Vishal N. Kalsaria Vs. Bank of India 2016(3) SCC 762** in the context of the provisions of Rent Control Act, has ruled that interest of tenant would be intact in proceedings under SARFAESI Act and eviction would take place as per the provisions of Rent Control Act. Said judgement has to be read in the context it has been delivered and it would be difficult to extend any benefit to the petitioner out of the said judgement, decided and interpreted in fact and situation. Said judgement is also suggestive of the fact that other laws don't get automatically obliterated unless provided for.

27. In view of this, prayer that has been so made to quash the sale proceedings in question that has been so undertaken under SARFAESI Act, 2002 cannot be accorded by us in the facts of case and further to distribute sale proceeds in consonance with the provision of Section 529 and 529-A of the Companies Act also cannot be accorded by us as same would tantamount to creating a statutory provision that otherwise does not exist in the absence of winding up proceeding. No impediment can be created by us in use of sale proceeds by the secured creditor. However, in the peculiar fact of the case, as amount has already been so directed by this Court to be retained and to be kept in no lien account and as of now said amount is still lying, as such we proceed to pass order that secured creditor would be free to utilize the said amount as statutory charge could be created only when company is in winding/liquidation and here there is no such contingency in existence. Coupled with this, as mention has been made in the earlier order passed by this Court that dues would be settled in accordance with law the company in question is directed to consider the request of petitioners and intervenor in accordance with law by coming up with the scheme as to in what way and manner dues would be ensured to workmen and cane growers in question preferably within next three months. In case within three months such scheme is not formulated then it is always open to petitioner/intervenor to go ahead with for recovery of dues as per law. We further proceed to pass order that as far as incumbents who have proceeded to purchase the unit in question in proceeding undertaken under SARFAESI Act, their request for providing adequate , protection for lifting of scrap be considered by the Authority concerned and possible assistance as admissible in law be rendered to them by the respondents.

28. With the above observation/direction present writ petition stands disposed of accordingly.

Writ C No.- 30501 Of 2016

Rev. K.V. Abraham ...Petitioner
Commissioner, Varanasi & Ors. Versus
...Respondents

Counsel for Petitioner:
Ashish Kumar Srivastava

Counsel for Respondents:
Somesh Khare
Held

The **Commissioner under Section 12-D(2) of the Societies Registration Act, 1860 is a quasi-judicial authority and not a 'court'**, hence the **Limitation Act, 1963 does not apply directly** to such proceedings.

Sections 5 and 14 of the Limitation Act are not directly applicable to proceedings before such quasi-judicial authorities.

However, the **principles underlying Section 14 of the Limitation Act (exclusion of time spent in bona fide proceedings)** are applicable even to quasi-judicial proceedings.

Where a party has **bona fide pursued a wrong remedy with due diligence**, the time spent therein **can be excluded while computing limitation**.

The absence of express power to condone delay under the Societies Registration Act **does not bar application of equitable principles** derived from Section 14.

The **Commissioner was justified in condoning delay** since the appellant had first approached the High Court and thereafter promptly filed the appeal.

Denial of such benefit would cause **grave injustice and defeat substantive rights**, hence a **liberal and justice-oriented interpretation** is warranted.

Section 29(2) of the Limitation Act does not automatically extend Limitation Act provisions to quasi-judicial bodies unless proceedings are before a “court”.

The **distinction between "court" and "tribunal/quasi-judicial authority"** is crucial, and Limitation Act applies strictly to courts.

The writ court, **will not interfere with condonation of delay** when it is based on sound legal principles and promotes justice.

CASE LAW CITED

M.P. Steel Corporation v. Commissioner of Central Excise, (2015) 7 SCC 58

Kerala State Electricity Board v. T.P. Kunhaliumma, (1976) 4 SCC 634

CST v. Parson Tools and Plants, (1975) 4 SCC 22

Consolidated Engineering Enterprises v. Principal Secretary, (2008) 7 SCC 169

Mukri Gopalan v. Cheppilat Puthanpurayil Aboobacker, AIR 1995 SC 2272

Vidyacharan Shukla v. Khubchand Baghel, AIR 1964 SC 1099

Andhra Pradesh Power Coordination Committee v. Lanco Kondapalli Power Ltd., (2016) 3 SCC 468

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. This writ petition is directed against an order passed by the appellate authority i.e. Commissioner, Varanasi Division, Varanasi, condoning delay in filing of appeal under Section 12-D(2) of the Societies Registration Act, 1860. The order is challenged essentially on the ground that the Divisional Commissioner exercising his jurisdiction under the Societies Registration Act, 1860 (hereinafter referred to as the 'Act of 1860') has no authority to condone delay under the Act, and since authority does not act as a 'Court', the provisions of the Limitation Act are not attracted, rendering the order illegal for want of jurisdiction.

2. Facts relevant for the present purposes are that Pilgrim's Mission, 12, Bungalow, Varanasi, U.P. is a society registered under the provisions of Societies Registration Act, 1860, bearing Registration No.2838 of 1973-74. The society was lastly renewed on 10.10.2010, vide certificate of registration dated 19.10.2010. An application was filed by respondent no.2 before the Registrar, stating that renewal of the society had been obtained by playing fraud, and therefore, it be cancelled. An affidavit was also filed stating facts in support of such application. The Assistant Registrar, Firms, Societies and Chits rejected the application of respondent no.2, vide his order dated 12th March, 2012. This order of Assistant Registrar was challenged before this Court in a Writ Petition No.23181 of 2012, which came to be dismissed, in view of the availability of alternative remedy of filing an appeal, vide order dated 11th May, 2012, which reads as under:-

"1. Learned counsel for the petitioner could not dispute that in the present case the registration of society and its renewal was already over and in effect the petitioner wanted its cancellation, therefore, the application of petitioner was referable to Section 12-D of Societies Registration Act, 1860 and the order passed by Registrar under Section 12-D is appealable under sub-section (2) thereof.

2. Learned counsel for the petitioner states that petitioner would avail the statutory alternative remedy.

3. The writ petition is dismissed on the ground of alternative remedy."

3. In view of the observations made, an appeal has been preferred by respondent no.2 before the Commissioner, Varanasi Division, Varanasi, on 17th May, 2012, alongwith an application under Section 5 readwith Section 14 of the Limitation Act, 1963 for condoning delay in filing of appeal. The appeal was admitted by the Commissioner on 13th April, 2015. An application was filed by the present petitioner for recall of the order dated 13th April, 2015, on the ground that no opportunity of contest on the aspect relating to condonation of delay had been granted. The

Commissioner vide order dated 6.8.2015 adjourned the matter to 20th August, 2015 for hearing the parties on the aspect relating to condonation of delay. An affidavit in opposition to the delay condonation application was also filed. The appellate authority accordingly proceeded to pass an order on 21st September, 2015 observing that since the appeal has already been admitted, it would be appropriate that all issues be examined together on merits. This order then came to be challenged by filing a Writ Petition No.56016 of 2015, which was entertained, and following interim protection was granted on 1.10.2015:-

"Sri Somesh Khare and Smt. Komal Khare have put in appearance on behalf of second respondent.

Sri Khare prays for and is granted three days time to file a counter affidavit. Rejoinder affidavit, if any, may be filed within two days thereafter.

Put up on 14 October 2015 in the additional cause list.

The submission of the learned counsel for the petitioner is that an appeal was preferred by the private respondent before the Commissioner, under Section 12-D of the Societies Registration Act assailing the order of Registrar(Societies) which admittedly being time barred could not have been entertained by the Commissioner as the provision provides for filing of appeal within 30 days, there being no provision for extension of time in case of delay, the Commissioner, therefore was not competent under law to entertain and admit the appeal.

The submission requires consideration.

Till then, further proceedings in Appeal No.191 of 2012 pending before the Commissioner, Varanasi Division, Varanasi shall remain stayed."

4. Ultimately the writ petition got disposed of on 24.11.2015, vide following order:-

"Heard Sri Ashish Kumar Srivastava, learned counsel for the petitioner, learned Standing Counsel appearing for the State-respondents and Sri Somesh Khare along with Ms.Komal Khare, learned counsel for respondent no. 2.

Through this writ petition the petitioner has prayed for issuing a writ of certiorari quashing the orders dated 13.4.2015 and 21.9.2015 passed in Appeal No. 191 of 2012 (Pilgrim's Mission Inc. California vs. Assistant Registrar and others). Vide order dated 13.4.2015 the Divisional Commissioner, Varanasi Division, Varanasi (in short the Commissioner) has admitted the appeal and fixed 11.5.2015 for hearing after issuing notice to the other side whereas vide order dated 21.9.2015 the Commissioner, on the application of the petitioner to decide the question of limitation first, has directed to consider the question of limitation at the time of deciding the appeal on merits.

While assailing these orders Sri Srivastava, learned counsel for the petitioner submits that the respondent-appellant has filed an application for condonation of delay in filing the appeal before the Commissioner, therefore, without condonation of delay there could be no appeal and unless there was an appeal it could not be entertained. In his submissions the court below has erred in admitting the appeal vide order dated 13.4.2015 without condoning the delay in filing the appeal. In support of his submission he has placed reliance upon the judgment of Full Bench of this Court in Commissioner of Income Tax, Kanpur vs. Mohd. Farooq (2009) 84 Taxman 191 (All) and another decision of this Court in Prabhu and another vs. Deputy Director of Consolidation, Ghazipur and others (2013 (1) ADJ 554).

Sri Khare, who appears for respondent no.2 submits that in view of sub-section (2) of Section 29 of the Limitation Act read with Section 12-D of the Societies Registration Act the appeal is within time and if it is treated to be beyond time the Commissioner has power to condone the delay. In support of his submission he has placed reliance upon the judgment of the Apex Court in Mukri Gopalan vs. Cheppilat Pathanpurayil Aboobacher (AIR 1995 SC 2272).

Without addressing myself on the points and the cases cited by the learned counsel for the parties, considering the fact that the appeal has been filed along with an application for condonation of delay and without condoning the delay the appeal has been admitted, in view of the settled legal position that without condoning the delay appeal could not be admitted, reference may be had in the case of Shambhu Sharan Chaubey and others vs. State of U.P. and others (2012 (10)ADJ 742, the Commissioner has erred in admitting the appeal. However taking note of the concept of speedy justice without disturbing the order of admission, it is provided that before deciding the appeal on merit the question of limitation shall be decided first by the Commissioner after hearing both the sides, if possible within a period of three months from the date of production of a certified copy of the order of this Court. Further fate of the appeal would depend upon the fate of the order passed on the point of limitation.

With the aforesaid observation, the writ petition is disposed of."

5. Pursuant to the directions issued by this Court, the appellate authority has considered the application for condonation of delay. It has observed that against the order dated 12th March, 2012, a writ petition had been filed before this Court, which had been dismissed on the ground of alternative remedy of filing appeal, on 11th May, 2012, and immediately thereafter, an appeal was preferred on 18th May, 2012. Accordingly, delay has been condoned by allowing the application under Section 5/14 of the Limitation Act with the observation that there was no intentional delay in filing of the appeal, and sufficient grounds for its condonation was disclosed. It is this order of Commissioner dated 13th June, 2016, which is put to challenge in the present writ petition.

6. Learned counsel for the petitioner submits that the Divisional Commissioner while exercising his powers under Section 12-D(2) of the Act does not act as a court, and consequently, the provisions of Limitation Act are not attracted. It is also contended that Societies Registration Act is a special law, which specifically provides for a period of 30 days limitation for filing of

appeal, and does not confer jurisdiction upon the appellate authority to condone delay, and consequently, in absence of applicability of Section 14(2) of the Limitation Act 1963 (hereinafter referred to as the 'Act of 1963'), the delay on account of pursuing a wrong remedy could not be condoned. Learned counsel in support of such contention placed reliance upon judgments of the Apex Court in *Hukumdev Narain Yadav Vs. Lalit Narain Mishra* [AIR 1974 SC 480], *The Commissioner of Sales Tax, Uttar Pradesh, Lucknow Vs. M/s Parson Tools and Plants, Kanpur* [AIR 1975 SC 1039], *Anwari Basavaraj Patil and others Vs. Siddaramaiah and others* [1993(1) SCC 636], *Gopal Sardar Vs. Karuna Sardar* [2004 (4) SCC 252], *L.S. Synthetics Ltd. Vs. Fairgrowth Financial Services Ltd. And another* [2004(11) SCC 456], *Consolidated Engineering Enterprises Vs. Principal Secretary, Irrigation Department and others* [2008 (7) SCC 169], *Commissioner of Customs and Central Excise Vs. Hongo India Private Limited and another* [2009(5) SCC 791], as well as judgments of this Court in *Commissioner of Income Tax, Kanpur Vs. Mohd. Farooq* in IT Appeal Nos.11 of 2001, 78 of 2002, 5 and 6 of 2003, decided on 3.9.2009, *Commissioner of Central Excise, Meerut Vs. M/s. Salora International Limited* in Central Excise Reference Application No.(4) of 2001, decided on 13.9.2005, *Mantri Khadi Gram Udyog Samiti, Harijan Gurukul Heera Patti, Sadar, District Azamgarh Vs. The Prescribed Authority, Azamgarh and others* in Writ Petition No.45385 of 2012, decided on 25.9.2012, as well as judgment of the Madhya Pradesh High Court in *Seth Banshidhar Kedia Rice Mills Pvt. Ltd. Vs. State Bank of India* in Writ Petition No.2393 of 2011, decided on 5.9.2011.

7. Sri Somesh Khare, learned counsel for the respondents, per contra, submits that the provisions of Limitation Act, 1963 are attracted to proceedings undertaken before the Commissioner, by virtue of Section 29(2) of the Act of 1963. Learned counsel submits that there is no express or implied exclusion of the provisions of Limitation Act. Learned counsel further submits that the Commissioner while hearing the appeal under Section 12-D(2) discharges quasi-judicial functions, akin to a 'court', under the special law, even if not under the provisions of Code of Civil Procedure, and the time spent in pursuing a wrong remedy since was bona fide, it is liable to be excluded by virtue of Section 14 of the Act. Learned counsel has placed reliance upon Constitution Bench judgment in *Vidyacharan Shukla Vs. Khubchand Baghel* reported in AIR 1964 SC 1099, as well as judgment of Apex Court in *Mukri Gopalan Vs. Cheppilat Puthanpurayil Aboobacker* reported in AIR 1995 SC 2272.

8. I have heard Sri Ashish Kumar Srivastava, learned counsel for the petitioner, Learned Standing Counsel and Sri Somesh Khare for the respondents, and have perused the records as well as the judgments relied upon.

9. Before advertng to the submissions made, it would be appropriate to take note of relevant statutory provisions. Section 12-D has been inserted in the Act of 1860, by way of a State amendment in 1975, which reads as under:-

"12D. Registrar's power to cancel registration in certain circumstance.-

(1) Notwithstanding anything contained in this Act, the Registrar may, by order in writing, cancel the registration of any society on any of the following grounds:--

(a) that the registration of the society or of its name or change of name is contrary to the provisions of this Act or of any other law for the time being in force;

(b) that its activities or proposed activities have been or are or will be subversive of the objects of the society or opposed to public policy;

[(c) that the registration or the certificate of renewal has been obtained by misrepresentation or fraud]:

Provided that no order of cancellation of registration of any society shall be passed until the society has been given a reasonable opportunity of altering its name or object or of showing cause against the action proposed to be taken in regard to it.

[(2) An appeal against an order made under sub-section (1) may be preferred to the Commissioner of the Division in whose jurisdiction the Headquarter of the society lies, within one month from the date of communication of such order.

(3) The decision of the Commissioner under sub-section (2), shall be final and shall not be called in question in any court.]"

10. Section contemplates filing of appeal against an order made under sub-section 1 of Section 12-D, within one month from the date of communication of such order. The Act does not confer jurisdiction upon the appellate authority to condone delay in filing of appeal. According to the respondents, power to condone delay is available to the appellate authority by virtue of Section 29(2) of the Limitation Act, 1963, which reads as under:-

"29(2). Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."

11. Submission is that Act of 1860 is a special law relating to societies, which prescribes a period of limitation in filing of appeal. Since no corresponding provision exists in the schedule to Limitation Act, 1963, as such a different period exists providing for Limitation Act and Act of 1860, and accordingly necessary ingredients exist for Section 29 to operate in the field. Reliance is placed upon following observation of the Supreme Court in para-20 in Mukri Gopalan (supra):-

"20. Our attention was also invited by counsel for the appellant to a later decision of this court in the case of The Sahkari Ganna Vikas Samiti Ltd., Vs. Mahabir Sugar Mills (P) Ltd., (AIR 1982 SC 119). In that case a bench of two learned Judges was concerned with the question whether Divisional Commissioner acting under the U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 acted as a revenue court or whether he was a persona designata. It was held that the Divisional Commissioner had been constituted as appellate authority under the Act. That showed that the Divisional Commissioner was made an appellate court not as persona designata but as a revenue court. That being so it was obvious that Section 5 of the Act applied to appeals before Divisional Commissioner and he could condone the delay in filing appeals. It becomes obvious that this court in the aforesaid decision was dealing with revenue court constituted under U.P. Sugarcane (Regulation of Supply and Purchase) Act which was a special law. It was in terms held that Section 5 of the Limitation Act was applicable to revisional proceedings before such Revenue Courts. It is of course true as pointed out by Mr. Nariman that in the said decision no other decision of this court was cited and Section 29(2) was not expressly referred to but the ratio of the decision is necessarily and implicitly based on the applicability of Section 29(2) but for which Section 5 of the Limitation Act would not have been made applicable to such revision proceedings before revenue court functioning under the special law. Before parting with the discussion on this question we may also refer to one submission of Shri Nariman. He submitted that Sections 4 to 24 of the Limitation Act would apply to civil courts as duly constituted under the Civil Procedure Code and if that is so even if they are to be made applicable to suit, appeal or application governed by periods of limitation prescribed by any special or local law, they necessarily require such suit, appeal or application to be filed under special or local law before full-fledged civil courts as otherwise Sections 4 to 24 by themselves would not apply to them. It is difficult to agree. It has to be kept in view that Section 29(2) gets attracted for computing the period of limitation for any suit, appeal or application to be filed before authorities under special or local law if the conditions laid down in the said provision are satisfied and once they get satisfied the provisions contained in Sections 4 to 24 shall apply to such proceedings meaning thereby the procedural scheme contemplated by these Sections of the Limitation Act would get telescoped into such provisions of special or local law. It amounts to a legislative shorthand. Consequently, even this contention of Shri Nariman cannot be countenanced."

12. Learned counsel for the petitioner, however, submits that Commissioner while deciding the appeal under Section 12-D does not act as a 'court', and therefore, provisions of Sections 5 & 14 of the Limitation Act cannot be exercised by him. Judgments relied upon by the counsel for the parties in support of their submissions have already been noticed above.

13. This Court, however, is not required to examine all cited decisions, inasmuch as rival contentions have been answered by the Apex Court in *M.P. Steel Corporation Vs. Commissioner of Central Excise*, reported in 2015(7) SCC 58. Question as to whether provisions of the Limitation Act would be applicable in proceedings before quasi-judicial tribunal/forum or would be applicable only to a 'court', as is understood in strict sense of being part of judicial branch of the State, has been answered. The dispute was examined by Apex Court in the context of an appeal filed under Section 128 of the Customs Act. Their Lordships of the Supreme Court after noticing the statutory

scheme as well as the judgments delivered previously on the issue have been pleased to hold that provisions of Limitation Act apply only to suits, appeals and applications filed in 'courts' and not to quasi-judicial bodies. The distinction between 'court' and 'quasi-judicial proceedings' have also been examined, with reference to the judgments delivered previously on the issue. After noticing the scheme of Limitation Act, 1963 in paras-11 onwards their Lordships observed as under in para-19 of the report:-

"19. When it comes to applications, again Articles 124, 130 and 131 throw a great deal of light. Only review of judgments by a "court" is contemplated in the Third Division in the Schedule. Further, leave to appeal as a pauper again can be made either to the High Court or only to any other court vide Article 130. And by Article 131, a revision petition filed only before Courts under the Code of Civil Procedure Code or the Code of Criminal Procedure are referred to. On a plain reading of the provisions of the Limitation Act, it becomes clear that suits, appeals and applications are only to be considered (from the limitation point of view) if they are filed in courts and not in quasi-judicial bodies."

Issue for consideration is specified in following words in para-21:-

"21. Under our constitutional scheme of things, the judiciary is dealt with in Chapter IV of Part V and Chapter V of Part VI. Chapter IV of Part V deals with the Supreme Court and Chapter V of Part VI deals with the High Courts and courts subordinate thereto. When the Constitution uses the expression "court", it refers to this Court system. As opposed to this court system is a system of quasi-judicial bodies called Tribunals. Thus, Articles 136 and 227 refer to "courts" as distinct from "tribunals". The question in this case is whether the Limitation Act extends beyond the court system mentioned above and embraces within its scope quasi-judicial bodies as well?

Reliance has been placed upon a 3-Judge Bench of Apex Court in para-23 as under:-

23. In Kerala State Electricity Board v. T.P. Kunhaliumma, (1976) 4 SCC 634, a 3-Judge Bench of this Court followed the aforesaid two judgments and stated:-

"22. The conclusion we reach is that Article 137 of the 1963 Limitation Act will apply to any petition or application filed under any Act to a civil court. With respect we differ from the view taken by the two-judge bench of this Court in Athani Municipal Council case [(1969) 1 SCC 873 : (1970) 1 SCR 51] and hold that Article 137 of the 1963 Limitation Act is not confined to applications contemplated by or under the Code of Civil Procedure. The petition in the present case was to the District Judge as a court. The petition was one contemplated by the Telegraph Act for judicial decision. The petition is an application falling within the scope of Article 137 of the 1963 Limitation Act."

This judgment is an authoritative pronouncement by a 3-Judge Bench that the Limitation Act applies only to courts and not to quasi-judicial Tribunals. Athani's case was

dissented from on a different proposition - that Article 137 is not confined to applications under the Code of Civil Procedure alone. So long as an application is made under any statute to a Civil Court, such application will be covered by Article 137 of the Limitation Act."

After noticing the judgments of the Supreme Court in *Mukri Gopalan* (supra), *CST Vs. Madan Lal Das & Sons* [1976(4) SCC 464], and *CST Vs. Parson Tools and Plants* [1975(4) SCC 22], their Lordships observed as under in paras-28 to 33 of the report:-

"28. Two other judgments of this Court need to be dealt with at this stage. In Mukri Gopalan v. Cheppilat Puthanpurayil Aboobacker, (1995) 5 SCC 5, a 2-Judge Bench of this Court held that the Limitation Act would apply to the appellate authority constituted under Section 13 of the Kerala Buildings (Lease and Rent Control) Act, 1965. This was done by applying the provision of Section 29(2) of the Limitation Act. Despite referring to various earlier judgments of this Court which held that the Limitation Act applies only to courts and not to Tribunals, this Court in this case held to the contrary. In distinguishing the Parson Tools' case, which is a 3-Judge Bench binding on the Court that decided Mukri Gopalan's case, the Court held:-

"18. ... If the Limitation Act does not apply then neither Section 29(2) nor Section 14(2) of the Limitation Act would apply to proceedings before him. But so far as this Court is concerned it did not go into the question whether Section 29(2) would not get attracted because the U.P. Sales Tax Act Judge (Revisions) was not a court but it took the view that because of the express provision in Section 10(3)(B) applicability of Section 14(2) of the Sales Tax Act was ruled out. Implicit in this reasoning is the assumption that but for such an express conflict or contrary intention emanating from Section 10(3)(B) of the U.P. Sales Tax Act which was a special law, Section 29(2) would have brought in Section 14(2) of the Limitation Act even for governing period of limitation for such revision applications. In any case, the scope of Section 29(2) was not considered by the aforesaid decision of the three learned Judges and consequently it cannot be held to be an authority for the proposition that in revisional proceedings before the Sales Tax authorities functioning under the U.P. Sales Tax Act Section 29(2) cannot apply as Mr. Nariman would like to have it."

It then went on to follow the judgment reported in The Commissioner of Sales Tax, U.P. v. M/s. Madan Lal Das & Sons, Bareilly, (1976) 4 SCC 464 which, as has been pointed out earlier, is not an authority for the proposition that the Limitation Act would apply to Tribunals. In fact, Mukri Gopalan's case was distinguished in Om Prakash v. Ashwani Kumar Bassi, (2010) 9 SCC 183 at paragraph 22 as follows:

"22. The decision in Mukri Gopalan case [(1995) 5 SCC 5] relied upon by Mr Ujjal Singh is distinguishable from the facts of this case. In the facts of the said case, it was the District Judges who were discharging the functions of the appellate authority and being a court, it was held that the District Judge, functioning as the appellate authority, was a court and not persona designata and was, therefore, entitled to resort to Section 5 of the Limitation Act. That is not so in the instant case where the Rent Controller appointed by the State Government is a member of the

Punjab Civil Services and, therefore, a persona designata who would not be entitled to apply the provisions of Section 5 of the Limitation Act, 1963, as in the other case."

The fact that the District Judge himself also happened to be the appellate authority under the Rent Act would have been sufficient on the facts of the case for the Limitation Act to apply without going into the proposition that the Limitation Act would apply to tribunals.

29. Quite apart from Mukri Gopalan's case being out of step with at least five earlier binding judgments of this Court, it does not square also with the subsequent judgment in Consolidated Engg. Enterprises v. Principal secy., Irrigation Deptt., (2008) 7 SCC 169. A 3-Judge Bench of this Court was asked to decide whether Section 14 of the Limitation Act would apply to Section 34(3) of the Arbitration and Conciliation Act, 1996. After discussing the various provisions of the Arbitration Act and the Limitation Act, this Court held:

"23. At this stage it would be relevant to ascertain whether there is any express provision in the Act of 1996, which excludes the applicability of Section 14 of the Limitation Act. On review of the provisions of the Act of 1996 this Court finds that there is no provision in the said Act which excludes the applicability of the provisions of Section 14 of the Limitation Act to an application submitted under Section 34 of the said Act. On the contrary, this Court finds that Section 43 makes the provisions of the Limitation Act, 1963 applicable to arbitration proceedings. The proceedings under Section 34 are for the purpose of challenging the award whereas the proceeding referred to under Section 43 are the original proceedings which can be equated with a suit in a court. Hence, Section 43 incorporating the Limitation Act will apply to the proceedings in the arbitration as it applies to the proceedings of a suit in the court. Sub-section (4) of Section 43, inter alia, provides that where the court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the court shall be excluded in computing the time prescribed by the Limitation Act, 1963, for the commencement of the proceedings with respect to the dispute so submitted. If the period between the commencement of the arbitration proceedings till the award is set aside by the court, has to be excluded in computing the period of limitation provided for any proceedings with respect to the dispute, there is no good reason as to why it should not be held that the provisions of Section 14 of the Limitation Act would be applicable to an application submitted under Section 34 of the Act of 1996, more particularly where no provision is to be found in the Act of 1996, which excludes the applicability of Section 14 of the Limitation Act, to an application made under Section 34 of the Act. It is to be noticed that the powers under Section 34 of the Act can be exercised by the court only if the aggrieved party makes an application. The jurisdiction under Section 34 of the Act, cannot be exercised suo motu. The total period of four months within which an application, for setting aside an arbitral award, has to be made is not unusually long. Section 34 of the Act of 1996 would be unduly oppressive, if it is held that the provisions of Section 14 of the Limitation Act are not applicable to it, because cases are no doubt conceivable where an aggrieved party, despite exercise of due diligence and good faith, is unable to make an application within a period of four months. From the scheme and language of Section 34 of the Act of 1996, the intention of the legislature to exclude the applicability of Section 14 of the Limitation Act is not manifest. It is well

to remember that Section 14 of the Limitation Act does not provide for a fresh period of limitation but only provides for the exclusion of a certain period. Having regard to the legislative intent, it will have to be held that the provisions of Section 14 of the Limitation Act, 1963 would be applicable to an application submitted under Section 34 of the Act of 1996 for setting aside an arbitral award."

30. While discussing Parson Tools, this Court held:

"25.....In appeal, this Court held that (1) if the legislature in a special statute prescribes a certain period of limitation, then the Tribunal concerned has no jurisdiction to treat within limitation, an application, by excluding the time spent in prosecuting in good faith, on the analogy of Section 14(2) of the Limitation Act, and (2) the appellate authority and the revisional authority were not "courts" but were merely administrative tribunals and, therefore, Section 14 of the Limitation Act did not, in terms, apply to the proceedings before such tribunals.

26. From the judgment of the Supreme Court in CST [(1975) 4 SCC 22 : 1975 SCC (Tax) 185 : (1975) 3 SCR 743] it is evident that essentially what weighed with the Court in holding that Section 14 of the Limitation Act was not applicable, was that the appellate authority and the revisional authority were not "courts". The stark features of the revisional powers pointed out by the Court, showed that the legislature had deliberately excluded the application of the principles underlying Sections 5 and 14 of the Limitation Act. Here in this case, the Court is not called upon to examine scope of revisional powers. The Court in this case is dealing with Section 34 of the Act which confers powers on the court of the first instance to set aside an award rendered by an arbitrator on specified grounds. It is not the case of the contractor that the forums before which the Government of India undertaking had initiated proceedings for setting aside the arbitral award are not "courts". In view of these glaring distinguishing features, this Court is of the opinion that the decision rendered in CST [(1975) 4 SCC 22 : 1975 SCC (Tax) 185 : (1975) 3 SCR 743] did not decide the issue which falls for consideration of this Court and, therefore, the said decision cannot be construed to mean that the provisions of Section 14 of the Limitation Act are not applicable to an application submitted under Section 34 of the Act of 1996."

31. In a separate concurring judgment Justice Raveendran specifically held:

"44. It may be noticed at this juncture that the Schedule to the Limitation Act prescribes the period of limitation only to proceedings in courts and not to any proceeding before a tribunal or quasi-judicial authority. Consequently Sections 3 and 29(2) of the Limitation Act will not apply to proceedings before the tribunal. This means that the Limitation Act will not apply to appeals or applications before the tribunals, unless expressly provided."

While dealing with Parson Tools, the learned Judge held:

"56. In Parson Tools [(1975) 4 SCC 22] this Court did not hold that Section 14(2) was excluded by reason of the wording of Section 10(3-B) of the Sales Tax Act. This Court was

considering an appeal against the Full Bench decision of the Allahabad High Court. Two Judges of the High Court had held that the time spent in prosecuting the application for setting aside the order of dismissal of appeals in default, could be excluded when computing the period of limitation for filing a revision under Section 10 of the said Act, by application of the principle underlying Section 14(2) of the Limitation Act. The minority view of the third Judge was that the revisional authority under Section 10 of the U.P. Sales Tax Act did not act as a court but only as a Revenue Tribunal and therefore the Limitation Act did not apply to the proceedings before such Tribunal, and consequently, neither Section 29(2) nor Section 14(2) of the Limitation Act applied. The decision of the Full Bench was challenged by the Commissioner of Sales Tax before this Court, contending that the Limitation Act did not apply to tribunals, and Section 14(2) of the Limitation Act was excluded in principle or by analogy. This Court upheld the view that the Limitation Act did not apply to tribunals, and that as the revisional authority under Section 10 of the U.P. Sales Tax Act was a tribunal and not a court, the Limitation Act was inapplicable. This Court further held that the period of pendency of proceedings before the wrong forum could not be excluded while computing the period of limitation by applying Section 14(2) of the Limitation Act. This Court, however, held that by applying the principle underlying Section 14(2), the period of pendency before the wrong forum may be considered as a "sufficient cause" for condoning the delay, but then having regard to Section 10(3-B), the extension on that ground could not extend beyond six months. The observation that pendency of proceedings of the nature contemplated by Section 14(2) of the Limitation Act, may amount to a sufficient cause for condoning the delay and extending the limitation and such extension cannot be for a period in excess of the ceiling period prescribed, is in the light of its finding that Section 14(2) of the Limitation Act was inapplicable to revisions under Section 10(3-B) of the U.P. Sales Tax Act. These observations cannot be interpreted as laying down a proposition that even where Section 14(2) of the Limitation Act in terms applied and the period spent before wrong forum could therefore be excluded while computing the period of limitation, the pendency before the wrong forum should be considered only as a sufficient cause for extension of period of limitation and therefore, subjected to the ceiling relating to the extension of the period of limitation. As we are concerned with a proceeding before a court to which Section 14(2) of the Limitation Act applies, the decision in *Parson Tools* [(1975) 4 SCC 22 : 1975 SCC (Tax) 185 : (1975) 3 SCR 743] which related to a proceeding before a Tribunal to which Section 14(2) of the Limitation Act did not apply, has no application."

32. Obviously, the ratio of *Mukri Gopalan* does not square with the observations of the 3-Judge Bench in *Consolidated Engineering Enterprises*. In the latter case, this Court has unequivocally held that *Parson Tools* is an authority for the proposition that the Limitation Act will not apply to quasi-judicial bodies or Tribunals. To the extent that *Mukri Gopalan* is in conflict with the judgment in the *Consolidated Engineering Enterprises* case, it is no longer good law.

33. The sheet anchor in *Mukri Gopalan* was Section 29(2) of the Limitation Act. Section 29(2) states:-

"29. Savings.-- (1) * * *

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only insofar as, and to the extent to which, they are not expressly excluded by such special or local law."

A bare reading of this Section would show that the special or local law described therein should prescribe for any suit, appeal or application a period of limitation different from the period prescribed by the schedule. This would necessarily mean that such special or local law would have to lay down that the suit, appeal or application to be instituted under it should be a suit, appeal or application of the nature described in the schedule. We have already held that such suits, appeals or applications as are referred to in the schedule are only to courts and not to quasi-judicial bodies or Tribunals. It is clear, therefore, that only when a suit, appeal or application of the description in the schedule is to be filed in a court under a special or local law that the provision gets attracted. This is made even clearer by a reading of Section 29(3). Section 29(3) states:-

"29. Savings.-- (1)-(2) * * *

(3) Save as otherwise provided in any law for the time being in force with respect to marriage and divorce, nothing in this Act shall apply to any suit or other proceeding under any such law."

When it comes to the law of marriage and divorce, the Section speaks not only of suits but other proceedings as well. Such proceedings may be proceedings which are neither appeals nor applications thus making it clear that the laws relating to marriage and divorce, unlike the law of limitation, may contain proceedings other than suits, appeals or applications filed in courts. This again is an important pointer to the fact that the entirety of the Limitation Act including Section 29(2) would apply only to the three kinds of proceedings mentioned all of which are to be filed in courts."

14. In view of clear annunciation of law by the Supreme Court in *M.P. Steel Corporation* (supra), argument advanced on behalf of respondents that the appellate authority has jurisdiction to condone delay under the provisions of the Limitation Act, in view of the judgment in *Mukri Gopalan* (supra) must fail. Admittedly, the Commissioner under Section 12-D(2) while functioning as the appellate authority is not a 'court' in strict sense, as a 'court' constituted under the constitutional scheme, but would at best be a quasi-judicial body. This is so as under the Act of 1860, the appellate authority is to pass orders after affording reasonable opportunity of showing cause and opportunity of hearing, and the decision taken in appeal becomes final and is not open to be questioned in any court. Jurisdiction of civil court in the matter is excluded.

15. After holding that provisions of Limitation Act, 1963 would not apply to proceedings before the quasi-judicial authorities, Hon'ble Supreme Court proceeded further in the matter and observed as under in para-38 of the judgment in M.P. Steel Corporation (supra):-

"38. We have already held that the Limitation Act including Section 14 would not apply to appeals filed before a quasi-judicial Tribunal such as the Collector (Appeals) mentioned in Section 128 of the Customs Act. However, this does not conclude the issue. There is authority for the proposition that even where Section 14 may not apply, the principles on which Section 14 is based, being principles which advance the cause of justice, would nevertheless apply. We must never forget, as stated in Bhudan Singh & Anr. v. Nabi Bux & Anr., (1970) 2 SCR 10, that justice and reason is at the heart of all legislation by Parliament. This was put in very felicitous terms by Hegde, J. as follows:

"Before considering the meaning of the word "held" in Section 9, it is necessary to mention that it is proper to assume that the lawmakers who are the representatives of the people enact laws which the society considers as honest, fair and equitable. The object of every legislation is to advance public welfare. In other words as observed by Crawford in his book on Statutory Constructions the entire legislative process is influenced by considerations of justice and reason. Justice and reason constitute the great general legislative intent in every piece of legislation. Consequently where the suggested construction operates harshly, ridiculously or in any other manner contrary to prevailing conceptions of justice and reason, in most instances, it would seem that the apparent or suggested meaning of the statute, was not the one intended by the law-makers. In the absence of some other indication that the harsh or ridiculous effect was actually intended by the legislature, there is little reason to believe that it represents the legislative intent."

After noticing various judgments on the issue, their Lordships have been pleased to hold that principle of Section 14 nevertheless apply to proceedings before the quasi-judicial authorities/tribunal. Para-43 of the judgment in M.P. Steel Corporation (supra) is reproduced:-

"43. Merely because Parson Tools also dealt with a provision in a tax statute does not make the ratio of the said decision apply to a completely differently worded tax statute with a much shorter period of limitation - Section 128 of the Customs Act. Also, the principle of Section 14 would apply not merely in condoning delay within the outer period prescribed for condonation but would apply de hors such period for the reason pointed out in Consolidated Engineering above, being the difference between exclusion of a certain period altogether under Section 14 principles and condoning delay. As has been pointed out in the said judgment, when a certain period is excluded by applying the principles contained in Section 14, there is no delay to be attributed to the appellant and the limitation period provided by the concerned statute continues to be the stated period and not more than the stated period. We conclude, therefore, that the principle of Section 14 which is a principle based on advancing the cause of justice would certainly apply to exclude time taken in prosecuting proceedings which are bona fide and with due diligence pursued, which ultimately end without a decision on the merits of the case."

16. Following the judgments aforesaid, this Court finds that in the facts of the present case, principles of Section 14 of the Limitation Act, 1963 would be attracted. Section 14 of the Act reads as under:-

"14. Exclusion of time of proceeding bona fide in court without jurisdiction. --(1) *In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.*

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.

Explanation.-- For the purposes of this section,--

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction."

17. In the facts of the present case, immediately after the order had been passed by the Registrar, the respondent preferred a Writ Petition No. 23181 of 2012, which was dismissed on the ground of alternative remedy of preferring an appeal under Section 12-D(2) of the Act of 1860. After passing of such order, petitioner has immediately preferred an appeal, and delay has been condoned. Since the principles underlying Section 14 of the Limitation Act are attracted, as such, the period spent in pursuing a wrong remedy is liable to be condoned.

18. In the present case, if principles of Section 14 are not applied, grave hardship would be otherwise caused to respondent Pilgrim's Mission. The respondent in this case was diligently pursuing remedy against the order of Registrar by filing a writ petition, and unless delay is condoned, it would not be

possible to challenge the order. In Consolidated Engg. Enterprises Vs. Irrigation Department, reported in 2008(7) SCC 169, following conditions have been held to be met before Section 14 could be pressed into service:-

"21. Section 14 of the Limitation Act deals with exclusion of time of proceeding bona fide in a court without jurisdiction. On analysis of the said section, it becomes evident that the following conditions must be satisfied before Section 14 can be pressed into service:

(1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;

(2) The prior proceeding had been prosecuted with due diligence and in good faith;

(3) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;

(4) The earlier proceeding and the latter proceeding must relate to the same matter in issue and;

(5) Both the proceedings are in a court."

Except for the exclusion of last condition that appellate authority is not a 'court', all other conditions of Section 14 are met. However, if the principles of Section 14 are made applicable upon quasi-judicial bodies, then power to condone delay on account of pursuing a wrong remedy would be available to Commissioner. Such construction would subserve the larger cause and save the provision itself from the vice of unreasonableness.

19. In M.P. Steel Corporation (supra), Apex Court has also examined as to what periods are to be excluded under Section 14 of the Act. The issue has been answered in para-52 of the judgment, which is conveniently reproduced:-

"52. As has been already noticed, Sarathy's case i.e. (2000) 5 SCC 355 has also held that the court referred to in Section 14 would include a quasi-judicial tribunal. There appears to be no reason for limiting the reach of the expression "prosecuting with due diligence" to institution of a proceeding alone and not to the date on which the cause of action for such proceeding might arise in the case of appellate or revisional proceedings from original proceedings which prove to be abortive. Explanation (a) to Section 14 was only meant to clarify that the day on which a proceeding is instituted and the day on which it ends are also to be counted for the purposes of Section 14. This does not lead to the conclusion that the period from the cause of action to the institution of such proceeding should be left out. In fact, as has been noticed above, the explanation expands the scope of Section 14 by liberalizing it. Thus, under explanation (b) a person resisting an appeal is also deemed to be prosecuting a proceeding. But for explanation (b), on a literal reading of Section 14, if a person has won in the first round of litigation and an appeal is filed by his opponent, the period of such appeal would not be liable to be excluded under the Section, leading to an

absurd result. That is why a plaintiff or an applicant resisting an appeal filed by a defendant shall also be deemed to prosecute a proceeding so that the time taken in the appeal can also be the subject matter of exclusion under Section 14. Equally, explanation (c) which deems misjoinder of parties or a cause of action to be a cause of a like nature with defect of jurisdiction, expands the scope of the section. We have already noticed that the India Electric Works Ltd. judgment has held that strictly speaking misjoinder of parties or of causes of action can hardly be regarded as a defect of jurisdiction or something similar to it. Therefore properly construed, explanation (a) also confers a benefit and does not by a side wind seek to take away any other benefit that a purposive reading of Section 14 might give. We, therefore, agree with the decision of the Madhya Pradesh High Court that the period from the cause of action till the institution of appellate or revisional proceedings from original proceedings which prove to be abortive are also liable to exclusion under the Section. The view of the Andhra Pradesh High Court is too broadly stated. The period prior to institution of the initiation of any abortive proceeding cannot be excluded for the simple reason that Section 14 does not enable a litigant to get a benefit beyond what is contemplated by the Section - that is to put the litigant in the same position as if the abortive proceeding had never taken place."

20. The judgment in *M.P. Steel Corporation* (supra) has been followed in a subsequent decision of Apex Court in *Andhra Pradesh Power Corporation Committee and others Vs. Lanco Kondapalli Power Limited and others*, reported in 2016 (3) SCC 468. Paras- 24 & 32 to 35 of the judgment are reproduced:-

"24. Mr. Sundaram placed reliance upon judgment in the case of M.P. Steel Corporation (supra) to support his submission that Limitation Act applies only to courts stricto-sensu and not to quasijudicial tribunals. It may be noted here that the matter in M.P. Steel Corporation (supra) had arisen from proceedings under the Customs Act and hence in that case there was no occasion to consider the issue whether the Limitation Act is applicable to an action initiated before the Commission by virtue of provisions of the Electricity Act, 2003. However, this judgment does help the respondents to an extent by holding that principles underlying Section 14 of the Limitation Act will be applicable even in matters filed before a quasi-judicial tribunal such as the Commission. But the moot question remains to be answered - whether the bar of limitation is required to be respected by the Commission on the ground that there is no provision in the Electricity Act conferring additional rights upon a party moving the Commission for relief so as to claim even such reliefs which stand barred by limitation before the Civil Court or even for arbitral proceedings. The other ancillary issue required to be answered is - whether by virtue of provisions of the Electricity Act 2003 the Limitation Act has been made applicable to an action before the Commission by express provision or even by necessary intendment?"

* * *

32. In the light of above there can be no difficulty in appreciating that M/s. LANCO rightly appreciated the hurdle of limitation in its way when such an objection was taken by the appellant and it rightly chose to seek exclusion of the period it was pursuing arbitration proceeding before the High Court, on the basis of principles underlying Section 14 of the Limitation Act.

33. The issue as to whether the impugned order by APTEL permitting application of principles on Section 14 of the Limitation Act is in accordance with law or warrants interference now

requires to be answered on the basis of law as well as facts. In law, the APTEL could grant exclusion of certain period on the basis of principles under Section 14 in view of law laid down or clarified in M.P. Steel Corporation (supra). On facts, although the parties have argued at length, we find no difficulty in holding that APTEL has adopted a just and lawful approach in examining the relevant facts and in excluding the entire period claimed by M/s. LANCO which starts from the notice for arbitration dated 8.9.2003 given by M/s. LANCO, till the application of M/s. LANCO under Section 11 of the Arbitration Act before the High Court was finally disposed of on 18.3.2009.

34. The issue whether the first notice dated 8.9.2003 or the next notice dated 26.3.2004 should be treated as notice for arbitration for the purpose of Section 21 of the Arbitration Act was rightly not pursued further by Mr. Giri after some initial arguments. But since this issue was touched, we have looked at the entire Article 14 of the PPA as well as the notice dated 8.9.2003 and we find no difficulty in holding it as the notice for arbitration which amounted to initiation of arbitral proceedings as contemplated by Section 21 of the Arbitration Act.

35. A spirited argument was advanced on behalf of appellant that after the judgment of this Court in Gujarat Urja (supra) on 13.3.2008, the continuance of the arbitral proceedings before the High Court at the instance of M/s. LANCO should not be accepted as bona fide and that the commission was justified in not excluding this period of about one year on the ground that it was not bona fide and in such facts APTEL should not have taken a contrary view. Having considered submissions of the parties we find no merit in the aforesaid contention advanced on behalf of appellant. The view which we are going to take has been indicated by this Court in several judgments including M.P. Steel Corporation (supra). But the point requires no debate in view of clear stipulation in explanation (a) to sub-section (3) of Section 14 of the Limitation Act. This explanation reads as follows:-

"Explanation - For the purposes of this section, -

"(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;"

The same conclusion is inevitable even on other relevant facts. The appellant had notice of the arbitral proceeding and after judgment in Gujarat Urja (supra), the appellant also took no steps to get the application under Section 11 listed and disposed of earlier to 18.3.2009. The averments and the materials are not sufficient to establish the claim of the appellant that the proceeding ceased to be bona fide after 13.3.2008."

21. In the present case, Commissioner has condoned delay in filing of appeal, for which source of power can be traced to the principles contained under Section 14 of the Act of 1963. Although provisions of Section 14 ipso facto do not apply but its principles are clearly attracted. The Commissioner was thus right in condoning delay. No interference is thus warranted in exercise of writ jurisdiction of this Court under Article 226 of the Constitution of India with the order of Commissioner dated 13.6.2016. Writ petition fails and is dismissed. No order as to costs.

(2016) 8 ILRA 266
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.08.2016

BEFORE

THE HON'BLE RAN VIJAI SINGH, J.

Writ C No.- 32546 Of 2016
&
Connected With Other Cases

Smt. Nilam Devi

...Petitioner

Versus

State Of U.P. & Ors.

...Respondents

Counsel for Petitioner:

Ajay Singh Sengar

Counsel for Respondents:

C.S.C., Anand Kumar Yadav

Held

The **District Supply Officer (DSO)** has jurisdiction to suspend and cancel fair price shop agreements even in rural areas, as he falls within the definition of "competent authority" under the U.P. Scheduled Commodities Distribution Order, 2004.

The **powers of District Magistrate, District Supply Officer, and Sub-Divisional Officer are concurrent and overlapping**, and can be exercised simultaneously regarding inspection, suspension, and cancellation of fair price shops.

The argument that **only Sub-Divisional Officer has authority in rural areas is legally unsustainable. Government Orders issued under statutory control orders have overriding effect** over administrative circulars (e.g., Food Commissioner's letter dated 25.01.2006).

The **U.P. Scheduled Commodities Distribution Order, 2004 (issued under the Essential Commodities Act, 1955)** has statutory force and prevails over inconsistent executive instructions.

The **executive power under Article 162 of the Constitution extends to issuing binding government orders**, especially when backed by statutory authority.

Suspension orders cannot be interfered with merely on jurisdictional grounds when **authority exists under statutory framework**.

Courts may refrain from interference when:

Inquiry is pending, and

Petitioners have opportunity to respond.

Authorities are directed to **complete proceedings within a reasonable time (2 months / 6 weeks)** to ensure procedural fairness.

CASE LAW CITED

Garahan Ram v. State of U.P., 2013 (3) ADJ 314

(Delivered by Hon'ble Ran Vijai Singh, J.)

1. Heard Sri Ajay Sengar, learned counsel for the petitioner in Writ-C No. 32546 of 2016 (Smt. Nilam Devi Vs. State of U.P. and others), Sri Sanjay Singh, learned counsel in Writ-C No. 25347 of 2016 (Harveer Singh Vs. State of U.P. and others), Sri Ashok Malaviya, learned counsel in Writ C No. 35046 of 2016 (Ram Sajiwan Vs. State of U.P. and others) and Ms. Swati Agrawal, learned counsel in Writ C No. 34430 of 2016 (Smt. Zeeshan Fatma Vs. State of U.P. And others).

2. Through these writ petitions, orders of suspension of fair price shop have been challenged. While arguing the matter, argument was advanced by learned counsel for the petitioners that the order of suspension has been passed by the District Supply Officer and the shop is situated in the rural areas, therefore the order of suspension is without jurisdiction.

3. Taking note of the submissions of learned counsel for the petitioners, on 19.7.2016, this Court has passed the following order :-

Heard Sri Ajay Singh Sengar, learned counsel for the petitioner, learned Standing Counsel appearing for the State-respondents and Sri Anand Kumar Yadav, learned counsel for the gaon sabha.

Number of cases are coming before this Court with respect to the fair price shop running in the rural areas, where the orders of suspension and cancellation are being passed by the concerned District Supply Officer.

It has been argued by the learned counsel for the petitioner that so far as the rural area is concerned, it is the Sub Divisional Officer concerned who enters into the agreement to run fair price shop with the fair price shop agent and he has the power to appoint, suspend and cancel the agreement to run fair price shop. So far as the District Supply Officer is concerned, his jurisdiction is confined to suspend and cancel the agreement to run fair price shop situated in the urban areas.

Learned standing counsel taking shelter of the U.P. Schedule Commodities Control Order, 2004 has tried to submit that the District Supply Officer can also pass an order of suspension and cancellation with respect to rural areas.

It would be appropriate that the Principal Secretary (Food and Civil Supplies), Government of U.P., Lucknow shall file an affidavit clarifying the position with regard to the exercise of the power of suspension and cancellation of the agreement to run fair price shop in urban and rural areas.

As prayed, put up this case as fresh on 3.8.2016 as fresh.

It may be clarified that I have not stayed the proceeding of cancellation of agreement to run fair price shop with respect to the petitioner. Since the petitioner has already filed his reply, it will be open for the District Supply Officer concerned to take decision thereon, provided he has jurisdiction to do so.

4. Pursuant thereto, learned Standing Counsel has filed an affidavit of Principal Secretary, Food and Civil Supplies. For the purposes of the case, the averments made in paragraphs 7, 8 and 10 of the affidavit of the Principal Secretary are relevant which are reproduced herein under :-

7. That the deponent respectfully submits that Cluase-12 of the Government Order No. 2715 dated 17.8.2002 provides the power to District Supply Officer to inspect the shops lying in the rural area and in case any irregularity is found during the inspection, he is also empowered to take punitive action against the agent.

8. That in furtherance thereof another Government Order No. 3126 dated 30.9.2004 also refers to the powers vested with the officers namely District Magistrate and District Supply Officer to

inspect all the shops pertaining to PDS in rural as well as urban areas of a district.

10. That, the aforesaid Government Order dated 30.9.2004 also provides that the power of the Sub-Divisional Officer to inspect and take punitive actions pertaining to suspension and cancellation shall remain intact and that the power of District Magistrate/District Supply Officer shall run concurrently and parallel to the power of the Sub-Divisional Officer, so far as it pertains to the inspection/suspension/cancellation of the shops in rural areas.

5. The reply to the aforesaid affidavit has been filed by learned counsel for the petitioner in Writ - C No. - 32546 of 2016.

6. In paragraph 7 of the affidavit of Principal Secretary, reliance has been placed upon the government order dated 17.8.2002. In paragraph 12 of the government order dated 17.8.2002, the District Supply Officer has also been authorized to inspect the fair price shop situated in the rural areas and in the event of finding any irregularity in distribution of scheduled commodities, power has also been conferred to take strict action. For ready reference, paragraph 12 of the government order dated 17.8.2002 is reproduced herein under :-

“ जिलापूर्ति अधिकारी को यह अधिकार होगा कि ग्रामीण क्षेत्र की दुकानों का निरीक्षण तथा अनियमितता पाये जाने पर दुकानदारों के विरुद्ध दण्डात्मक कार्यवाही कर सकते हैं।”

7. The reliance has also been placed upon the government order dated 30.9.2004. The relevant portion of the aforesaid government order reads as under :-

“ 2. विभिन्न जिलों द्वारा शासन से ग्रामीण क्षेत्र एवं शहरी क्षेत्र में

उचित दर दुकानों के दण्डात्मक कार्यवाही (निलम्बन/निरस्तीकरण आदि) के अधिकार की स्थिति स्पष्ट करने के सम्बन्ध में मार्गदर्शन की अपेक्षा की गयी है। उक्त के परिप्रेक्ष्य में मुझसे यह कहने की अपेक्षा की गयी है कि जिलाधिकारी तथा जिलापूर्ति अधिकारी को सम्पूर्ण जिले के (जिसमें नगरीय एवं ग्रामीण दोनों क्षेत्र सम्मिलित होंगे) लक्षित जन वितरण प्रणाली के सभी दुकानों के निरीक्षण तथा उनके विरुद्ध दण्डात्मक कार्यवाही (निलम्बन/निरस्तीकरण आदि) करने का अधिकार होगा। उप जिलाधिकारी को अपने तहसील में स्थित सभी दुकानों के निरीक्षण तथा उनके विरुद्ध दण्डात्मक कार्यवाही (निलम्बन/निरस्तीकरण आदि) करने का अधिकार यथावत् रहेगा। ”

8. Learned counsel for the petitioner submitted that there is a overlapping of the power in between the District Magistrate, District Supply Officer and the Sub-Divisional Officer. In their submissions, since in the rural areas, an agreement is executed for running the fair price shop in between the Sub-Divisional Officer and the fair price shop agent, therefore it is the District Magistrate and the Sub-Divisional Officer who can inspect and cancel the agreement of the fair price shop agent and the District Supply Officer can neither suspend nor cancel the agreement.

9. Sri Vishal Tandon, learned Standing Counsel appearing for the State respondents, in addition to what has been stated in the counter affidavit, has invited attention of this Court towards Para 2 (i) of the U.P.Scheduled Commodities Distribution Order, 2004 (hereinafter referred to as 'Distribution Order, 2004') which defines the competent authority, which means Collector and includes Additional District Magistrate, District Supply Officer, Deputy Town and

Rationing Officer and Sub-Divisional Officer or Area Rationing Officer. He also submits that under Sub-Para 3 of Para 28 of the Distribution Order 2004, provision of appeal has been made against the order of the competent authority. In addition to that, he has also placed reliance upon the judgment of the Division Bench of this Court in **Garahan Ram Vs. State of U.P. (2013 (3) ADJ 314)**.

10. It is not in dispute that the petitioners are the fair price shop agents and their appointments are made and regulated through government order. Initially after the repeal of Uttar Pradesh Scheduled Commodities (Regulation of Distribution) Order, 1989, U.P. Scheduled Commodities Distribution Order 1990, (in short 'Distribution Order, 1990') had come into force and in view of the Order 4 of the Distribution Order, 1990, a government order dated 3.7.1990 was issued. In the aforesaid government order, procedure for appointment of fair price shop agent and regulation of the distribution of scheduled commodities have been detailed. After the Distribution Order 1990, distribution order has come into force known as U.P. Scheduled Commodities Distribution Order, 2004. Sub-Order 1 of Order 4 of the Distribution Order, 2004 provides that a fair price shop shall be run through such person and in such manner as the Collector, subject to the directions of the State Government may decide. Nothing has been brought to my notice that after commencement of the Distribution Order, 2004, any new government order has been issued relating to appointment of fair price shop agent. Learned Standing Counsel has only placed reliance upon the provisions of the government orders dated 3.7.1990, 17.8.2002 and 30.9.2004. In the government order dated 17.8.2002, in para 3, it is mentioned that the provisions of the government order dated 3.7.1990 will remain in force which are not inconsistent with the provisions contained in the government order dated 17.8.2002. It may be noticed that when the government order dated

3.7.1990 was issued, along with the aforesaid government order, a format of the agreement was also annexed. For the purposes of the case, para 16 of the agreement is relevant, which is reproduced herein under :-

“16. जिला मैजिस्ट्रेट/जिला पूर्ति अधिकारी/नगर राशनिंग अधिकारी/अतिरिक्त जिला अधिकारी (आपूर्ति) क्षेत्रीय खाद्य नियंत्रक को इस अनुबन्ध पत्र को किसी भी समय विना कारण बताये हुये समाप्त करने का अधिकारी होगा। ”

11. However, after issuance of the government order dated 17th August, 2002 and commencement of the Distribution Order, 2004, the conditions of the agreement have been slightly changed. The Condition No. 22 (1) of the new format of agreement is reproduced herein under :-

“22(1) यदि और जब कभी एतद् पूर्व उल्लिखित शर्तों और प्रतिबन्धों में से किसी का भी अभिकर्ता द्वारा उल्लंघन किया जाय वा/और अनुपालन किया जाय तो सक्षम प्राधिकारी लिखित रूप से स्पष्टतः कारण बताते हुए अभिकर्ता द्वारा जमा प्रतिभूति की राशि अपने विवेकानुसार आंशिकत अथवा सम्पूर्ण रूप से शासन के पक्ष में जब्त कर सकता है अथवा इस अनुबन्ध पत्र को निलम्बित करते हुए अभिकर्ता के विरुद्ध अग्रेतर जॉच एवं विभागीय कार्यवाही संयोजित कराकर प्रक्रिया में ला सकता है और विभागीय कार्यवाही की प्रक्रिया में अभिकर्ता को उसके विरुद्ध साक्ष्यों का अवलोकन करने का अवसर प्रदान करते हुए अभिकर्ता को अपना पक्ष प्रस्तुत करने का अवसर प्रदान करते हुए गुणावगुण के आधार पर

विचारोपरान्त अभिकर्ता का अनुबन्धय निरस्त तक कर सकता है तथा सम्पूर्ण प्रतिभूति राशि शासन के पक्ष में जब्त कर सकता है। ”

12. From the perusal of the Condition No. 16 of the government order dated 3.7.1990, it would transpire that earlier under the condition of the agreement, there was a provision that the District Magistrate, District Supply Officer, City Rationing Officer, Additional District Magistrate (Supply) and Regional Food Officer could cancel the agreement without assigning any reason. Whereas in view of the Condition No. 22 (i) of the recent agreement, for the purposes of the cancellation of the agreement, fair price shop agent has to be provided an opportunity to rebut the charges.

13. From going through the government order dated 3.7.1990 and the Distribution Order, 2004, it would transpire that the power of suspension and cancellation has through out been conferred upon the District Magistrate, District Supply Officer, Sub-Divisional Officer and other officers. Para 2 (i) of the Distribution Order, 2004 talks about the competent authority and it is the competent authority under the Distribution Order, 2004 who can suspend and cancel the agreement of the person. Since the competent authority includes the District Supply Officer too, therefore the argument of learned counsel for the petitioner that the District Supply Officer has no jurisdiction to suspend the agreement cannot be sustained in the eyes of law.

14. Learned counsel for the petitioners, placing reliance upon the Condition Nos. 5 and 6 of the order/letter dated 25.1.2006 issued by the Food Commissioner, have submitted that in the rural areas, it is the Sub-Divisional Officer which has power to appoint, suspend and cancel the agreement of fair price shop agent and in the urban areas, it is the District Supply Officer who has the same power. In their submissions, the Food Commissioner has issued letter/order on 25.1.2006, therefore this will prevail over all the government orders including the Distribution Order, 2004.

For appreciation, Condition Nos. 5 and 6 of the letter/order dated 25.1.2006 is reproduced herein under :-

“5. ग्रामीण क्षेत्र में उचित दर विक्रेता की नियुक्ति/निलंबन निस्तीकरण दुकानदार को खाद्यान्न/चीनी एवं मिट्टी तेल के आवंटन का कार्य उपजिलाधिकारी द्वारा सुनिश्चित किया जाता है, इसलिए उनका दायित्व है कि वह क्षेत्र के उचित दर विक्रेताओं से अनुबन्ध की शर्तों का पूर्ण पालन कराये तथा उपलब्ध संसाधनों द्वारा वह वितरण व्यवस्था पर कड़ी दृष्टि रखें। अपने क्षेत्र में राशन माफियाओं को पनपने न दें। यथा आवश्यक कानूनी कार्यवाही करनी पड़े तो अवश्य की जाये।

जहाँ कहीं खाद्यान्न के व्यवर्तन के गंभीर मामले संज्ञान में आये वहाँ पर वस्तु अधिनियम के अंतर्गत कार्यवाही के अतिरिक्त प्रिवेन्शन ऑफ डिटेन्शन एक्ट 1980 के अंतर्गत दोषी व्यक्ति को निरुद्ध करने की भी कार्यवाही की जाये।

6. जिला पूर्ति अधिकारी को शहरी क्षेत्रों के उचितदर विक्रेताओं पर कड़ी दृष्टि रखनी होगी तथा विक्रेताओं से अनुबंध की शर्तों का पूर्ण पालन कराना होगा कर्तव्य एवं दायित्व की अवहेलना अक्षम्य होगी। ”

15. Learned Standing Counsel appearing for the State respondents submitted that in fact, the alleged letter/order of the Food Commissioner is a circular, therefore the government orders issued from time to time will have overriding effect over the circular. Taking shelter of Article 162 of the Constitution of India, he submitted that the power of executive is co-extensive and it has also power to legislate upto some extent. In his submissions, the government order issued from time to time under the provisions of relevant Control Orders regulating the distribution of scheduled commodities will also have overriding effect and will have statutory force, therefore the government orders as well as Distribution Order, 2004 will prevail over the alleged order/letter of the Food Commissioner dated 25.1.2006.

16. I find substance in the submissions of learned Standing Counsel.

17. I am of the opinion that the government order issued from time to time including the Distribution Order, 2004 will have overriding effect over the order/letter of the Food Commissioner, therefore also the argument of learned counsel for the petitioner that in the rural areas, the District Supply Officer has no power to suspend/cancel the agreement of the fair price shop agent is unsustainable.

18. Here in this case, the view taken by me also finds support from the Division Bench judgment of this Court in the case of Garahan Ram (supra). Paragraph 6 of the aforesaid judgment is relevant for the aforesaid cases, which is reproduced hereinunder :-

6. The U.P. Scheduled Commodity Distribution Order, 2004 has been issued by the State Government in exercise of powers under section 3 of the Essential Commodities Act, 1955. Under the said order of 2004, the State Government is empowered to issue orders regulating inspection and monitoring of the fair price shops. The power of

the State Government is clearly provided for in clauses 21 and 23 of 2004 Order. The State Government having specifically provided for empowering the District Supply Officer and

the District Magistrate to take all action including suspension and cancellation, the submission of the petitioner that the District Supply Officer has no jurisdiction to suspend the fair price shop agreement is without any substance.

19. In view of foregoing discussions, I am of the view that the District Supply Officer has also power to suspend and cancel the agreement of the fair price shop agent in the rural areas.

20. The attention of this Court has also been drawn towards the government order dated 26.11.2014 in which it is provided that the proceeding of cancellation of the agreement of fair price shop agent is to be concluded within a period of four weeks and here in all the cases, the suspension orders are older than four weeks, therefore too, there is no occasion to interfere with those suspension orders.

21. On being confronted as to whether in these cases, the petitioners have filed their reply to the show cause notice, learned counsel for the petitioners, except the petitioner in Writ-C No. 25347 of 2016, have submitted that they have filed their reply.

22. These writ petitions are disposed of with the direction to the District Supply Officer to conclude the inquiry expeditiously as early as possible within a period of two months from the date of filing of certified copy of the order of this Court.

23. So far as the petitioner in Writ-C No. 25347 of 2016 is concerned, this writ petition is also disposed of with the liberty to the petitioner to file his reply along with certified copy of the order of this Court. In case, such reply is filed, the District Supply Officer shall conclude the inquiry within a period of six weeks from the date of filing of the reply.

(2016) 8 ILRA 273
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2016

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ C No.- 34041 Of 2016
&
Writ C No.- 34496 Of 2016

M/S U.P. State Sugar And Cane Development Corp. Ltd. & Anr.
Versus

...Petitioners

Assistant Labour Commissioner & Ors.

...Respondents

Counsel for Petitioners:

Shakti Swarup Nigam

Counsel for Respondents:

C.S.C., Syed Mohd. Fazal

In the present writ petition order dated 6.6.2016 passed by the Deputy Labour Commissioner under Section 6-H(1) of the U.P. Industrial Disputes Act, 1947 is under challenge. The moot question, which arises for consideration of this Court in the present matter, is as to whether the Deputy Labour Commissioner exercising his jurisdiction under Section 6-H(1) of the U.P. Industrial Disputes Act has any power to review his order?

From the nature of proceedings and jurisdiction conferred thereunder, it is not in dispute that the Deputy Labour Commissioner exercises quasi-judicial powers. Learned counsel for the petitioner has submitted that under the provisions of the Act, as well as the Rules, there exists no power of substantive review available to the Deputy Labour Commissioner.

This Court in a recent decision in M/s. Indo Gulf Industries Ltd. Vs. State of U.P. And others, reported in 2016 (148) FLR 991 held that "The legal position summarised above, compels me to hold that though the prescribed authority had no power to review its own decision but had the power to consider the applications for recall of the orders on the limited grounds on which procedural review is permissible. Therefore, ignoring the substantive part of the review and without touching the merits of the orders could have considered the recall applications within the limited scope of violation of principles of natural justice. Thus, it committed material irregularity in rejecting the applications as not maintainable for want of power to review."

Court held that neither the review application filed by the respondent no.2 was maintainable before the Deputy Labour Commissioner nor he had any jurisdiction to review his order passed previously. The orders impugned dated 6.6.2016, consequently, are wholly without jurisdiction, and are set aside.

The writ petitions stand allowed.

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Challenge is laid in both writ petitions to the orders passed by the Deputy Labour Commissioner under Section 6-H(1) of the U.P. Industrial Disputes Act, 1947, dated 6.6.2016, whereby the authority concerned has reviewed its previous orders passed in the matter on 1st October, 2015.

2. A perusal of the record goes to show that an industrial dispute was raised at the instance of the respondent workmen, which came to be registered as Adjudication Case No.99 of 1982. Proceedings for recovery under Section 6-H(2) were also initiated in Misc. Case No.30 of 1984, and both matters came to be decided finally by the Labour Court on 30th September, 1985. It gave rise to filing of Writ Petition Nos.3982 of 1986 and 3983 of 1986. The writ petitions were disposed of by this Court on 5th February, 2009. It appears that modification applications were thereafter filed being Application Nos.97252 of 2009 and 97253 of 2009, both of which came to be disposed of by this Court on 15th January, 2013. Operative portion of the order dated 15.1.2013 reads as under:-

"Accordingly, as the petitioners had been reinstated hence order dated 5.2.2009 is modified. There is no question of granting back wages. However, as petitioners were taken back in service and continued to work for 22 years till the closure of the mill hence there is no question of disturbing the reinstatement order passed through impugned award. Accordingly, it is directed that since the date of reinstatement which according to workmen was 17.11.1985 the workmen shall be paid such amounts which were paid to other similarly situate employees of the same Mill as retaining allowance and bonus. If other employees of the mill in question have been offered or are offered benefit of V.R.S. scheme the same benefit may be extended to the workmen in this writ petition who have not yet crossed the age of retirement.

Direction for payment of Rs.35,000/- to each workman is recalled.

Modification applications are disposed of. Judgement and orders dated 5.2.2009 are modified accordingly."

3. It appears that while the issue relating to the award as well as proceedings upon modification were pending, the sugar factory, which initially belonged to U.P. State Sugar and Cane Development Corporation, came to be transferred pursuant to a slump sale agreement in favour of respondent no.2 i.e. M/s Dynamics Sugar Private Ltd. The respondent no.2 accordingly moved an application and sought its impleadment in pending proceedings before this Court, which was allowed. The order passed by this Court on 15th January, 2013 has been assailed by respondent no.2 before the Hon'ble Supreme Court by filing Special Leave to Appeal (Civil) CC No.12606 of 2013, in which delay has been condoned on 13th December, 2013, and notices were issued. It is agreed between the parties that the SLP against the order of this Court dated 15th January, 2013 continues to remain pending.

4. It appears that benefit of the order passed by this Court in writ petitions arising out of the award was not extended to the workmen, and as such, an application under Section 6-H(1) of the

U.P. Industrial Disputes Act was filed by the workers before the Deputy Labour Commissioner, in which respondent no.2 through its Chief Accountant and Managing Director of the respondent no.2 were impleaded as opposite parties. An objection was raised against the claim of respondent workers by respondent no.2 disputing its liability to pay the amount, as claimed against them in view of the terms of transfer deed. The Deputy Labour Commissioner proceeded to adjudicate the issue, and passed an order on 1.10.2015 holding the respondent no.2 liable for payment of amount due to the workmen under Section 6-H(1) of the Act.

5. Aggrieved by the order of the Deputy Labour Commissioner dated 1.10.2015, respondent no.2 moved an application for review before the same authority on the ground that in terms of provisions of slump sale agreement, respondent no.2 was not liable for payment of dues admissible to the workers. This application has been brought on record of the writ petition no.34041 of 2016 as Annexure-9. The application for review was objected to by the workers on the ground that Deputy Labour Commissioner had no jurisdiction to review his order. It appears that while review application was pending, a direction was issued to implead the present petitioner also as a respondent to the main proceedings under Section 6-H(1). An objection, therefore, was filed by the petitioner specifically challenging the jurisdiction of the authority to entertain a substantive review in the absence of an enabling provision. Reliance was placed upon various orders passed by this Court as well as by the Hon'ble Supreme Court in Kapra Mazdoor Ekta Union Vs. Birla Cotton Spinning and Weaving Mills Ltd. And another, reported in 2005 (13) SCC 777.

6. The Deputy Labour Commissioner after hearing the parties has proceeded to pass the orders impugned, whereby application for review filed by the respondent no.2 has been allowed, and a finding has been returned that in terms of the provisions of slump sale agreement, the liability to pay the dues of the workmen lay with petitioner and not upon respondent no.2. It is these orders passed upon review application, which are assailed in the present writ petition.

7. I have heard Sri S.S. Nigam, learned counsel for the petitioner, learned Standing Counsel appearing for the respondent no.1, Sri S.G. Hasnain, learned Senior Counsel assisted by Sri Syed Mohd. Fazal for the respondent no.2, and Sri A.K. Singh, learned counsel appearing for the respondent nos.3 to 6.

8. The moot question, which arises for consideration of this Court in the present matter, is as to whether the Deputy Labour Commissioner exercising his jurisdiction under Section 6-H(1) of the U.P. Industrial Disputes Act has any power to review his order?

9. Section 6-H(1) of the U.P. Industrial Disputes Act, 1947, reads as under:-

"6H. Recovery of money due from an employer.--(1) Where any money is due to a workman from an employer under the provisions of Sections 6J to 6R under a settlement or award, or under an award given by an adjudicator or the State Industrial Tribunal appointed or constituted under this Act, before the commencement of the Uttar Pradesh Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956, the workman may, without prejudice to any

other mode of recovery, make an application to the State Government for the recovery of the money due to him, and if the State Government is satisfied that any money is so due, it shall issue a certificate for that amount to the Collector who shall proceed to recover the same as if it were an arrear of land revenue."

10. From the nature of proceedings and jurisdiction conferred thereunder, it is not in dispute that the Deputy Labour Commissioner exercises quasi-judicial powers. Learned counsel for the petitioner has submitted that under the provisions of the Act, as well as the Rules, there exists no power of substantive review available to the Deputy Labour Commissioner.

11. Sri Hasnain, learned Senior Counsel appearing for the respondent no.2, although has made various submissions, but attention of the Court has not been drawn to any provision under the U.P. Industrial Disputes Act, 1947 or the Rules framed thereunder, which confers power of substantive review upon the Deputy Labour Commissioner.

12. From the materials, which have been brought on record, this Court finds that the claim as was originally instituted by the respondent workmen under Section 6-H(1) was against respondent no.2. It further appears from the record that an objection was taken by respondent no.2, questioning the claim raised by respondent workmen as against respondent no.2. This issue was considered and has been decided by the Deputy Labour Commissioner, on merits, after hearing the respondent no.2. In its order dated 1st October, 2015, respondent no.2 has categorically held that in terms of the provisions of the agreement, liability to pay the dues of respondent workmen lay upon respondent no.2.

13. In case, respondent no.2 felt aggrieved by the order dated 1st October, 2015, as according to them they were not liable to pay such amount under the agreement, they had the remedy available to assail the order before the appropriate forum, which has not been pursued. In the absence of any enabling provision conferring power of review upon the authority, a review application was not maintainable. The review application filed by the respondent no.2 was not a procedural review, inasmuch as the order dated 1st October, 2015 had been passed after hearing the respondent no.2. In the absence of any power of substantive review available to the Deputy Labour Commissioner, he had no jurisdiction to pass the order upon the review application. Neither the review application was maintainable nor any order upon it would have been passed. The question as to whether in the absence of power of substantive review, a quasi-judicial authority could exercise the power of review has been adjudicated by the Apex Court in *Kapra Mazdoor Ekta Union* (supra). Para-19 of the judgment reads as under:-

"19. Applying these principles it is apparent that where a Court or quasi judicial authority having jurisdiction to adjudicate on merit proceeds to do so, its judgment or order can be reviewed on merit only if the Court or the quasi judicial authority is vested with power of review by express provision or by necessary implication. The procedural review belongs to a different category. In such a review, the Court or quasi judicial authority having jurisdiction to adjudicate proceeds to do so, but in doing so commits a procedural illegality which goes to the root of the matter and invalidates the proceeding itself, and consequently the order passed therein. Cases where a decision is rendered by the Court or quasi judicial authority without notice to the opposite party or under a mistaken impression that the notice had been served upon the opposite party, or where a matter is taken up for hearing and decision on a date

other than the date fixed for its hearing, are some illustrative cases in which the power of procedural review may be invoked. In such a case the party seeking review or recall of the order does not have to substantiate the ground that the order passed suffers from an error apparent on the face of the record or any other ground which may justify a review. He has to establish that the procedure followed by the Court or the quasi judicial authority suffered from such illegality that it vitiated the proceeding and invalidated the order made therein, inasmuch the opposite party concerned was not heard for no fault of his, or that the matter was heard and decided on a date other than the one fixed for hearing of the matter which he could not attend for no fault of his. In such cases, therefore, the matter has to be re-heard in accordance with law without going into the merit of the order passed. The order passed is liable to be recalled and reviewed not because it is found to be erroneous, but because it was passed in a proceeding which was itself vitiated by an error of procedure or mistake which went to the root of the matter and invalidated the entire proceeding. In Grindlays Bank Ltd. vs. Central Government Industrial Tribunal and others (supra), it was held that once it is established that the respondents were prevented from appearing at the hearing due to sufficient cause, it followed that the matter must be re-heard and decided again."

14. Per contra, Sri Hasnain, learned Senior Counsel, has relied upon a decision of the Apex Court in Rajendra Singh Vs. Lt. Governor, Andaman and Nicobar Islands and others, reported in 2005 (107) FLR 1069. Paras-11 and 12 of the judgment, which have been relied upon, reads as under:-

"11. We are unable to countenance the argument advanced by learned Additional Solicitor General appearing for the respondents. A careful perusal of the impugned judgment does not deal with and decide many important issues as could be seen from the grounds of review and as raised in the grounds of special leave petition/appeal. The High Court, in our opinion, is not justified in ignoring the materials on record which on proper consideration may justify the claim of the appellant. Learned counsel for the appellant has also explained to this Court as to why the appellant could not place before the Division Bench some of these documents which were not in possession of the appellant at the time of hearing of the case. The High Court, in our opinion, is not correct in overlooking the documents relied on by the appellant and the respondents. In our opinion, review jurisdiction is available in the present case since the impugned judgment is a clear case of an error apparent on the face of the record and non-consideration of relevant documents. The appellant, in our opinion, has got a strong case in their favour and if the claim of the appellant in this appeal is not countenanced, the appellant will suffer immeasurable loss and injury. Law is well-settled that the power of judicial review of its own order by the High Court inheres in every Court of plenary jurisdiction to prevent mis-carriage of justice.

12. The power, in our opinion, extends to correct all errors to prevent miscarriage of justice. The courts should not hesitate to review its own earlier order when there exists an error on the face of the record and the interest of the justice so demands in appropriate cases. The grievance of the appellant is that though several vital issues were raised and documents placed, the High Court has not considered the same in its review jurisdiction. In our opinion, the High Court's order in the revision petition is not correct which really necessitates our interference."

15. The judgment of the Apex Court in Rajendra Singh (supra) was delivered by the Hon'ble Supreme Court in the context of exercise of power by the High Court under Article 226 of the Constitution

of India. It is not in dispute that power of review is available to a High Court, and therefore, any observation made in paras-11 and 12 will have to be read in the context of the power, which was being exercised. The observation made in paras-11 and 12, therefore, cannot be pressed into service by the respondents to contend that Deputy Labour Commissioner had an authority to review his order. This Court in a recent decision in *M/s. Indo Gulf Industries Ltd. Vs. State of U.P. And others*, reported in 2016 (148) FLR 991, has been pleased to scan the law on the issue, and following observations have been made in Paras-24, 25 and 26, which reads as under:-

"24. In Kapra Mazdoor Ekta Union³ the Three Judges of the Supreme Court considered the distinction between the review and the recall applications and held though the Act do not grant any power of review either expressly or by necessary implication but the procedural power belongs to a different category and if the party is able to establish that the procedure followed by the forum is vitiated and therefore, the order requires to be recalled it has ample power to do so.

25. In view of the above discussion, it is crystal clear that the power of substantive review is not exercisable by any court, tribunal or authority unless the same is specifically conferred upon it under the relevant statute whereas the power of procedural review is inherent in every court tribunal or authority and could be exercised even if no such power is given to them under the Act but for the exercise of the same the party applying has to establish that he was not served with the notice or that he was prevented for sufficient good reason from attending the proceedings or that the procedure followed by the forum stood vitiated as it was violative of the principles of natural justice.

26. The legal position summarised above, compels me to hold that though the prescribed authority had no power to review its own decision but had the power to consider the applications for recall of the orders on the limited grounds on which procedural review is permissible. Therefore, ignoring the substantive part of the review and without touching the merits of the orders could have considered the recall applications within the limited scope of violation of principles of natural justice. Thus, it committed material irregularity in rejecting the applications as not maintainable for want of power to review."

16. In view of the discussions aforesaid, this Court has no hesitation to hold that neither the review application filed by the respondent no.2 was maintainable before the Deputy Labour Commissioner nor he had any jurisdiction to review his order passed previously. The orders impugned dated 6.6.2016, consequently, are wholly without jurisdiction, and are set aside. This judgment, however, shall not preclude the respondent no.2 from challenging the order dated 1.10.2015, if they are so advised, in the manner contemplated by law.

17. Subject to the observations made above, the writ petitions stand allowed. No order as to costs.

(2016) 8 ILRA 279
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2016

BEFORE

THE HON'BLE V.K. SHUKLA, J.
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Writ C No.- 42116 Of 2015

Vikash Rao

...Petitioner

Versus

Union Of India & Ors.

...Respondents

Counsel for Petitioner:

Siddharth Khare, Ashok Khare

Counsel for Respondents:

A.S.G.I., S.C., Sanjiv Singh, Yogendra Kumar

Petitioner is before the court to quash the order dated 15.07.2015 issued by the Senior Divisional Retail Sales Manager, Indian Oil Corporation Ltd., for a direction to restrain the respondents from taking any action on the basis of order impugned and for a direction to the respondents to forthwith issue the Letter of Intent to the petitioner on the basis of his selection dated 10.04.2013 for allotment of Retail Outlet Dealership. An advertisement in 'Dainik Jagran' dated 26.10.2011, whereby applications were invited for appointment of Retail Outlet Dealers with regard to several sites in the State.

Court observed that on the date i.e. 23.12.2011 the petitioner had proceeded to misrepresent the Corporation, wherein the petitioner has deliberately shown the amount of Rs.10,40,000/- in his account but actually on the said date thereafter Rs.4.5 lacs had been withdrawn and consequently on the said date only Rs.5,90,000/- was available in the said account. Once this fact has been brought into the notice of the Corporation, they proceeded to cancel the claim of the petitioner. After considering the facts and circumstances it was clear that the petitioner tried to make a deliberate attempt to place the incorrect statement of account on the date of submission of application i.e. 23.12.2011 as Rs.10,40,000/- but actually on the said date the petitioner had only Rs.5,90,000/- in his account and court is of the opinion that the petitioner had misrepresented the Corporation and as per the provisions contained under the advertisement the Corporation has every right to reject the candidature, in case any misrepresentation had been made.

The writ petition sans merit and is accordingly dismissed.

(Delivered by Hon'ble V.K. Shukla, J.
&
Hon'ble Mahesh Chandra Tripathi, J.)

1. Vikash Rao is before this Court for a direction to quash the order dated 15.07.2015 issued by the Senior Divisional Retail Sales Manager, Indian Oil Corporation Ltd., Gorakhpur

Divisional office, Gorakhpur; for a direction to restrain the respondents from taking any action on the basis of order impugned and for a direction to the respondents to forthwith issue the Letter of Intent to the petitioner on the basis of his selection dated 10.04.2013 for allotment of Retail Outlet Dealership (Petrol Pump) at the site between mile stone no.23 to 26 on Kasaya-Deoria Road (State Highway-79) District Deoria pursuant to advertisement dated 26.10.2011 within stipulated period.

2. This much is reflected from the record that the respondent-Indian Oil Corporation Ltd., Lucknow (in short "the Corporation") issued an advertisement in 'Dainik Jagran' dated 26.10.2011, whereby applications were invited for appointment of Retail Outlet Dealers with regard to several sites in the State. The applications were also invited for Retail Outlet Petrol Pump Dealership in question on Kasya-Deoria Road (State Highway-79) between Mile Stone No.23-26 specified at SN 225 of the said advertisement. The petitioner being fully qualified and eligible also applied pursuant to the aforesaid advertisement. The application so submitted was accompanied by several documents including proof of ownership of requisite land and a photocopy of the pass book of the petitioner with regard to Account No.3157567504 of Central Bank at Gadrampur Branch, Deoria and other documents. It is claimed that an amount of Rs.10,40,000/- was available in the account of the petitioner on the relevant date i.e. 23.12.2011. Consequently, in response to his application he had been called for an interview, which was held on 10.4.2013. On the said date total five applicants were interviewed and the petitioner was declared as duly selected for allocation of Retail Outlet Dealership in question. A photocopy of displayed mark sheet dated 10.4.2013 is also appended as Annexure No.3 to the writ petition. A perusal of the aforesaid mark sheet would demonstrate that other four candidates namely Ashutosh Kumar Rai, Farware Alam Siddiqui, Pramod Kumar Jaiswal and Sanjay Jaiswal were categorised as not qualified on account of their having secured less than 60 marks on the basis of various parameters specified for selection. In the said marksheet the petitioner stood at first position having 82.74 marks out of total 100 marks. It is submitted that based upon the aforesaid selection a letter of intent ought to have been issued to the petitioner but a complaint was made by Pramod Kumar Jaiswal against the selection of the petitioner, however, the said complaint was rejected by the General Manager, U.P. State Office-1 of India Oil Corporation Ltd. by order dated 25.6.2014. In the meantime, Pramod Kumar Jaiswal has filed Writ Petition No.62083 of 2014 (Pramod Kumar Jaiswal v. Indian Oil Corporation Ltd. & Ors.) challenging the selection of the petitioner. The said writ petition was dismissed by this Court on 28.11.2014. It is submitted that inspite of aforesaid facts, the letter of intent was not issued in favour of the petitioner. Consequently, the Senior Divisional Retail Sales Manager vide order dated 15.7.2015 has proceeded to cancel the candidature of the petitioner for the proposed location on the basis of vigilance report.

3. In this background, Shri Ashok Khare, learned Senior Counsel assisted by Shri Siddharth Khare have contended that the entire vigilance enquiry had been made by the respondents behind the back and at no point of time they have proceeded to issue any notice to the petitioner in this regard and inspite of completion of all the requisite formalities, the respondents had proceeded to cancel the candidature of the petitioner and as such it is contended that the order impugned is in violation of the principle of natural justice. Once a complaint was made against the petitioner and the competent authority had examined the matter and rejected the said objection vide

order dated 25.6.2014 upholding the selection of the petitioner and once all the objections have been turned down, then the subsequent order impugned amounts to review of all earlier orders, which cannot sustain. Without any authority to review its earlier order, the respondents have proceeded to review the same, which is per se bad.

4. Shri Ashok Khare, Sr. Advocate further makes submissions that as per Paragraph 13 (ii) of the brochure, which was issued by the Corporation governing selection of Dealers for Petrol/ Diesel Outlet dated 2.9.2011, eight parameters were provided over which the allocation is to be made. The marks so indicated demonstrates that under the category of capacity to raise finances for which twenty five marks were allocated, twenty marks were allocated for the financial condition and five marks for creditworthiness. The twenty marks specified for financial condition stood further sub-categorized into twelve marks for availability of liquid funds, four marks for possession of movable and immovable property and four marks for income from various sources. It is contended that even in case the petitioner did not have the requisite liquid fund on the date of application and 12 marks allocated for liquid funds are deleted from the marks allocated to the petitioner, even in that eventuality the petitioner remains qualified candidate having 70.74 marks to his credit and even in that eventuality he continues to maintain the first position in the selection amongst five applicants. As such it is contended that the order impugned is per se bad and in violation of the selection guidelines and this Court should come to rescue and reprieve of the petitioner.

5. On the other hand, Shri Sanjiv Singh, learned counsel for the Corporation has vehemently opposed the writ petition on the ground that the petitioner had proceeded to submit his account statement for his account in question in which availability of Rs.10.40 lacs had been shown on 23.12.2011. The petitioner has concealed the material fact in the matter and had not proceeded to submit his financial status as per the terms and conditions and even though without required financial capability had proceeded to submit his claim. The last date for submissions of application form was also 23.12.2011. During field verification of documents of the petitioner, on perusal of bank statement, it was observed that an amount of Rs.4.5 lacs was withdrawn on the same day i.e. on 23.12.2011 and only Rs.5.90 lacs was available as on the date of application/ submission i.e. 23.12.2011. As per point 13 of the application form, provided in the advertisement, amount shown in the application form in support of financial capabilities should be valid on the date of application i.e. closing balance on the date of application and as such the petitioner had proceeded to misrepresent the Corporation. As per Clause 10 (ja) of advertisement, the application of a candidate will be rejected in case of misrepresentation of facts. As such he submits that the Corporation has every right to find out the true financial status of the incumbent, who is interested to run the outlet. It is the responsibility of the Corporation to ensure that by all eventuality the incumbent in whose favour the allotment is going to be made must have financial viability / capability so that he may run the outlet. It is submitted that as such there is no infirmity or illegality in the order impugned and the writ petition is liable to be dismissed with cost.

6. Learned counsel for the petitioner, regarding the aforesaid withdrawal from the account, has explained in para 27 of the writ petition as under:-

"27. That on account of emergent circumstances on 23.12.011 an amount of Rs.4,50,000/- had to be withdrawn from the said account. It is specifically stated that the aforesaid withdrawal was made after up-dating passbook had been enclosed and submitted along with the application form."

7. In this background, we have proceeded to examine the record in question. This much is reflected that the petitioner had proceeded to submit application for retail outlet on 22.12.2011. Along with the said application the petitioner had appended the statement of Account No.3157567504 of Central Bank of India, Branch Garhrampur, Deoria, wherein the amount of Rs.10,40,000/- is shown in the account on the relevant date i.e. 23.12.2011. The entry in the bank statement so appended along with the writ petition was hand written. At the time of argument, the pass book of the petitioner's account updated upto 21.09.2012 has been placed by Shri Siddharth Khare. For adjudicating the present controversy it would be relevant to indicate the transactions on the relevant date i.e. 23.12.2011, which is quoted as under:-

Date	Cheque No.	Particulars	Withdrawals	Deposits	Balance
22/12/11		BY CASH PAN DETAILS AJJ		440000	440000
23/12/11	179673	TO TRF. TR		150000	590000
23/12/11		BY CASH PAN DETAILS AJJ		150000	740000
23/12/11		BY CASH PAN DETAILS AJJ		300000	1040000
23/12/11	463	CSH (CHQ) Paid to sanjy r	150000		890000
23/12/11	461	CSH (CHQ) Paid to sanjy r	300000		590000

8. The aforesaid entries clearly proceed to mention that on the said date i.e. 23.12.2011 an amount of Rs.1,50,000/- has been deposited in the account through cheque no.179673. Thereafter, Rs.1,50,000/- and Rs.3,00,000/- have been deposited through cash on the same day making total amount of Rs.10,40,000/- in the said account. But surprisingly on the same day, two transactions had also been made by which an amount of Rs.1,50,000/- through cheque no.000463 and

Rs.3,00,000/- through cheque no.000461 have been debited from the account making Rs.5,90,000/- available in the account.

9. On the basis of aforesaid facts, we are of the considered opinion that on the said date i.e. 23.12.2011 the petitioner had proceeded to misrepresent the Corporation, wherein the petitioner has deliberately shown the amount of Rs.10,40,000/- in his account but actually on the said date thereafter Rs.4.5 lacs had been withdrawn and consequently on the said date only Rs.5,90,000/- was available in the said account. Once this fact has been brought into the notice of the Corporation, they proceeded to cancel the claim of the petitioner.

10. The entire claim of the petitioner has been set out on the basis of his account no.3157567504 and no other financial status has been shown or claimed. We proceed to make a mention that the pass book of the petitioner updated upto 21.9.2012 has been placed before this Court and on 21.09.2012 in his account there was only Rs.96,628/-.

11. The aforementioned facts and circumstances clearly gives an impression that just for processing his application, the petitioner tried to make a deliberate attempt to place the incorrect statement of account on the date of submission of application i.e. 23.12.2011 as Rs.10,40,000/- but actually on the said date the petitioner had only Rs.5,90,000/- in his account and as such we are of the considered opinion that the petitioner had misrepresented the Corporation and as per the provisions contained under the advertisement the Corporation has every right to reject the candidature, in case any misrepresentation had been made. It is also apparent that as per the policy of the Corporation, they have every right to ensure that whatever the funds are mentioned along with the application on the relevant date, the applicant should ensure that the minimum funds required for the said purpose be available as closing balance at least on the said date.

12. In view of this, we find that the action of the respondents are fully justified under the present facts and circumstances and impugned order does not call for any interference under Art.226 of the Constitution of India.

13. The writ petition sans merit and is accordingly **dismissed**.

(2016) 8 ILRA 284
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.08.2016

BEFORE

THE HON'BLE TARUN AGARWALA, J.
THE HON'BLE VIPIN SINHA, J.

Civil Misc. Writ Petition (Writ C) No.- 7521 Of 2016
&
Connected With Other Cases

Mange @ Mange Ram

...Petitioner
Versus

State Of U.P. & Ors.

...Respondents

Present petition has been filed praying for a writ of mandamus commanding the respondents to allot 10% developed abadi land in terms of the decision of the Full Bench of this Court in Gajraj and others Vs. State of U.P. and others, 2011 (11) ADJ 1.

The Full Bench held that the land owners, who had challenged the notifications would be entitled for payment of additional compensation to the extent of 64.70% in addition to the compensation already received. The Full Bench further held that the land owners would also be entitled for allotment of developed abadi land to the extent of 10%. The Full Bench in paragraph 482(4) held that the authority will take a decision as to whether the benefit of additional compensation and allotment of developed abadi plot to the extent of 10% should be given to those land owners whose writ petition had been dismissed earlier as well as for those land owners, who had not come to the Court challenging the acquisition proceedings. Court observed that the judgment of the Full Bench was affirmed by the Supreme Court in Savitri Devi (supra).

While affirming the decision, the direction of the Full Bench in paragraph 484(4) to the authority to consider the case for payment of additional compensation and allotment of developed abadi plot to those land owners, who had not challenged the acquisition proceedings or whose writ petitions were dismissed earlier was also affirmed by the Supreme Court. Based on such direction, the authority took a decision to pay additional compensation to all the land owners irrespective of the fact as to whether they had challenged the acquisition proceedings or not. But with regard to allotment of developed abadi land, the authority took a decision not to allot to those land owners, who had not approached the writ Court on the ground that they have no developed land to allot to these land owners. The fact that the authority does not have any developed land for allotment has not been disputed as no rejoinder affidavit has been filed nor any evidence has been brought on record. Court also find that such decision taken by the Board is neither arbitrary nor discriminatory.

The Full Bench in order to save the acquisition proceedings had issued the direction for payment of additional compensation and for allotment of developed abadi plots in the extenuating facts and circumstances of the case. The Supreme Court acceded to the said consideration holding that the Full Bench was justified in issuing such directions in the peculiar facts and circumstances of the case and in order to save the acquisition proceedings from the vice of arbitrariness. The Supreme Court while affirming the decision of the Full Bench categorically held that the said decision would not be treated to form a precedent for future cases.

Court is of the opinion that the ratio decendi of the Full Bench cannot be applied to similarly situated persons. The said benefit given by the Full Bench cannot be extended to the petitioners, even though they may be similarly situated and their land had been acquired under the same notification.

No relief can be granted to the petitioner. All the writ petition fails and are dismissed.

(Delivered by Hon'ble Tarun Agarwala, J.)

1. In this group of writ petitions, the petitioners have filed the present writ petitions praying for a writ of mandamus commanding the respondents to allot 10% developed abadi land in terms of the decision of the Full Bench of this Court in **Gajraj and others Vs. State of U.P. and others, 2011 (11) ADJ 1.**

2. For facility, the facts of Writ Petition No.7521 of 2016 is being taken into consideration.

3. It transpires that a notification dated 4th July, 2003 under Section 4 and notification dated 21st July, 2003 under Section 6 of the Land Acquisition Act was issued for acquisition of various parcels of land for planned industrial development. The urgency clause was invoked and possession was taken, award was made and compensation was paid to the petitioners'. The petitioners' land was situate in Village Chhaparauli Bangar, Pargana Dadari, Tehsil Sadar, District Gautam Budh Nagar. The petitioner did not challenge the acquisition proceedings and received the compensation. However, other land owners challenged the acquisition proceedings. The aforesaid notification as well as other notifications for different tracts of land and for different villages were clubbed together and decided by the Full Bench of this Court in **Gajraj's case (supra)** vide judgment dated 21st October, 2011. The Full Bench disposed of the writ petitions with the following directions:-

"481. As noticed above, the land has been acquired of large number of villagers in different villages of Greater Noida and Noida. Some of the petitioners had earlier come to this Court and their writ petitions have been dismissed as noticed above upholding the notifications which judgments have become final between them. Some of the petitioners may not have come to the Court and have left themselves in the hand of the Authority and State under belief that the State and Authority shall do the best for them as per law. We cannot lose sight of the fact that the above farmers and agricultures/owners whose land has been acquired are equally affected by taking of their land. As far as consequence and effect of the acquisition it equally affects on all land losers. Thus land owners whose writ petitions have earlier been dismissed upholding the notifications may have grievances that the additional compensation which was a subsequent event granted by the Authority may also be extended to them and for the aforesaid, further spate of litigation may start in so far as payment of additional compensation is concerned. In the circumstances, we leave it to the Authority to take a decision as to whether the benefit of additional compensation shall also be extended to those with regard to whom the notifications of acquisition have been upheld or those who have not filed any writ petitions. We leave this in the discretion of the Authority/State which may be exercised keeping in view the principles enshrined under Article 14 of the Constitution of India.

482. In view of the foregoing conclusions we order as follows:

1. The Writ Petition No. 45933 of 2011, Writ Petition No. 47545 of 2011 relating to village Nithari, Writ Petition No. 47522 of 2011 relating to village Sadarpur, Writ Petition No. 45196 of 2011, Writ Petition No. 45208 of 2011, Writ Petition No. 45211 of 2011, Writ Petition No. 45213 of 2011, Writ Petition No. 45216 of 2011, Writ Petition No. 45223 of 2011, Writ Petition No. 45224 of 2011, Writ Petition No. 45226 of 2011, Writ Petition No. 45229 of 2011, Writ Petition No. 45230 of 2011, Writ Petition No. 45235 of 2011, Writ Petition No. 45238 of 2011, Writ Petition No. 45283 of 2011 relating to village Khoda, Writ Petition No. 46764 of 2011, Writ Petition No. 46785 of 2011 relating to village Sultanpur, Writ Petition No. 46407 of 2011 relating to village Chaura Sadatpur and Writ Petition No. 46470 of 2011 relating to village Alaverdipur which have been filed with inordinate delay and laches are dismissed.

2(i) The writ petitions of Group 40 (Village Devla) being Writ Petition No. 31126 of 2011, Writ Petition No. 59131 of 2009, Writ Petition No. 22800 of 2010, Writ Petition No. 37118 of 2011, Writ Petition No. 42812 of 2009, Writ Petition No. 50417 of 2009, Writ Petition No. 54424 of 2009, Writ Petition No. 54652 of 2009, Writ Petition No. 55650 of 2009, Writ Petition No. 57032 of 2009, Writ Petition No. 58318 of 2009, Writ Petition No. 22798 of 2010, Writ Petition No. 37784 of 2010, Writ Petition No. 37787 of 2010, Writ Petition No. 31124 of 2011, Writ Petition No. 31125 of 2011, Writ Petition No. 32234 of 2011, Writ Petition No. 32987 of 2011, Writ Petition No. 35648 of 2011, Writ Petition No. 38059 of 2011, Writ Petition No. 41339 of 2011, Writ Petition No. 47427 of 2011 and Writ Petition No. 47412 of 2011 are allowed and the notifications dated 26.5.2009 and 22.6.2009 and all consequential actions are quashed. The petitioners shall be entitled for restoration of their land subject to deposit of compensation which they had received under agreement/award before the authority/Collector.

2(ii) Writ petition No. 17725 of 2010 Omveer and others Vs. State of U.P. (Group 38) relating to village Yusufpur Chak Sahberi is allowed. Notifications dated 10.4.2006 and 6.9.2007 and all consequential actions are quashed. The petitioners shall be entitled for restoration of their land subject to return of compensation received by them under agreement/award to the Collector.

2(iii) Writ Petition No.47486 of 2011 (Rajee and others vs. State of U.P. and others) of Group-42 relating to village Asdullapur is allowed. The notification dated 27.1.2010 and 4.2.2010 as well as all subsequent proceedings are quashed. The petitioners shall be entitled to restoration of their land.

3. All other writ petitions except as mentioned above at (1) and (2) are disposed of with following directions:

(a) The petitioners shall be entitled for payment of additional compensation to the extent of same ratio (i.e. 64.70%) as paid for village Patwari in addition to the compensation received by them under 1997 Rules/award which payment shall be ensured by the Authority at an early date. It may be open for Authority to take a decision as to what proportion of additional compensation be asked to be paid by allottees. Those petitioners who have not yet been paid compensation may be paid the compensation as

well as additional compensation as ordered above. The payment of additional compensation shall be without any prejudice to rights of land owners under section 18 of the Act, if any.

(b) All the petitioners shall be entitled for allotment of developed Abadi plot to the extent of 10% of their acquired land subject to maximum of 2500 square meters. We however, leave it open to the Authority in cases where allotment of abadi plot to the extent of 6% or 8% have already been made either to make allotment of the balance of the area or may compensate the land owners by payment of the amount equivalent to balance area as per average rate of allotment made of developed residential plots.

4.The Authority may also take a decision as to whether benefit of additional compensation and allotment of abadi plot to the extent of 10% be also given to;

(a) those land holders whose earlier writ petition challenging the notifications have been dismissed upholding the notifications; and

(b) those land holders who have not come to the Court, relating to the notifications which are subject matter of challenge in writ petitions mentioned at direction No.3.

5. The Greater NOIDA and its allottees are directed not to carry on development and not to implement the Master Plan 2021 till the observations and directions of the National Capital Regional Planning Board are incorporated in Master Plan 2021 to the satisfaction of the National Capital Regional Planning Board. We make it clear that this direction shall not be applicable in those cases where the development is being carried on in accordance with the earlier Master Plan of the Greater NOIDA duly approved by the National Capital Regional Planning Board.

6. We direct the Chief Secretary of the State to appoint officers not below the level of Principal Secretary (except the officers of Industrial Development Department who have dealt with the relevant files) to conduct a thorough inquiry regarding the acts of Greater Noida (a) in proceeding to implement Master Plan 2021 without approval of N.C.R.P. Board, (b) decisions taken to change the land use, (c) allotment made to the builders and (d) indiscriminate proposals for acquisition of land, and thereafter the State Government shall take appropriate action in the matter."

4. The Full Bench held that the land owners, who had challenged the notifications would be entitled for payment of additional compensation to the extent of 64.70% in addition to the compensation already received. The Full Bench further held that the land owners would also be entitled for allotment of development abadi land to the extent of 10%. The Full Bench in paragraph 482(4) held that the authority will take a decision as to whether the benefit of additional compensation and allotment of developed abadi plot to the extent of 10% should be given to those land owners whose writ petition had been dismissed earlier as well as for those land owners, who had not come to the Court challenging the acquisition proceedings.

5. Based on the aforesaid directions, Noida took a decision in its Board meeting of paying additional compensation to the extent of 64.70% to all the land owners whether those land owners had

challenged the notifications or had not challenged the notification. In terms of paragraph 482(4) of the judgment, Noida took a decision not to allot abadi plot to the extent of 10% to those land owners, who had not approached the writ Court and had not questioned the acquisition proceedings on the ground that the authority does not have any developed land to give to such persons for allotment. The petitioners', being aggrieved by the non-allotment of additional abadi plot, has filed the present writ petition praying for a writ of mandamus commanding the respondents to allot abadi plot and give the same benefit as given by the Full Bench of this Court to the land owners whose land had been acquired.

6. The connected writ petitions seek the same relief though the acquisition was for different villages by different notifications. In Writ Petition No.7553 of 2016 the acquisition was for Village Malakpur, Pargana Dadri, vide notification under Section 4 dated 2nd May, 2003 and notification under Section 6 dated 22nd July, 2003. In Writ Petition No.7553 of 2016 the acquisition was for Village Malakpur, Pargana Dadri, Tehsil Dadri vide notification under Section 4 dated 2nd May, 2003 and notification under Section 6 dated 22nd July, 2003. In Writ Petition No.7532 of 2016, the acquisition was for Village Chhaparauli Bangar, Pargana Dadri, Tehsil Sadar vide notification under Section 4 dated 4th July, 2003 and notification under Section 6 dated 21st July, 2003. In Writ Petition No.7639 of 2016, the acquisition was for Village Basi Brahuddin Nagar, Pargana & Tehsil Dadri vide notification under Section 4 dated 12th April, 2005 and notification under Section 6 dated 6th October, 2005. In Writ Petition No.8262 of 2016, the acquisition was for Village Asgarpur Jagi, Pargana & Tehsil Dadri vide notification under Section 4 dated 24th August, 2007 and under Section 6 dated 12th August, 2008. In Writ Petition No.9985 of 2016, the acquisition was for Village Kondali Bangar, Pargana & Tehsil Sadar through sale deed. In Writ Petition No.9989 of 2016, the acquisition was for Village Sadarpur, Pargana & Tehsil Dadri vide notification under Section 4 dated 30th March, 2002 and notification under Section 6 dated 28th June, 2003. In Writ Petition No.10125 of 2016, the acquisition was for Village Suthiyana, Pargana & Tehsil Dadri vide notification under Section 4 dated 30th October, 2006 and notification under Section 6 dated 21st November, 2006. In Writ Petition No.7952 of 2016, the acquisition was for Village Basi Brahuddin Nagar, Pargana & Tehsil Dadri vide notification under Section 4 dated 12th April, 2005 and notification under Section 6 dated 6th October, 2005. In Writ Petition No.7956 of 2016, the acquisition was for Village Soharkha Jahidabad, Pargana & Tehsil Dadri vide notification under Section 4 dated 12th April, 2005 and notification under Section 6 dated 27th July, 2006. In Writ Petition No.13626 of 2016, the acquisition was for Village Suthiyana, Pargana & Tehsil Dadri vide notification under Section 4 dated 30th October, 2006 and notification under Section 6 dated 21st November, 2006. In Writ Petition No.21038 of 2016, the acquisition was for Village Nithari, Chura Satadpur and Morna vide notification under Section 4 dated 1st June, 1976 and notification under Section 6 dated 16th September, 1976. In Writ Petition No.21157 of 2016, the acquisition was for Village Soharkha Jahidabad, Pargana & Tehsil Dadri vide notification under Section 4 dated 12th April, 2005 and notification under Section 6 dated 27th July, 2006.

7. We have heard Sri Pankaj Dubey, the learned counsel for the petitioner, the learned Standing Counsel for the State and Sri Shivam Yadav, the learned counsel for Noida.

8. The learned counsel for the petitioner contended that admittedly the land of the petitioner was acquired under a notification, which was challenged not by the petitioners' but by other similarly situated land owners before the High Court, which was disposed of by the Full Bench in the case of **Gajraj Singh**

(*supra*) with certain directions. The Full Bench directed the land owners, who had challenged the notification to be given an additional abadi land to the extent of 10% of their holdings. The learned counsel contended that parity should be maintained and since the petitioners' land was also acquired under the same notification, they should also be given the same benefit, even though the petitioners had not challenged the acquisition proceedings. The learned counsel contended that the respondents being an instrumentality of the State should act fairly and their action should not be discriminatory. The learned counsel contended that if the land owners under the same acquisition can be given additional abadi land, the same benefit should also be given to those land owners, who were similarly placed but had not questioned the acquisition proceedings. The learned counsel submitted that the action of the respondents in not allotting additional abadi land was wholly arbitrary and discriminatory and, consequently, a writ of mandamus should be issued commanding them to allot additional land. It was contended that some of the land owners as well as the State had filed special leave petition before the Supreme Court against the decision of the Full Bench in **Gajraj (*supra*)**, which was disposed of in the case of **Savitri Devi Vs. State of U.P. and others, 2015 (7) SCC 21** wherein the Supreme Court in its judgment dated 14th May, 2015 accorded the following benefits to the land owners, namely:-

"To sum up, following benefits are accorded to the land owners:

(a) increasing the compensation by 64.7%;

(b) directing allotment of developed abadi land to the extent of 10% of the land acquired of each of the land owners;

(c) compensation which is increased at the rate of 64.7% is payable immediately without taking away the rights of the land owners to claim higher compensation under the machinery provided in the Land Acquisition Act wherein the matter would be examined on the basis of the evidence produced to arrive at just and fair market value;

This, according to us, provides substantial justice to the appellants."

9. The learned counsel submitted that a specific direction was given by the Supreme Court that 10% of the developed abadi land should be given to each of the land owners meaning thereby that additional land should be given to those land owners, who had not challenged the acquisition proceedings.

10. On the other hand, Sri Shivam Yadav, the learned counsel for Noida submitted that pursuant to the direction of the Full Bench, Noida Board took a decision to pay additional compensation to the extent of 64.70% to all the land owners whose land was acquired irrespective of the fact as to whether the land owners had challenged the acquisition proceedings before the High Court or not. The learned counsel submitted that the Board took a conscious decision not to allot any developed abadi land to those land owners, who had not approached the writ Court on the ground that they do not have any developed land to offer to the land owners. The learned counsel contended that the decision taken by the Board was neither arbitrary nor discriminatory and that the decision taken was fair and just and in accordance with the direction issued by the Full Bench. The learned counsel further submitted that the direction of the Supreme

Court to allot developed abadi land to each of the land owners was in relation to those land owners who had filed the special leave petition and was not applicable to those land owners who had not challenged the acquisition proceedings.

11. Having heard the learned counsel for the parties and having perused the direction given by the Full Bench in **Gajraj's case (supra)** as well as the decision of the Supreme Court in **Savitri Devi (supra)**, we find that the judgment of the Full Bench was affirmed by the Supreme Court in **Savitri Devi (supra)**. While affirming the decision, the direction of the Full Bench in paragraph 484(4) to the authority to consider the case for payment of additional compensation and allotment of developed abadi plot to those land owners, who had not challenged the acquisition proceedings or whose writ petitions were dismissed earlier was also affirmed by the Supreme Court. Based on such direction, the authority took a decision to pay additional compensation to all the land owners irrespective of the fact as to whether they had challenged the acquisition proceedings or not. But with regard to allotment of developed abadi land, the authority took a decision not to allot to those land owners, who had not approached the writ Court on the ground that they have no developed land to allot to these land owners. The fact that the authority does not have any developed land for allotment has not been disputed as no rejoinder affidavit has been filed nor any evidence has been brought on record. We also find that such decision taken by the Board is neither arbitrary nor discriminatory.

12. The Full Bench in order to save the acquisition proceedings had issued the direction for payment of additional compensation and for allotment of developed abadi plots in the extenuating facts and circumstances of the case. The Supreme Court acceded to the said consideration holding that the Full Bench was justified in issuing such directions in the peculiar facts and circumstances of the case and in order to save the acquisition proceedings from the vice of arbitrariness. The Supreme Court while affirming the decision of the Full Bench categorically held that the said decision would not be treated to form a precedent for future cases. The Supreme Court held:

"50. Keeping in view all these peculiar circumstances, we are of the opinion that these are not the cases where this Court should interfere under Article 136 of the Constitution. However, we make it clear that directions of the High Court are given in the aforesaid unique and peculiar/specific background and, therefore, it would not form precedent for future cases."

13. Thus, we are of the opinion that the ratio decendi of the Full Bench cannot be applied to similarly situated persons. The said benefit given by the Full Bench cannot be extended to the petitioners, even though they may be similarly situated and their land had been acquired under the same notification.

14. We are of the view that the action of the respondents in not giving additional developed abadi land to the petitioners is neither arbitrary nor discriminatory, especially when there is no evidence to dispute the fact that the respondents have no developed land with them for allotment.

15. In the light of the aforesaid, no relief can be granted to the petitioner. All the writ petition fails and are dismissed.

**(2016) 8 ILRA 291
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.08.2016**

BEFORE

**THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE KAUSHAL JAYENDRA THAKER, J.**

Writ Tax No.- 563 Of 2013

M/S Prema Construction

...Petitioner

Versus

Assistant Commissioner, Central Excise and Service Tax & Ors.

...Respondents

Counsel for Petitioner:

Rakesh Kumar Srivastava, S.D. Singh, Ashish Agarwal

Counsel for Respondents:

R.K. Shukla, Sr. S.C., P.K. Tripathi, R.C. Shukla

Held

A writ petition under Article 226 **is not maintainable for recovery of money** arising out of contractual obligations.

Disputes relating to:

Interpretation of contract,

Payment under contract,

Alleged breach of contract,

fall within the domain of **private law** and must be adjudicated through:

Civil suit, or

Arbitration (if provided in contract).

Mere involvement of a **statutory body** does not convert a contract into a **statutory contract**.

In absence of a **statutory right**, relief under Article 226 **cannot be invoked** for contractual claims.

A writ seeking payment under a contract is essentially a **money decree**, which cannot be granted in writ jurisdiction.

Questions such as:

Whether any amount is due,

Whether payment was justified or not,

require **evidence and adjudication**, unsuitable for writ jurisdiction.

The proper remedy lies in **ordinary civil proceedings**, not writ jurisdiction.

The writ petition is **devoid of merit and dismissed**.

CASE LAW CITED

A writ petition under Article 226 is not maintainable for recovery of money arising out of contractual obligations.

Disputes relating to:

Interpretation of contract,

**Payment under contract,
Alleged breach of contract,**

**fall within the domain of private law and must be adjudicated through:
Civil suit, or**

Arbitration (if provided in contract).

Mere involvement of a statutory body does not convert a contract into a statutory contract.

In absence of a statutory right, relief under Article 226 cannot be invoked for contractual claims.

A writ seeking payment under a contract is essentially a money decree, which cannot be granted in writ jurisdiction.

**Questions such as:
Whether any amount is due,
Whether payment was justified or not,
require evidence and adjudication, unsuitable for writ jurisdiction.**

The proper remedy lies in ordinary civil proceedings, not writ jurisdiction.

The writ petition is devoid of merit and dismissed.

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Kaushal Jayendra Thaker, J.)

1. Heard Sri Ashish Agarwal, learned counsel for petitioner and Sri P.K. Tripathi, Advocate, for respondents.

2. Sri Ashish Agarwal, learned counsel for petitioner, at the outset, stated that Prayer (i) has rendered infructuous by efflux of time.

3. With respect to Prayer (ii), he could not dispute that it relates to recovery of certain money from U.P. Rajya Vidyut Utpadan Nigam Limited based on contractual matter for which remedy lies in common law and for that purpose no writ petition lie since in absence of any statutory right, Article 226 cannot be availed to claim any money in respect of breach of contract or tort or otherwise.

4. In **Kerala State Electricity Board and another Vs. Kurien E. Kalathil and others 2000 (6) SCC 293**, Court said that interpretation and implementation of a clause in a contract cannot be subject-matter of a writ petition. Whether a contract envisages actual payment or not is a question of construction of contract. If a term of contract is violated, ordinarily remedy is not the writ petition under Article 226. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. A statute may

expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Disputes arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies have power to contract or deal with property like private parties. Such activities may not raise any issue of public law. When it is not shown that contract is statutory and parties are within the realm of their authority, contract between the parties is in the realm of private law. The disputes relating to interpretation of terms and conditions of such contract cannot be agitated in a petition under Article 226 of the Constitution. The Court further said:

"That is a matter for adjudication by a civil court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition."

5. Following the above authorities, a Division Bench of this Court in **M/S Prabhu Construction Company through its Proprietor Vs. State of U.P. and another (Writ C No. 25075 of 2014)** decided on 05.05.2014 said as under:

"In the present case, there is nothing on the record which may persuade us to hold that the contract is a statutory contract. The remedy of the contractor, if he is aggrieved by non-payment, would be to either file an ordinary civil suit or if there is an arbitration agreement between the parties, to invoke the terms of the agreement."

6. The Court also relied on its earlier decision in **M/s R.S. Associate Vs. State of U.P. and others (Writ-C No. 11544 of 2014)** decided on 24.02.2014.

7. Again in **Alaska Tech Vs. State of U.P. 2014 (6) ADJ 591**, a Division Bench of this Court observed as under:

"2. We are of the view that, in a matter of this nature which pertains to alleged non-payment of dues under a contract for supply of goods, it would neither be prudent nor judicious for this Court, in exercise of its jurisdiction under Article 226 of the Constitution, to grant relief, which is in substance, is a prayer for a money decree. These matters, it must be emphasized, are not those relating to statutory contracts but are purely non-statutory contracts. Whether work has been satisfactorily performed, whether the rates which had been quoted are in accordance with the terms of the contract, whether the goods were of a quality as mandated, and above all, whether the claim is within limitation or otherwise, are issues which cannot appropriately be adjudicated upon under Article 226 of the Constitution."

8. The same view has been reiterated in **M/S Goyal Stationary Mart through its Proprietor State of U.P. (Misc. Bench No. 10971 of 2015)** decided on 27.11.2015, **Budh Gramin Sansthan Vs. State of U.P. 2014 (7) ADJ 29**, **Kaka Advertising Agency Vs. U.P. Technical University and others 2014 (11) ADJ 227**, **M/s A.K. Constructions Vs. State of U.P. and others (Misc. Bench No. 1909 of 2014)** decided on 07.03.2014, **Major Travels through Proprietor Vs. State of U.P. and others (Misc. Bench No. 3472 of 2014)** decided on 25.04.2014 and **Uttaranchal Paper Converters and Publishers through Proprietor Vs. State of U.P. and others (Misc. Bench No. 3898 of 2015)** decided on 13.05.2014.

9. In view thereof, we are clearly of the view so far as Prayer (ii), mandamus sought by petitioner is nothing but grant of a money decree in extraordinary equitable jurisdiction under Article 226 which ought not to have been granted. We, therefore, find not reason to interfere.

10. The writ petition lacks merits. Dismissed.

11. Interim order, if any, stands vacated.

(2016) 8 ILRA 295
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Writ Tax No.- 575 Of 2016

LG Electronics India Pvt. Ltd.

...Petitioner

Versus

The Principal Commissioner Of Income Tax

...Respondent

Counsel for Petitioner:

Suyash Agarwal, Rupesh Jain, Gaurav Jain

Counsel for Respondent:

C.S.C., Gaurav Mahajan

This writ petition under Article 226 of the Constitution has been filed by LG Electronics India Pvt. Ltd. aggrieved by notice dated 08.06.2016 issued by Principal Commissioner of Income Tax, NOIDA, Gautambudh Nagar in exercise of power under Section 263 of Income Tax Act, 1961 in respect of Assessment Year 2007-08.

The only issue raised and pressed before this court is, "whether impugned notice is barred by limitation prescribed under Section 263(2) of Act, 1961 or not".

Limitation prescribed under Section 263(2) for exercise power under sub-section (1) thereof is two years from the end of financial year in which order sought to be revised was passed.

Learned counsel for the petitioner submitted that for the purpose of Section 263(1) limitation will commence from the end of financial year when order dated 31.10.2011 was passed and that comes to 31.03.2012 and two years period would elapsed on 31.03.2014.

Court held that that impugned notice dated 08.06.2016 issued by Principal Commissioner of Income Tax, NOIDA, Gautambudh Nagar is in reference to some discrepancy in original assessment order dated 31.10.2011 and not re-assessment order dated 26.03.2015, therefore, limitation would run from the date of regular order of assessment and in that view of the matter, impugned notice, evidently is barred by limitation prescribed under Section 263(2) of Act, 1961.

The writ petition is allowed.

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Rupesh Jain, Advocate assisted by Sri Gaurav Jain and Sri Suyash Agarwal, Advocates for petitioner and Sri Gaurav Mahajan, learned counsel for respondents.

2. This writ petition under Article 226 of the Constitution has been filed by LG Electronics India Pvt. Ltd. (*hereinafter referred to as the "petitioner"*) aggrieved by notice dated 08.06.2016 issued by Principal Commissioner of Income Tax, NOIDA, Gautambudh Nagar (*hereinafter referred to as the "PCIT"*) in exercise of power under Section 263 of Income Tax Act, 1961 (*hereinafter referred to as the "Act, 1961"*) in respect of Assessment Year 2007-08.

3. It is contended that notice itself is barred by limitation hence it is void ab initio and without jurisdiction.

4. Return for Assessment Year 2007-08 was filed by petitioner on 31.10.2007 declaring income of Rs. 2,68,82,20,341/-. It was selected for scrutiny and after verification/ examination draft assessment order under Section 143(3)/144C(1) of Act, 1961 was passed on 27.12.2010 proposing some disallowances and addition of income of Rs. 61,00,79,579/- being subsidy by way of sales tax incentive received under the scheme formulated by Government of U.P. The Assessing Officer (*hereinafter referred to as the "AO"*) suggested that it is "revenue receipt" and not "capital receipt" as claimed by petitioner though in Maharashtra a similar incentive was treated as "capital receipt".

5. Aggrieved by draft assessment order dated 27.12.2010 petitioner filed objection before Dispute Resolution Panel (*hereinafter referred to as the "DRP"*), whereupon direction under Section 144C(5) was issued on 27.09.2011 to AO to pass final order. AO thereafter made final assessment on 31.10.2011 assessing total income to Rs. 5,83,91,17,785/- after making addition of Rs. 61,00,79,579/- on account of sales tax incentive treating it as revenue receipt.

6. Petitioner preferred appeal being ITA No. 5140/Del/2011 before Income Tax Appellate Tribunal, New Delhi under Section 253(1)(d) of Act, 1961. Tribunal allowed appeal partly vide order dated 08.12.2014. It confirmed addition of Rs. 61,00,79,579/- towards sales tax subsidy treating it as "revenue receipt". Against this order petitioner filed further appeal before this Court, i.e., ITA No. 89 of 2015 which is pending.

7. The AO reopened assessment under Section 147 and issued notice dated 21.03.2014 under Section 148 alleging that in assessment year in question there is a escaped assessment on account of failure to disallow expenditure on purchases from overseas in terms of Section 40(a)(i) of Act, 1961 for non-deduction of tax at source from such payment. Re-assessment order was passed on 26.03.2015 after making disallowance of purchase of Rs. 13,89,59,995/-. Aggrieved thereto petitioner has filed appeal before Commissioner of Income Tax (Appeals) (*hereinafter referred to as the "CIT(A)"*) under Section 246A(1)(b), which is pending.

8. Now respondent-PCIT has issued impugned notice dated 08.06.2016 under Section 263 on the ground that assessment order dated 26.03.2015 passed under Section 143(3) was erroneous and prejudicial to the interest of Revenue inasmuch as sales tax subsidy of Rs. 20,58,34,234/-

accruing to petitioner under scheme of Government of Maharashtra had not been brought to tax as "revenue receipt". It is contended that aforesaid notice dated 08.06.2016 is barred by limitation under Section 263 of Act, 1961.

9. The only issue raised and pressed before this court is, "whether impugned notice is barred by limitation prescribed under Section 263(2) of Act, 1961 or not".

10. Section 263 of Act, 1961 reads as under:

"263. (1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

Explanation: For the removal of doubts, it is hereby declared that, for the purposes of this sub-section, -

(a) an order passed on or before or after the 1st day of June, 1988, by the Assessing Officer shall include -

(i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;

(ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorised by the Board in this behalf under section 120;

(b) "record" shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject-matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.

Explanation: In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded." (emphasis added)

11. Limitation prescribed under Section 263(2) for exercise power under sub-section (1) thereof is two years from the end of financial year in which order sought to be revised was passed.

12. Learned counsel for the petitioner submitted that for the purpose of Section 263(1) limitation will commence from the end of financial year when order dated 31.10.2011 was passed and that comes to 31.03.2012 and two years period would elapsed on 31.03.2014.

13. Learned Standing Counsel appearing for respondent, on the contrary, submitted that period of limitation would run from the date of re-assessment order dated 26.03.2015 and, therefore, impugned notice is within limitation.

14. Sri Jain, learned counsel for the petitioner, argued that original assessment order accepted sales tax subsidy by way of refund of VAT received under Maharashtra State Government as "capital receipt" and not chargeable to tax. Accepting same, AO passed assessment order dated 31.10.2011 after due inquiry. Re-assessment order did not refer to aforesaid aspect of the matter and instead re-assessment proceedings have been initiated on the ground of "escaped assessment" due to certain purchases made from outside India since no tax was deducted at source in respect thereto. He submitted that notice under Section 263 has been issued raising an issue which relates to not re-assessment order but original assessment order dated 31.10.2011 and, therefore, it is barred by limitation. Reliance is placed on **Commissioner of Income Tax Vs. Alagendran Finance Ltd., 2007(293) ITR 1 (SC); Commissioner of Income Tax, Delhi-I Vs. Bharti Airtel Ltd., 2013(37) taxmann.com 218 (Delhi); Commissioner of Income Tax Vs. Shriram Engineering Construction Co. Ltd., 2011(330) ITR 568 (Mad); Ashoka Buildcon Ltd. Vs. Assistant Commissioner of Income Tax and another, 2010(325) ITR 574 (Bom); Commissioner of Income Tax Vs. Lark Chemicals Ltd, 2014(368) ITR 655 (Bom); and, Commissioner of Income Tax Vs. ICICI Bank Ltd., 2012(343) ITR 74 (Bom).**

15. Per contra, learned Standing Counsel submitted that Sections 2(8) and (40) of Act, 1961 defines terms "assessment" and "regular assessment". Assessment includes re-assessment. Assessment made under Sections 143 or 144 is termed as "regular assessment", therefore, it does not include re-assessment made under Section 147. The meaning of "assessment", therefore, has to be seen in this context.

16. It is submitted that for the purpose of Section 263 period of two years is from the date of "assessment" and if read with Section 2(8) it would be the date of "re-assessment" and not "original assessment". It is contended that any other view would vitiate the plain and unambiguous language of Section 263(2).

17. Facts are not in dispute hence we proceed to consider, "whether here is a case where limitation under Section 263(2) would commence from regular assessment order dated 31.10.2011 or re-assessment order dated 26.03.2015".

18. Assessment order dated 31.10.2011 is on record as Annexure-B to the writ petition. In computation of income the AO has made following additions:

"Additions-as discussed above

1. Sales Tax Subsidy	Rs. 61,00,79,579/-
2. Provision for Service Warranty	Rs. 7,79,04,573/-
3. Royalty	Rs. 81,98,02,800/-
4. International Transaction	Rs.2,26,61,73,676/-"

19. AO also allowed following deductions:

"Less : Deductions:

1. Depreciation as claimed	Rs. 81,44,24,056/-
2. Gain on fixed assets	Rs. 1,27,10,222/-
3. Weighted deduction u/s 35(2AB)	Rs. 13,77,25,422/-
5. Deduction u/s 35D	Rs. 2,10,272/-
6. Incentive from Maharashtra VAT as claimed	Rs. 20,58,34,234/-
7. Expenses u/s 43B as claimed	Rs. 8,68,12,113/-
8. Sums disallowed u/s 40a(ia) in AY 06-07 now claimed	Rs. 6,76,72,351/-

9. Provision of Expenses W/o in AY 07-08 but not allowed as deduction in AY 06-07	Rs. 4,90,76,047/-
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10. Sales Tax receipt claimed in revised return as exempt is disallowed Para No. 2.	Rs. 61,00,79,579/-
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20. The proceedings for "re-assessment" were initiated vide notice dated 19.06.2014 issued under Section 147 and the same is on record as Annexure-D to the writ petition. AO has given reasons for initiating "re-assessment" proceedings stating that petitioner is a permanent establishment of LG Electronics, Korea and its other Associated Enterprises. Its business connection and income is taxable as per Section 4, 5 and 9 of Act, 1961 and Articles 5 and 7 of Indo Korea DTAA. Petitioner had made certain remittances during Financial Year 2006-07 (Assessment Year 2007-08) to its parent Company Korea and other Associated Enterprises on which no TDS was deducted. Such expenses are disallowable under Section 40(a)(i) of Act, 1961. Details of remittances are given in a chart which totalled to Rs. 18,08,65,60,127/-.

21. After considering reply of Assessee and examining the matter in detail, AO made addition of Rs. 13,89,59,995/- under Section 40(a)(i) of Act, 1961 bringing total assessed income to Rs. 5,97,80,77,790/-. Thus "re-assessment" order was not for review or re-assessment of entire case but only in respect of a particular item, i.e., transactions outside India on which no TDS was deducted, hence were disallowable under Section 40(a)(i). In all other respect, original assessment order was maintained, and addition made by re-assessment order dated 26.03.2015 was added in income assessed in "original assessment" order and that is how it comes to Rs. 5,97,80,77,790/-. This is also evident from operative part of "re-assessment" order of AO, which reads as under:

"After due verification of available facts and records and examination of assessee submissions, income of the assessee is computed as under:

<i>Income as per order u/s 143(3)144C dated 31.10.2011</i>	<i>Rs. 583,91,17,790/-</i>
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<i>Addition as per para (2) above</i>	<i>Rs. 13,89,59,995/-</i>
<i>Assessed Income</i>	<i>Rs. 597,80,77,785/-</i>

<i>Or say</i>	<i>Rs. 597,80,77,790/-"</i>
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22. Now the notice under Section 263(1) shows that respondent, though has referred to "re-assessment order" showing total taxable income determined therein but in fact has referred to discrepancy in "assessment order", i.e., regular assessment order dated 31.10.2011, wherein incentive of VAT from Maharashtra Government received by petitioner was allowed to be deducted. This incentive has no concern with "re-assessment" proceedings result in order dated 26.03.2015.

23. We have discussed the items on which re-assessment proceedings were initiated by AO. Notice under Section 263(1) has been issued with reference to re-assessment, apparently to cover up bar of limitation. The reason obvious is that judicial precedents have made out a difference in a case where entire assessment is reopened and a fresh re-assessment order is passed and in a case where one or two items of assessment order are re-assessed and reconsidered and in other respect, initial assessment order is maintained. In a case where except one or a few items, original assessment order is maintained, it has been held that assessment order continue to remain subject to addition or modification by re-assessment order and if a notice under Section 263(1) has been issued with reference to an item of assessment order and not re-assessment order, for the purpose of limitation it has to be seen whether it involves an issue of escaped assessment under original assessment order or re-assessment order.

24. Learned counsel appearing for respondent when confronted with this factual background, did not and could not, dispute that notice under Section 263(1) has been issued with reference to a discrepancy occurred in assessment order dated 31.10.2011 and it has nothing to do with re-assessment order dated 26.03.2015.

25. Now in the light of above facts we may examine the judicial authorities, whether limitation in such a case, for the purpose of notice under Section 263(1), will commence from original "assessment order", discrepancy whereof is the foundation for notice under Section 263(1), or "re-assessment order" which is on a different subject.

26. We find that this issue is clinched by a Supreme Court judgment in **Commissioner of Income Tax Vs. Alagendran Finance Ltd. (supra)**. The question formulated by Court in above case reads as under:

"Whether for the purpose of computing the period of limitation envisaged under sub-section (2) of Section 263 of the Income Tax Act, 1961 (for short "the Act"), the date of order of assessment or that of the reassessment, is to be taken into consideration."

(emphasis added)

27. Therein also for Assessment Years 1994-95, 1995-96 and 1996-97, assessment was completed on 27.02.1997; 12.03.1997; and, 30.03.1998, respectively. In all the assessment years, assessee's return under the head "Lease Equalisation Fund" was accepted. Assessing Officer initiated re-assessment proceedings under Section 148 in respect of following three items:

- "(i) the expenses claimed for share issue,
- (ii) bad and doubtful debts and
- (iii) excess depreciation on gas cylinders and goods containers."

28. Re-assessment has nothing to do on items relating to "Lease Equalization Fund". CIT invoked revisional jurisdiction under Section 263(3) vide notice dated 29.03.2004 stating that depreciation of leased assets claimed as goods depreciation and disallowed in computation income was not correct and order of Assessing Officer is prejudicial to interest of Revenue as the lease rentals had not been properly brought to

tax. Assessee contended that said order of Commissioner under Section 263 was barred by limitation,, and in appeal, preferred before Tribunal, he succeeded. Tribunal held that error pointed out in revisional order under Section 263 was in the order of Assessing Authority passed in regular assessment and not re-assessment, therefore, barred by limitation under Section 263(2). Appeal preferred by Revenue also failed before Madras High Court, who following its decision in **CWT vs. A.K. Thanga Pillai, 2001(252) ITR 260**, dismissed appeal. Before Supreme Court, Revenue sought to argue that order of assessment would merge with order of re-assessment and, therefore, for the purpose of notice under Section 263, limitation would commence from the date when "re-assessment order" was passed. After referring to Section 263, Court held:

*"A bare perusal of the order passed by the Commissioner of Income Tax would clearly demonstrate that **only that part of order of assessment which related to lease equalization fund was found to be prejudicial to the interest of the Revenue. The proceedings for reassessment have nothing to do with the said head of income. Doctrine of merger, therefore, would not apply in a case of this nature.**" (emphasis added)*

29. Court referred to Section 263(1), Explanation (C) providing that doctrine of merger would apply only in respect of such items which were subject matter of appeal and not which were not to fortify its view.

30. Distinction in the words "assess" and "re-assess" was considered in **CIT Vs. Sun Engineering Works P. Ltd., 1992(198) ITR 297 (SC)**. Therein issue was raised by assessee contending that once jurisdiction under Section 147 is invoked, whole assessment proceedings become re-opened. It was negated by Court holding as under:

*"Thus, under Section 147, **the assessing officer has been vested with the power to "assess or reassess" the escaped income of an assessee.** The use of the expression "assess or reassess such income or recompute the loss or depreciation allowance" in section 147 after the conditions for reassessment are satisfied, is only relatable to the preceding expression in Clauses (a) and (b) viz., "escaped assessment". **The term "escaped assessment" includes both "non- assessment" as well as "under assessment". Income is said to have "escaped assessment" within the meaning of this section when it has not been charged in the hands of an assessee in the relevant year of assessment. The expression "assess" refers to a situation where the assessment of the assessee for a particular year is, for the first time, made by resorting to the provisions of Section 147 because the assessment had not been made in the regular manner under the Act. The expression "reassess" refers to a situation where an assessment has already been made but the Income-tax Officer has, on the basis of information in his possession, reason to believe that there has been under assessment on account of the existence of any of the grounds contemplated by the provisions of Section 147(b) read with the Explanation (I) thereto.**" (emphasis added)*

31. Referring to above exposition of law, Court in **Commissioner of Income Tax Vs. Alagendran Finance Ltd. (supra)** further held:

*"There may not be any doubt or dispute that **once an order of assessment is reopened, the previous underassessment will be held to be set aside and the whole proceedings would start afresh but the***

same would not mean that even when the subject matter of reassessment is distinct and different, the entire proceeding of assessment would be deemed to have been reopened."

*"We may at this juncture also take note of the fact that even the Tribunal found that all the subsequent events were in respect of the matters other than the allowance of 'lease equalization fund'. The said finding of fact is binding on us. **Doctrine of merger, therefore, in the fact situation obtaining herein cannot be said to have any application whatsoever. It is not a case where the subject matter of reassessment and subject matter of assessment were the same. They were not.**" (emphasis added)*

32. Court also upheld judgment of Madras High court in **CWT vs. A.K. Thanga Pillai (supra)** and pointed out that same view was taken by Calcutta High Court in **CIT vs. Kanubhai Engineers (P) Ltd., 2000(241) ITR 665**. Operative part of judgment in **Commissioner of Income Tax Vs. Alagendran Finance Ltd. (supra)** reads as under:

*"We, therefore, are clearly of the opinion that keeping in view the facts and circumstances of this case and, in particular, having regard to the fact that the Commissioner of Income Tax exercising its revisional jurisdiction reopened the order of assessment only in relation to lease equalization fund which being not the subject of the reassessment proceedings, **the period of limitation provided for under Sub-section (2) of Section 263 of the Act would begin to run from the date of the order of assessment and not from the order of reassessment.** The revisional jurisdiction having, thus, been invoked by the Commissioner of Income Tax beyond the period of limitation, it was wholly without jurisdiction rendering the entire proceeding a nullity." (emphasis added)*

33. This decision in **Commissioner of Income Tax Vs. Alagendran Finance Ltd. (supra)** has been followed by Delhi High Court in **Commissioner of Income Tax, Delhi-I Vs. Bharti Airtel Ltd. (supra)** wherein also re-assessment order dealt with the issue of non deduction of tax at source on payment of interest to ABN Amro Bank, Stockholm Branch. Second addition was made on account of ESOP expenses. Subsequently Commissioner of Income Tax issued order under Section 263 for failure to deduct TDS under Section 194H on three air time provided to distributors and under Section 194J on roaming charges paid to other network operators. These issues were different than the subject matter of re-assessment order. Delhi High Court held that subject matter is different since Commissioner has found error in regular assessment order, hence limitation shall commence for regular assessment order.

34. To the same effect is the Division Bench judgment of Bombay High Court in **Ashoka Buildcon Ltd. Vs. Assistant Commissioner of Income Tax (supra)** delivered by Dr. D.Y. Chandrachud, J., (as His Lordship then was). Therein, Commissioner of Income Tax issued notice dated 30.04.2009 under Section 263. Assessment order was passed on 27.12.2006 under Section 143(3) for Assessment Year 2004-05. It was sought to be re-opened on 06.03.2007 in regard to benefit of Section 72A which deals with carry forward and set off of accumulated losses and unabsorbed depreciation allowances in cases, inter alia, of amalgamation and merger was wrongly allowed. Commissioner of Income Tax issued notice dated 30.04.2009 under Section 263 though referring to re-assessment order but in effect pointing out an error in regular assessment order dated 27.12.2006. Relying on **Commissioner of Income Tax Vs. Alagendran Finance Ltd. (supra)**, Delhi High Court said as under:

"Section 263 empowers the Commissioner to call for and examine the record of any proceedings under the Act and to pass such orders as the circumstances of the case justify, including an order enhancing, modifying or cancelling the assessment and directing a fresh assessment, if he considers that any order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the Revenue. Sub-section (2) of Section 263 stipulates that no order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed. That period of two years from the end of the financial year in which the original order of assessment dated 27 December 2006 was passed, has expired on 31 March 2009. Hence the exercise of the revisional jurisdiction in respect of the original order of reassessment is barred by limitation."

*"The substantive part of section 147 as well as Explanation 3 enables the Assessing Officer to assess or reassess income chargeable to tax which he has reason to believe had escaped assessment and other income which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section. There is nothing on the record of the present case to indicate that there was any other income which had come to the notice of the Assessing Officer as having escaped assessment in the course of the proceedings under Section 147 and when he passed the order of reassessment. **The Commissioner, when he exercised his jurisdiction under Section 263, in the facts of the present case, was under a bar of limitation since limitation would begin to run from the date on which the original order of assessment was passed. We must however clarify that the bar of limitation in this case arises because the revisional jurisdiction under Section 263 is sought to be exercised in respect of issues which did not form the subject matter of the reassessment proceedings under Section 143(3) read with 147. In respect of those issues, limitation would commence with reference to the original order of assessment.** If the exercise of the revisional jurisdiction under Section 263 was to be in respect of issues which formed the subject matter of the reassessment, after the original assessment was reopened, the commencement of limitation would be with reference to the order of reassessment. The present case does not fall in that category." (emphasis added)*

35. The judgments in **Commissioner of Income Tax Vs. Shriram Engineering Construction Co. Ltd. (supra)**; **Commissioner of Income Tax Vs. Lark Chemicals Ltd. (supra)**; and, **Commissioner of Income Tax Vs. ICICI Bank Ltd. (supra)** are also in the same line.

36. In these facts and circumstances and considering the fact that impugned notice dated 08.06.2016 issued by Principal Commissioner of Income Tax, NOIDA, Gautambudh Nagar is in reference to some discrepancy in original assessment order dated 31.10.2011 and not re-assessment order dated 26.03.2015, therefore, limitation would run from the date of regular order of assessment and in that view of the matter, impugned notice, evidently is barred by limitation prescribed under Section 263(2) of Act, 1961.

37. In the result, writ petition is allowed. Impugned notice dated 08.06.2016 is hereby quashed. Petitioner shall also be entitled to costs, which we quantify to Rs. 20,000/-.

(2016) 8 ILRA 305
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.08.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Writ Tax No.- 622 Of 2015
 &
 Connected With Other Cases

Vodafone South Limited

...Petitioner

Versus

State Of U.P. & Ors.

...Respondents

Counsel for Petitioner:

Ashish Mishra, S.D. Singh

Counsel for Respondents:

C.S.C., Rahul Sahai

Held

When a subsequent set of rules (**Rules, 2009**) supersedes earlier rules (**Rules, 2005**), and the subsequent rules are later declared **ultra vires**, the earlier rules **do not automatically revive**.

Supersession of earlier rules is an **independent legislative act**; even if the new rules are struck down, the earlier rules remain **extinguished unless expressly revived**.

The doctrine of **revival applies only in limited situations**, such as:

Where legislation is void due to **lack of legislative competence**, or
 Constitutional amendments being struck down.

It does **not apply** where delegated legislation is invalidated due to **procedural irregularities**.

Where a rule is **substituted or repealed**, it ceases to exist; striking down the substituting rule **does not revive** the earlier rule.

Since Rules, 2009 were struck down for **non-compliance with mandatory procedure** (and not lack of competence), the doctrine of "still-born" does not apply, and hence **no revival of Rules, 2005 occurs**.

Consequently, **no valid rules existed** for levy of advertisement tax for the relevant period; therefore, the demand raised is **without jurisdiction and illegal**.

The action of authorities in assuming automatic revival of Rules, 2005 is a **manifest legal error**.

All impugned demand notices are **quashed**, and any recovered amount must be **refunded**.

CASE LAW CITED

Anurag Bansal vs. State of U.P. (2011 (5) ADJ 879) – Rules, 2009 declared ultra vires.

Supreme Court Advocates-on-Record Association vs. Union of India (2016 (5) SCC 1)

N.P.V. Sundara vs. State of Andhra Pradesh (AIR 1958 SC 468)

Sagir Ahmad vs. State of U.P. (AIR 1954 SC 728)

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Mahendra Lal Jaini vs. State of U.P. (AIR 1963 SC 1019)

Firm A.T.B. Mehtab Majid & Co. vs. State of Madras (AIR 1963 SC 928)
B.N. Tiwari vs. Union of India (AIR 1965 SC 1430)
T. Devadasan vs. Union of India (AIR 1964 SC 179)
Indian Express Newspaper (Bombay) Pvt. Ltd. vs. Union of India
West U.P. Sugar Mills Association vs. State of U.P. (2002 (2) SCC 645)
Koteswar Vittal Kamath vs. K. Rangappa Baliga & Co. (1969 (1) SCC 255)
Bhagat Ram Sharma vs. Union of India (1988 (Supp.) SCC 30)
India Tobacco Co. Ltd. vs. CTO (1975 (3) SCC 512)
Rakesh vs. Dr. JT (2005 (12) SC 1)

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri S.D. Singh, learned Senior Advocate for petitioners and learned Standing Counsel as well as Sri Rahul Sahai, Advocate for respondents.

2. All these writ petitions involve comm on questions of law and fact and, therefore, as agreed by learned counsel for the parties, have been heard together and are being decided by this common judgment.

3. Demand of advertisement tax in accordance with Agra Nagar Nigam (Samachar Patro Me Prakashit Vigyapano Par Kar Ka Nirdharan Karna Aur Use Vasool Karna) Niyamawali, 2005 (*hereinafter referred to as the "Rules, 2005"*) published in U.P. Gazette dated 10.09.2005 and came into force on 01.04.2005 has been challenged on the ground that no such rules were in existence in the year of demand, i.e., 2010-11 and, therefore, demand of advertisement tax under Rules, 2005 is wholly without jurisdiction and illegal.

4. All the petitioners are Companies engaged in providing telecommunication service. They are Licensed Service Providers in State of U.P. by virtue of licence granted by Government of India, Ministry of Communications and IT, Department of Telecommunication under the provisions of Indian Telegraph Act, 1885 (*hereinafter referred to as the "Act, 1885"*). They have been authorized to set up and operate "Unified Access Services" (*hereinafter referred to as the "UAS"*) in the licensed service area.

5. Nagar Nigam, Agra (*hereinafter referred to as the "NNA"*) in purported exercise of powers under Sections 192, 219, 540(1), 550, 227, 172(2), (Ja) and 544 of U.P. Municipal Corporation Act, 1959 (*hereinafter referred to as the "Act, 1959"*) framed bye-laws/ Rules 2005 for imposing tax on advertisement, in the manner other than publication in newspapers, within territorial jurisdiction of NNA. Rules, 2005 contemplated a licence for the purpose of such advertisement and rate of tax payable by such person.

6. Subsequently, a new set of Rules, namely, U.P. Municipal Corporation (Assessment and Collection of Tax On Advertisement) Rules, 2009 (*hereinafter referred to as the "Rules, 2009"*)

have been framed applicable to every Municipal Corporation in State of U.P. and aforesaid Rules clearly provide that same are being promulgated in supersession of all the previous rules and orders issued in this behalf. These Rules were published in notification dated 24.12.2009 and came into effect from the date of their publication in gazette. It is admitted case of the parties that on promulgation of Rules, 2009, the Rules, 2005 stood superseded.

7. Pursuant thereto NNA issued a demand notice dated 18.11.2010 for the year 2010-11 demanding advertisement tax to the tune of Rs. 5327666/- (in Writ Petition No. 622 of 2015), which was objected by petitioners in Writ Petition No. 139 of 2011. The Court vide judgment dated 29.01.2011 directed NNA to decide objections filed by petitioners. One of the objection taken by petitioners is that Rules, 2009 were challenged being ultra vires of Act, 1959 as also Article 19(1)(a) and 19(1)(g) of the Constitution in various writ petitions led by **Misc. Bench No. 3336 of 2010 (Anurag Bansal and others Vs. State of U.P. and others)**. A Full Bench of this Court in its judgment reported in **2011(5) ADJ 879** has upheld the contention and declares Rules, 2009 as ultra vires of Act, 1959 and has struck down the same.

8. Petitioners thus contended that since Rules, 2009 have been declared ultra vires, no new Rules have been framed and earlier Rules, 2005 having already superseded by Rules, 2009, will not revive, hence no advertisement tax is payable by them.

9. Respondent-Nagar Nigam, however, by means of orders impugned in writ petitions have decided representation and rejecting same have taken the view that after striking down of Rules, 2009 liability to pay advertisement tax would fall back upon Rules, 2005 which would stand revive and, therefore, petitioners are liable to pay advertisement tax accordingly.

10. The only question which has been argued before us is that, Rules, 2005 after having been superseded and repealed by Rules, 2009 would not revive after Rules, 2009 are declared ultra vires and, therefore, any demand of advertisement tax for the period of 2010-11 and subsequent thereto would be illegal and without jurisdiction.

11. The stand of respondents in counter affidavit is very clear that after Rules, 2009 have been declared ultra vires, superseded Rules, 2005 would automatically revive. Stand taken by NNA in para 19 of counter affidavit filed in leading writ petition i.e. Writ Petition No. 622 of 2015 is reproduced as under:

*"19. That the averments made in paragraph no. 24 of the writ petition are not admitted. In reply it is submitted that upon the super session of the Rules of 2005, by the Rules of 2009 and upon adjudication of the rules of 2009 as being ultra vires, **the Rules of 2005 stood automatically revived** and thus there is no infirmity in the impugned proceedings." (emphasis added)*

12. Basic facts are not disputed. Earlier, rules framed were applicable only to NNA for levy of advertisement tax. Subsequently State Government framed a general set of Rules applicable to

all Municipal Corporations governed by Act, 1959. Rules, 2009 were published in supersession of all previous rules and orders issued in this behalf. Operative part of Rules, 2009, reads as under:

"In exercise of powers under section 227 read with section 192 and 219, sub-section (1) of section 540 and section 550 of the Uttar Pradesh Municipal Corporation Act, 1959 (Uttar Pradesh Act No. II of 1959) and section 21 of the Uttar Pradesh General Clause Act (Act No. 1 of 1904) and in super session of all the previous rules and orders issued in this behalf, the Governor, after considering the objections and suggestions received in pursuance of order published in Government notification no- 561/IX-9-2008-49Ja/2001, dated February 27, 2008 required by sub-section (2) of section 540 of the said Act of 1959, is pleased to make the following rules:" (emphasis added)

13. Rules, 2009 have been promulgated in a way that firstly rule framing authority has declared that notification dated 24.10.2009 is being issued in exercise of powers under Section 227 read with 192, 219, 540(1) and 550 of Act, 1959 and Section 21 of U.P. General Clauses Act, 1904 (hereinafter referred to as the "Act, 1904") and in supersession of all the previous rules and orders issued in this behalf. Second part of notification says that Governor after considering objections and suggestions received in pursuance of order published in Government notification dated 27.02.2008 as required by Section 540(2) of Act, 1959 is pleaded to make following rules, i.e., Rules, 2009. Thus by first part Rule framing authority has superseded all existing rules and orders issued in reference to provisions, namely, Sections 227, 192, 219, 540(1) and 550 of Act, 1959 read with Rule 21 of Act, 1904 and by subsequent part, Rules, 2009 have been promulgated.

14. It is not the case of respondents that power exercised by Rule framing authority with regard to supersession of earlier rules was bad or even this part has been nullified by any subsequent judgment of this Court.

15. Earlier validity of Rules, 2009 was upheld in **Taj Advertising and others Vs. State of U.P. and others, 2010(4) ALJ 293**. In another set of petitions filed at Lucknow Bench led by **Misc. Bench No. 3336 of 2010 (Anurag Bansal and others Vs. State of U.P. and others)**, Division Bench disagreeing with the view taken in **Taj Advertising (supra)**, formulated following questions and referred matter to Larger Bench:

"(1) Whether the State Government had legislative competence to frame the Rules, 2009?

(2) Whether the State Government in any case could have framed 'Rules' in general for all the municipal corporations, that too without taking recourse to Section 206 of the Act?

(3) Whether delegation of power could be made under the Rules framed by the State Government to the Central Government?

(4) Whether the licence for putting hoardings/advertisements on public properties, owned by private owners, can be given by public auction ?

(5) Whether the impugned rules are ultra vires to the provisions of Articles 14, 19(1) (a) and 19(1)(g) of the Constitution of India?

(6) Whether the Rules, 2009 are invalid, they having been framed without following the provisions of Sections 199 to 203 of the Act?

(7) Whether the provisions of the Rules, 2009, such as- requiring the owner of the building, where the advertisement is to be set up, to give an undertaking that in the event of default by the advertising company/firm to pay the tax, the owner of the building concerned would pay the tax, etc. can be said to be unreasonable and unfair to be adhered to and are liable to be struck down?

(8) Whether vesting of all the powers (as discussed in this order in relation to putting of hoardings and as given under the Rules, 2009) on private properties, in special areas etc. and in 'no hoarding zones' into the sole authority of the Municipal Commissioner, that too with no guidelines and without providing any superior forum of appeal/revision against his decision, suffers from the vice of excessive delegation and in any case absolutely arbitrary and unreasonable?"

16. Full Bench, however, decided to deliberate only questions no. 1, 2, 6 and 7 and answered the same as under:

"(1) State Government has got legislative competence to frame rules but subject to fulfilment of necessary conditions and procedure prescribed under Chapter IX of the Act (supra).

(2) Government could not have framed impugned rules for all the Municipal Corporations without taking recourse of not only Section 206 of the Act but other statutory provisions contained in Chapter IX of the Act.

(6) Impugned Rules 2009 is invalid and ultra vires to the Act being framed without following the provisions of Sections 199 to 203 of the Act and other statutory provisions discussed in the body of judgment (supra).

(7) Provision contained in the Rule 2009 requiring the owner of building to face penal consequences is invalid and violative of Section 195 of the Act."

17. Now the question is, "whether in view of aforesaid decision can it be said that Rules, 2005, stood superseded by Rules, 2009 would revive after striking down of Rules, 2009 by Full Bench in **Anurag Bansal (supra)**, authorising NNA to charge advertisement tax from petitioners under Rules, 2005".

18. Validity/ vires of statutory provisions normally examined in different ways and on different grounds. When an amendment is made to the provisions of Constitution, the only scope available to examine the same is, whether the same alters basic features of Constitution or not. Validity of a Principal Legislation made by Parliament or State Legislature is normally assailable on the ground of legislative competence or violation of constitutional provisions. Scope of challenge to delegated legislation namely, rules, regulations- bye-laws etc is much wider. Validity thereof can also be challenged on the ground that same are inconsistent with the provisions of Statute under which they have been framed or that mandatory procedure prescribed in statute for making delegated legislation has not been followed.

19. Effect of declaring any legislation as ultra vires or bad for any other reason is also different and depends upon various factors. An amendment to constitutional provision if declares ultra vires as it alters any element of basic feature of Constitution, it is considered to be a patent want jurisdiction on the part of Parliament which would have no effect on the law earlier to such legislation and, therefore, subsequent legislation if struck down would result in revival of earlier provision as if the earlier provision was never altered or repealed or substituted etc. A Constitution Bench recently has expressed this view in **Supreme Court Advocates-on-Record Association and another Vs. Union of India, 2016(5) SCC 1**. In the majority judgment rendered by Hon'ble Jagdish Singh Khehar, J. (for Himself and on behalf of Justice Madan B. Lokur, Justice Kurian Joseph and Justice Adarsh Kumar Goel), Court considered this aspect in paras 408 to 415 holding, when amended provision postulating a different provision is set aside, the original process of selection and appointment under unamended provision would revive.

20. When a principal legislation or delegated legislation is struck down being violative of fundamental rights or want of legislation, it is void ab initio. Sometimes when legislation is in the teeth of prohibition under Constitution, the Courts have evolved doctrine of "still-born". In **N.P.V. Sundara Vs. State of Andhra Pradesh AIR 1958 SC 468** doctrine of "still-born" piece of legislation was considered and it was held:

"If a law is on a field not within the domain of the legislature, it is absolutely null and void, and a subsequent cession of that field to the legislature will not have the effect to breathing life into what was a still-born piece of legislation and a fresh legislation on the subject would be requisite. But if the law is in respect of a matter assigned to the legislature but its provisions disregard constitutional prohibitions, though the law would be unenforceable by reason of those prohibitions, when once they are removed, the law will become effective without re-enactment." (emphasis added)

21. A slight different controversy arose in **Saghir Ahmad Vs. The State of U.P. & Ors AIR 1954 SC 728**. Therein U.P. State Transport Act, 1951 was promulgated enabling State Government to run Stage Carriage Service to the exclusion of others. Pursuant thereto State Government made a declaration extending aforesaid Act to a particular area and framed a scheme for operation of Stage Carriage Service on certain routes to the exclusion of others. Article 19(1)(g) conferred power upon a citizen to carry on business and there was no power under Constitution

available to State to deny such fundamental right to a citizen by engaging itself to carry on any trade or business. An amendment was made vide Constitution (First) Amendment Act, 1951. Thereunder State became entitled to carry on any trade or business either by itself or through corporation owned or controlled by it to the exclusion of private citizens wholly or in part. State sought to protect its enactment authorizing itself to run Stage Carriage Service to exclusion of others on the basis of aforesaid amendment of Constitution. The question raised before Court was, whether Constitution (First) Amendment Act could be invoked to validate earlier legislation. Court held that U.P. State Transport Act, 1951 when enacted was unconstitutional, therefore, it was "still-born". It could not have been vitalized by subsequent amendment of Constitution removing constitutional objection and must be re-enacted. Hon'ble Mukherjea, J. speaking for Court, referred to Prof. Cooley in his work on "Constitutional Limitations" (Vol. I page 384) and said:

"a statute void for unconstitutionality is dead and cannot be vitalised by a subsequent amendment of the Constitution removing the constitutional objection but must be re-enacted".

22. Court not only quoted aforesaid passage from Prof. Cooley but also said that this is a sound law and, therefore, gave it a legal recognition binding upon all in this country.

23. This view was reiterated in **Deep Chand Vs. The State of U.P. & Ors. AIR 1958 SC 648** where Court said that a plain reading of Article 13(2) indicates, without any reasonable doubt, that prohibition goes to the root of the matter and limits State's power to make law; the law made in spite of prohibition is a "still-born" law.

24. Again another Constitution bench in **Mahendra Lal Jaini Vs. State of U.P. AIR 1963 SC 1019** reiterated the above view in para 22 of report. It says:

"...it must be held that unlike a law covered by Art. 13(1) which was valid when made, the law made in contravention of the prohibition contained in Art. 13(2) is a still-born law either wholly or partially depending upon the extent of the contravention. Such a law is dead from the beginning and there can be no question of its revival under the doctrine of eclipse."

(emphasis added)

25. This has been followed in **Rakesh Vs. Dr. JT 2005 (12) SC 1**.

26. In the present case power of State to make Rules under Act, 1959 was not doubted by Court in **Anurag Bansal (supra)** but for disregard of procedural provisions, imposition of advertisement tax by State Government by Rules, 2009 was held invalid. Thus Rules, 2009 were struck down since procedure to make Rule which was mandatory, not followed. To our mind it is not a case where doctrine of "still-born" would be attracted. Rules, 2009 have not been struck down for want of legislative competence but they have been held invalid for the reason that mandatory procedure prescribed in statute has not been followed and, therefore, here doctrine of "still-born"

and consequences if such a law is made, would not apply but here is a case where a subordinate legislation has been found invalid for want of observance of certain mandatory procedure prescribed in statute. In these circumstances, it has to be examined whether subsequent delegated legislation when held invalid or struck down, would result in revival of earlier subordinate legislation which was already superseded by subsequent legislation.

27. In this regard we find that first decision available to us is **Firm A. T. B. Mehtab Majid and Co. v. State of Madras AIR 1963 SC 928**. Therein validity of Rule 16 of Madras General Sales Tax (Turnover and Assessment) Rules, 1939 as substituted w.e.f. 01.04.1955 was challenged. Court held that it is discriminatory and also contravenes Article 304-A of the Constitution. An argument was raised that if amended rules is invalid old Rule 16 would revive. The Court in para 24 of the judgment said:

"24. It has been urged for the respondent that if the impugned rule be held to be invalid, old r. 16 gets revived and that the tax assessed on the petitioner will be good. We do not agree. Once the old rule has been substituted by the new rule, it ceases to exist and it does not automatically get revived when the new rule is held to be invalid."

28. Again a similar issued came up for consideration before another Constitution Bench in **B.N. Tiwari Vs. Union of India and others AIR 1965 SC 1430**. Therein Ministry of Home Affairs made a provision vide resolution dated 13.09.1950 providing reservation for Scheduled Caste and Schedule Tribe at 12.5 percent and 5 percent respectively. There was no provision for carry forward. It was added by a supplementary instruction issued in 1952 providing that if suitable reserved category candidates are not available in one recruitment the unfilled vacancies shall be carried forward in next recruitment but still some vacancies remained unfilled they would be treated unreserved. This carry forward rule was amended by Government in 1955 to further carry forward unfilled vacancies without any provision for lapse, i.e., for treating vacancies unreserved. Result of substitution of provision by 1955 Rule was that paras 5(3) and 5(4) of 1952 Rule cease to exist. This rule of carry forward made in 1955 was challenged in **T. Devadasan vs The Union Of India and another, AIR 1964 SC 179** on the ground that it is unconstitutional. The Court struck down carry forward rule of 1955.

29. In **B.N. Tiwari (supra)** petitioner argued before Supreme Court that carry forward rule of 1955 was struck down and 1952 rule having already ceased to exist by substitution of 1955 Rule, hence there was no carry forward rule either of 1952 or 1955. In alternative it was argued that if 1952 Carry Forward Rule still continue, that is also arbitrary. Court considered three questions as under:

(1) Whether Carry Forward Rule of 1952 can still be said to exist?

(2) Whether Carry Forward Rule of 1952 if it is still exist is bad for the same reason as the Carry Forward Rule of 1955 in the light of judgment in **T. Devadasan (supra)**.

(3) Whether petitioner-B.N. Tiwari would be entitled to appointment even if Carry Forward Rule, 1952 does not exist?

30. Answering first question, Court said that in **T. Devadasan (supra)** Carry Forward Rule as modified in 1955 was declared invalid. Court did not say that it will result in revival of 1952 Rule. Further declaration of 1955 Rule as invalid would not mean that the Court said that 1952 Rule must be deemed to exist or revived because of declaration of 1955 Rule as invalid. Court held:

*"The carry forward rule of 1952 was substituted by the carry forward rule of 1955. On this substitution the carry forward rule of 1952 clearly, Ceased 'to exist because its place was taken by the carry forward rule of 1955. Thus by promulgating the new carry forward rule in 1955, the government of India itself cancelled the carry forward rule, of 1952. When therefore this Court struck down the carry forward rule as modified in 1955 that did not mean that the carry forward rule of 1952 which had already ceased to exist, because the Government of India itself cancelled it and had substituted a modified rule in 1955 in its place, could revive. **We are therefore of opinion that after the judgment of this Court in Devadasan's case there is no carry forward rule at all, for the carry forward rule of 1955 was struck down by this Court while the carry forward rule of 1952 had ceased to exist when the Government of India substituted the carry forward rule of 1955 in its place.**" (emphasis added)*

31. It also held that in view of above answer to first question the second question, whether 1952 Rule is also invalid, need not to answer. We are not concerned with third question and the issue raised in these writ petitions, in our view, is covered by the answer given by Supreme Court to first question in **B.N. Tiwari (supra)**.

32. Again a similar question arose in **Indian Express Newspaper (Bom) Pvt. Ltd. and others vs. Union of India and others, 1986(159) ITC 856**. Government of India had issued a notification dated 15.07.1977 under which total exemption was granted. It was substituted by notification dated 01.03.1981. Subsequent notification dated 01.03.1981 was challenged and struck down. The question arose, whether after striking down notification dated 01.03.1981, earlier notification would revive. Court held that on striking down of subsequent notification repealed notification would not revive.

33. The judgments in **Firm A. T. B. Mehtab Majid (supra)** and **B.N. Tiwari (supra)** came up for consideration before a three Judge Bench in **West Uttar Pradesh Sugar Mills Association and others Vs. State of U.P. and others, 2002(2) SCC 645**. Therein Rule 49 of U.P. Sugarcane (Regulation of Supply and Purchase) Rules, 1954 was substituted by U.P. Sugarcane (Regulation of Supply and Purchase) (Amendment) Rules, 1992. Rule 1(2) of notification dated 24.04.1992 which caused said amendment clearly provides that amendment Rules, 1992 shall remain in force w.e.f. 01.10.1991 to 30.09.1992. Therefore, effect of amendment of rules was only one year. However, Rule 2 whereby amendment was caused, said that for the rules setup in Column 1, rules set out in Column 2 shall be substituted. After 30.09.1992, Cane Commissioner issued a circular that now old Rule 49 has revived. This was challenged and argument was raised that old

Rule 49 having already been substituted without, any reservation, it would not revive after amended rule also become inoperative after 30.09.1992. Court considered the question, once old rule has been deleted, repealed or substituted by new rule, whether old rule would revive when substituted rule cease to be operative and it was answered in negative. However, in para 15 of judgment, Court said, that it would have been a different case where a subsequent law which modified earlier law held to be void. In such case, earlier law shall be deemed to have never been modified or repealed and, therefore, continued to be in force. Where it is found that legislature lacked competence to enact a law, still amends existing law and subsequently it is found that legislature or the authority was denuded with the power to amend the existing law, in such a case old law would revive and continue but where the rule framing authority has substituted a provision without showing intention to keep the old provision alive, position would be different.

34. In **Supreme Court Advocates-on-Record Association (supra)** also this issue has been considered after referring to earlier authorities on the subject, Court held, when an amendment is brought or a new set of rule is brought by substitution or supersession by legislature the annulment or concealment by legislature itself and if that be so earlier provision would not revive. In para 412.4 after referring judgments in **Koteswar Vittal Kamath Vs. K. Rangappa Baliga and Co., 1969(1) SCC 255**, Court observed, that, it is true that if amendment to an erstwhile legislative enactment, envisages substitution of an existing provision, the process of substitution must be deemed to comprise of two steps. The first step would envisage that old rule would cease to exist and second step would envisage that new rule had taken place of the old rule. As such, even if new rule was to be declared invalid, the first step depicted above, namely, that old rule has ceased to exist, would remain unaltered. Court however observed that said position will not apply in the matter considered by Constitution Bench in **Supreme Court Advocates-on-Record Association (supra)** for the reason that impugned Constitutional amendment was promulgated independently of original provisions of Constitution.

35. In para 412.7 of judgment, Court referred to its decision in **Indian Express Newspaper (Bom) Pvt. Ltd. (supra)** and said that legal effect of an earlier law, later law enacted in its place was declared invalid would not depend merely upon the use of words like "substitution" or "supersession". It would depend on totality of circumstances and context upon which provision was couched. Court also referred to the judgment in **Bhagat Ram Sharma vs. Union of India, 1988 (Suppl.) SCC 30** to observe that an enactment purported to be an amendment has the same qualitative effect as the repeal of existing statutory provision and said that there is no quarrel on the said proposition. It also said that it is not considering the question of effect of an amendment or a repeal but was faced with the case dealing with the effect of striking down of Constitutional amendment and legislative enactment through a process of judicial review.

36. In **India Tobacco Co. Ltd. vs. CTO, 1975(3) SCC 512** the effect and meaning of repeal was considered. Court said that repeal connotes abrogation or obliteration of one statute by another from statute book completely as if it had never been passed. When an Act is repealed, it must be considered (except as to transactions past and closed) as if it had never existed. It said:

"Repeal is not a matter of mere form but one of substance, depending upon the intention of the Legislature. If the intention, indicated expressly or by necessary implication in the subsequent statute, was to abrogate or wipe off the former enactment, wholly or in part, then it would be a case of total or pro tanto repeal. If the intention was merely to modify the former enactment by engrafting an exception or granting an exemption, or by super-adding conditions, or by restricting, intercepting or suspending its operation, such modification would not amount to a repeal."

37. Court further observed that broadly speaking, principal object of a repealing and amending Act is to excise dead matter, prune off superfluities and reject clearly inconsistent enactments.

38. If we examine the matter in present cases in the light of aforesaid discussion, we find that Rules, 2009 made two declarations. One is an independent declaration that existing rules and orders are superseded and second is an enactment of a set of rules by Rule framing authority.

39. Rules, 2009 dealing with liability and procedure of imposition of advertisement tax have been struck down for the reason that tax imposed by State Government straightway without exercising procedure provided in the Act. Rules, 2009 were framed by Government in contravention of statutory provision contained in Act. In paras 84 and 86 of judgment in **Anurag Bansal (supra)** Full Bench observed as under:

"84. ...the tax imposed by the State Government straightaway without exercising the power conferred by the Act i.e. issuance of direction by notification in gazette to impose tax seems to be an act of exceeding of jurisdiction. Impugned Rules have been framed by the Government in contravention of statutory provisions (supra) contained in the Act.

86. ...government seems to have exceeded its jurisdiction while framing the rules straightway without following the procedure provided by the Act."

40. Simultaneously in para 82 of judgment, Court further said:

"82. State Government has got power under Section 205 of the Act to abolish or modify the tax imposed by the Corporation. It does not mean that the State Government lacks power with regard to tax matter. Power conferred on the State Government is general power which may be exercised without affecting the statutory power provided to Corporation to impose and regulate tax within its jurisdiction. The government may, by notification, under Section 206 of the Act by general or special order published in official gazette, required corporations to impose any tax mentioned in Sub-section (2) of Section 172 of the Act, not already imposed at a specified rate. The Government may also increase, modify or vary the rate of tax in case the Corporation fails to carry out the order."

41. In para 83, Court said:

"83- The Government may pass suitable order imposing, increasing, modifying, or varying the tax thereupon and in such event the order of the State Government shall operate as if it had been a resolution duly passed by the Corporation."

42. Thus the power of State Government to abolish or modify a tax imposed by Government has validly been recognized but advertisement tax imposed by Rules, 2009 by State Government has been struck down for not complying with Section 206 of Act, 1959 and also without following the provisions of Sections 199 and 203 of Act, 1959. Thus aforesaid judgment in **Anurag Bansal (supra)** has nowhere declared that Rules, 2009, in so far as in initial part of notification, supersedes existing rules and orders, lacks authority and that part will not be operated. Legislative intention is clear that existing rules and orders in respect of advertisement tax were superseded. New set of Rules, which have been struck down, would not render revival of supersession already done by Rule framing authority and that be so in our view Rules, 2005 shall not revive.

43. Sri Rahul Sahai, learned counsel appearing for respondent-Nagar Nigam, when confronted with aforesaid authorities, could not place any authority before us so as to pursue to take a different view in the matter.

44. The authorities, therefore, committed a manifest error in proceeding to demand advertisement tax under Rules, 2005 on the assumption that after judgment in **Anurag Bansal (supra)** striking down Rules, 2009, earlier Rules, 2005 would stand revive. This is neither legally permissible nor otherwise valid.

45. In view of above, all these writ petitions are allowed. The orders and demand notices impugned in all these writ petitions are hereby quashed. It is held that respondents shall not be entitled to realize any amount under orders impugned in this writ petition, which are quashed by this judgment. If any, amount has been deposited by petitioners pursuant to impugned orders or realized by respondents by coercive method or otherwise, same shall be refunded to petitioners without any further delay.

46. However, we make it clear that this judgment shall not preclude Competent Rule making authority from promulgating new set of rules in accordance with law.

47. No costs.

(2016) 8 ILRA 317
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE KAUSHAL JAYENDRA THAKER, J.

Writ Tax No.- 718 Of 2005

Rajesh Paper Mills

...Petitioner

Versus

Union Of India & Anr.

...Respondents

Counsel for Petitioner:

B.C.Rai

Counsel for Respondents:

S.S.C.,A.S.G.I.,K.C. Sinha, R.C.Shukla, Radha Mohan Pandey

The present petition has been filed challenging the validity of Rule 8(3) of Central Excise Rules, 2002 (hereinafter referred to as 'Rules, 2002') being ultra vires of Article 14 of Constitution of India and Section 11AB of Central Excise Act, 1944 and also on the ground that same is beyond Rule making power under Section 3 of Act, 1944.

Petitioner is a company registered under Companies Act, 1956 and is engaged in manufacturing and sale of paper which is an excisable article, hence, petitioner is registered with Excise Department under the provisions of Act, 1944. Petitioner paid excise duty for the period October, 2002 to February, 2005. However, respondent-2 vide letter dated 9.12.2004 informed petitioner that during scrutiny of monthly returns submitted by petitioner since February, 2005 there appears to be certain discrepancies showing that excise duty was deposited beyond due date during February, 2004 to November, 2004. Consequently, petitioner was directed to produce duty paying documents for the months of March, 2004 to November, 2004, or if, amount was not deposited within due date, to pay interest at the rate of Rs.1,000/- per day.

It is contended by counsel for petitioner that interest has been calculated as per Rule 8(3) of Rules, 2002 which provides interest to be computed at the rate of 2% per month or Rs.1,000/- per day whichever is higher. Charging of interest at the rate of Rs.1,000/- per day is wholly illegal, inasmuch as it raises the rate of interest beyond maximum rate permissible under Section 11AB of Act, 1944. Therefore, same is beyond delegated legislative authority i.e. rule framing authority and is ultra vires of Section 11AB.

Court observed that a bare reading of Section 11AB shows that rate of interest, if any, payable under Section 11AB would be such as prescribed in two Notification published in Gazette. For that purpose there is neither any justification nor occasion to refer any Rule including Rule 8. When statute require specifically that rate of interest shall be fixed by Central Government at such rate as notified in official gazette by way of Notification, such rate shall prevail. Aforesaid Notification dated 12th September, 2003 partakes nature of "statutory instrument" issued under Section 11AB, since that is the only way prescribed for fixing rate of interest in respect of cases covered by Section 11AB. Any general provision will not cover this situation. Hence, demand

of interest at a rate, other than that prescribed in the Notification dated 12th September, 2003, by taking recourse of Rule 8(3) would be illegal and impermissible.

It is well settled, when law requires something to be done in a particular manner, things have to be done in that manner alone and not otherwise. This principle was recognized in *Nazir Ahmad Vs. King- Emperor* AIR 1936 PC 253.

Writ petition succeeds and is allowed.

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Kaushal Jayendra Thaker, J.)

1. Heard Sri Gopal Verma and Sri B.C. Rai, learned counsel for petitioner and Sri Ashok Mehta, Additional Solicitor General of India assisted by Sri Praveen Kumar for respondents.

2. Petitioner has challenged validity of Rule 8(3) of Central Excise Rules, 2002 (hereinafter referred to as 'Rules, 2002') being ultra vires of Article 14 of Constitution of India and Section 11AB of Central Excise Act, 1944 (hereinafter referred to as 'Act, 1944') and also on the ground that same is beyond Rule making power under Section 3 of Act, 1944. It has also prayed for a writ of certiorari quashing order dated 6.4.2005 (Annexure No.2 to the writ petition), whereby a demand of total sum of Rs.9,48,010/- has been raised by respondent-2 being interest on delayed payment of excise duty, by petitioner.

3. The facts in brief giving rise to present dispute are in a very narrow compass and stated as under.

4. Petitioner is a company registered under Companies Act, 1956 (hereinafter referred to as 'Act, 1956') and has its registered office at Barapech Sikohabad, District Firozabad. It is engaged in manufacture and sale of paper which is an excisable article, hence, petitioner is registered with Excise Department under the provisions of Act, 1944. Petitioner paid excise duty for the period October, 2002 to February, 2005. However, respondent-2 vide letter dated 9.12.2004 informed petitioner that during scrutiny of monthly returns submitted by petitioner since February, 2005 there appears to be certain discrepancies showing that excise duty was deposited beyond due date during February, 2004 to November, 2004. Consequently, petitioner was directed to produce duty paying documents for the months of March, 2004 to November, 2004, or if, amount was not deposited within due date, to pay interest at the rate of Rs.1,000/- per day. Petitioner produced relevant documents before respondent-2 but it issued order dated 6th April, 2005, impugned in this writ petition, demanding interest on duty paid by petitioner for the period October, 2002 to February, 2005 stating that duty was paid after due date and for period of delay petitioner was liable to pay interest under Rule 8(3) of Rules, 2002.

5. It is contended by counsel for petitioner that interest has been calculated as per Rule 8(3) of Rules, 2002 which provides interest to be computed at the rate of 2% per month or Rs.1,000/-

per day whichever is higher. Charging of interest at the rate of Rs.1,000/- per day is wholly illegal, inasmuch as it raises the rate of interest beyond maximum rate permissible under Section 11AB of Act, 1944. Therefore, same is beyond delegated legislative authority i.e. rule framing authority and is ultra vires of Section 11AB.

6. It is further submitted that before Finance Act, 1995 there was no provision authorizing respondents to charge interest on delayed payment. Section 11AA was inserted by Finance Act, 1995 w.e.f. 26.5.1995 and Section 11AB was inserted by Finance Act, 1996 w.e.f. 28.9.1996. Both these provisions provide that on delayed payment of duty, interest shall be chargeable at a rate not below 10% and not exceeding 36% but such rate shall be fixed by Central Government by Notification in official gazette. It is said that Central Government vide Notification No. 66/2000 - CE(NT), dated 12.9.2003, fixed rate of interest at 13% per annum in exercise of power under Section 11AB. Rule 8(3) of Rules, 2002 however provides for a different rate of interest i.e. 2% per month or Rs.1,000/- per day, whichever is higher, therefore, it is inconsistent with Section 11AB read with Notification dated 12.9.2003, hence ultra vires and liable to be struck down. It is also said that Rule 8 (3) is in conflict with Section 11AA and 11AB and hence, it is ultra vires.

7. Sri B.C. Rai urged that interest has always been compensatory in nature and fixation of rate of interest under Rule 8(3) elevates said Rule to the status of a penal and confiscatory provision, rendering the same arbitrary, unreasonable and irrational. Rate of interest fixed under Rule 8(3) is inequitable, unfair, unreasonable and confiscatory, inasmuch as rate of interest on deposits in bank was currently between 4% to 6% while rate of interest on borrowings from bank is between 7.5% to 12% but under Rule 8(3), rate of interest provided is 2% per month which comes to more than 24% per annum or Rs.1,000/- per day, whichever is higher, which is extremely excessive and hence in-violation of Article 14 of Constitution of India, since, it loses its nature of being compensatory.

8. Sri B.C. Rai urged that Section 37 of Act, 1944 confers power upon Central Government to frame Rules to give effect to the provisions of Act, 1944 but Rule 8(3) is beyond Rule making power. It is said, when Central Government itself has issued a Notification fixing a lower rate of interest, authorities cannot take recourse to Rule 8(3) and demand a higher rate of interest. It is also pointed out that Rule 8(3) has further been amended by Second Amendment of 2005. Now the amendment made by Notification dated 31.3.2005, Rule 8(3) provides that rate of interest would be such, as specified by Central Government vide Notification under Section 11AB of Act, 1944 and that being so, it must be taken that intention of legislature in Rule 8(3) was same for earlier period also.

9. It is lastly contended that in respect to some period for which interest has been demanded, amount of duty was paid by petitioner well within due date by way of submitting a bank cheque which was encashed by Bank when deposited by respondents for collection, but respondent-2 has charged interest by treating date of payment of duty on the date when respondents got the amount encashed from Bank and not on the date of deposit of cheque which was deposited / submitted in time. In this regard our attention is drawn to Rules 8(1) of Rule 2002 and it is urged

that, duty if deposited by cheque, is realized and encashed by Bank, when presented by Department, payment of duty shall be deemed to be on the date on which cheque was submitted by assessee.

10. Sri Ashok Mehta, Additional Solicitor General appearing for respondents contended that Rule 8 is part of subordinate legislation and Central Government in exercise of power under Section 37 of Act, 1944 and in order to give effect to the provisions of the Act has made the said Rule. Section 11AA and 11AB provide limit of minimum and maximum rate of interest, being 10% and 36% respectively. Rule 8(3) specifies rate of interest as 2% per month and Rs.1,000/- per day which apparently is not beyond maximum rate permitted under Section 11AB, hence it cannot be said that Rule 8(3) is invalid. It is further submitted that Section 11AB itself provides rate of interest upto 36% and validity of principal legislation is not under challenge, subordinate legislation providing rate of interest, within the limits prescribed under Section 11AB, cannot be said to be arbitrary, unreasonable and confiscatory. Lastly, it is contended that Notification dated 13.5.2002 is only a non statutory executive order and when exercising Rule framing power, a Rule has been framed, that will prevail over executive order, and therefore, petitioner is liable to pay interest as per Rule 8(3). With respect to the deemed date of deposit of duty, with reference to Rule 8(1), he fairly stated, when cheque is presented in Bank and amount of cheque is realized and credited to the account of Department, the date of presentation of cheque in designated bank shall be deemed to be date of payment and delay, if any, occurred in transferring amount by Bank to Department's account would not attract liability of interest. If respondent-2 has raised demand contrary to Rule 8(1), same shall be rectified if petitioner approaches respondent-2 and point out such a demand of interest in individual case(s).

11. We have heard counsel for parties at length and perused record.

12. Sections 11AA and Section 11AB which provide for interest on delayed payment of duty, read as follows :

"11AA. Interest on delayed payment of duty.- Subject to the provisions contained in section 11AB, where a person chargeable with duty determined under sub-section (2) of section 11A, **fails to pay such duty within three months from the date of determination**, he shall pay, in addition to the duty, **interest at such rate not below ten per cent and not exceeding thirty-six per cent per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette** on such duty from the date immediately after the expiry of the said period of three months till the date of payment of such duty:

Provided that where a person chargeable with duty determined under sub-section (2) of section 11A before the date on which the Finance Bill, 1995 receives the assent of the President, fails to pay such duty within three months from such date, then, such person shall be liable to pay interest under this section from the date immediately after three months from such date, till the date of payment of such duty.

Explanation 1.--Where the duty determined to be payable is reduced by the Commissioner (Appeals), Appellate Tribunal 6[, National Tax Tribunal] or, as the case may be, the Court, the date of such determination shall be the date on which an amount of duty is first determined to be pay-able.

Explanation 2.--Where the duty determined to be payable is in-creased or further increased by the Commissioner (Appeals), Appellate Tribunal, of National Tax Tribunal or, as the case may be, the Court, **the date of such determination shall be,--**

(a) for the amount of duty first determined to be payable, the date on which the duty is so determined;

(b) for the amount of increased duty, the date of order by which the increased amount of duty is first determined to be payable;

(c) for the amount of further increase of duty, the date of order on which the duty is so further increased. "

Section 11AB. Interest on delayed payment of duty. -(1) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person who is liable to pay duty as determined under sub-section (2), or has paid the duty under sub-section 2B, of section 11A, shall, in addition to the duty, be **liable to pay interest at such rate not below ten per cent and not exceeding thirty-six per cent. per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette**, from the first date of the month succeeding the month in which the duty ought to have been paid under this Act, or from the date of such erroneous refund, as the case may be, but for the provisions contained in sub-section (2), or sub-section (2B), of section 11A till the date of payment of such duty:

Provided that in such cases where the duty becomes payable consequent to issue of an order, instruction or direction by the Board under section 37B, and such amount of duty payable is voluntarily paid in full, without reserving any right to appeal against such payment at any subsequent stage, within forty-five days from the date of issue of such order, instruction or direction as the case may be, no interest shall be payable and in other cases the interest shall be payable on the whole of the amount, including the amount already paid.

(2) The provisions of sub-section (1) shall not apply to cases where the duty had become payable or ought to have been paid before the date on which the Finance Bill, 2001 receives the assent of the President.

Explanation 1.-- Where the duty determined to be payable is reduced by the Commissioner (Appeals), the Appellate Tribunal, National Tax Tribunal] or, as the case may be, the Court, the interest shall be payable on such reduced amount of duty.

Explanation 2.--Where the duty determined to be payable is increased or further increased by the Commissioner (Appeals), the Appellate Tribunal 5[, National Tax Tribunal] or, as the case may be, the Court, the interest shall be payable on such increased or further increased amount of duty.

(emphasis added)

13. Section 11AA and 11AB though look similar provisions but the actual difference is that Section 11AA takes within its ambit excise duty determined under Section 11A(2) while section 11AB has within its ambit liability of duty not complied with and covered by Section 11A(1). Irrespective of duty determined under sub-section (2) or paid under sub-section (2B) of Section 11A, rate of minimum interest as well as maximum, prescribed in both the provisions, is same i.e. 10% and 36% per annum. Both sections provide that actual rate of interest which shall be applicable, would be such, as fixed by Central Government by Notification in Official gazette.

14. It is admitted that so far as petitioner is concerned, it is covered by rate of interest prescribed under Section 11AB. Sri Ashok Mehta, counsel for respondent also did not dispute that in exercise of powers conferred by Section 11AB of Act, 1944 and in supersession of earlier Notification, Central Government issued a notification dated 12.9.2003 by publishing in Gazette, and fixed rate of interest at 13% per annum for the purpose of Section 11AB. Copy of aforesaid Notification dated 12.9.2003 is on record as Annexure -6 to writ petition and reads as under : -

"In exercise of the powers conferred by section 11AB of the Central Excise Act, 1944 (1 of 1944) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No.19/2002- Central Excise (N.T.), dated the 13th May, 2002 [GSR 355(E), dated the 13th May, 2002] , except as respect things done or omitted to be done before such supersession, the Central Government hereby fixes the rate of interest at thirteen percent per annum for the purpose of the said notification.

[Notification No.66/2003-C.E.(N.T.), dated 12.9.2003]"

15. In our view, a bare reading of Section 11AB shows that rate of interest, if any, payable under Section 11AB would be such as prescribed in two Notification published in Gazette. For that purpose there is neither any justification nor occasion to refer any Rule including Rule 8. When statute require specifically that rate of interest shall be fixed by Central Government at such rate as notified in official gazette by way of Notification, such rate shall prevail. Aforesaid Notification dated 12th September, 2003 partakes nature of "statutory instrument" issued under Section 11AB, since that is the only way prescribed for fixing rate of interest in respect of cases covered by Section 11AB. Any general provision will not cover this situation. Hence, demand of interest at a rate, other than that prescribed in the Notification dated 12th September, 2003, by taking recourse of Rule 8(3) would be illegal and impermissible.

16. It is well settled, when law requires something to be done in a particular manner, things have to be done in that manner alone and not otherwise. This principle was recognized in **Nazir**

Ahmad Vs. King-Emperor AIR 1936 PC 253 and, thereafter it has been reiterated and followed consistently by Apex Court in a catena of judgements, which we do not propose to refer all but would like to refer a few recent one.

17. In **Dhananjaya Reddy Vs. State of Karnataka 2001 (4) SCC 9** in para 23 of the judgment the Court held :

"It is a settled principle of law that where a power is given to do a certain thing in a certain manner, the thing must be done in that way or not at all."

18. In **Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala 2002 (1) SCC 633**, it was held :

"It is a normal rule of construction that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself."

19. The judgments in **Anjum M.H. Ghaswala (supra)** and **Dhananjaya Reddy (supra)** laying down the aforesaid principle have been followed in **Captain Sube Singh & others Vs. Lt. Governor of Delhi & others 2004 (6) SCC 440**.

20. In **Competent Authority Vs. Barangore Jute Factory & others 2005 (13) SCC 477**, it was held :

"It is settled law that where a statute requires a particular act to be done in a particular manner, the act has to be done in that manner alone. Every word of the statute has to be given its due meaning."

21. In **State of Jharkhand & others Vs. Ambay Cements & another 2005 (1) SCC 368** in para 26 of the judgment, the Court held:

"It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way."

22. In effect a similar question was considered by Division Bench of this Court [in which I was also a member with Hon'ble S.R. Alam, J., (as His Lordship then was)] in **Daya Shankar Singh Vs. State of U.P. and others, 2008(2) ESC 1220** and this Court has observed:

"A modification, amendment etc., therefore, is permissible by exercising the power in the like manner and subject to like sanction and conditions in which the main provision was made initially. Since, Staff Regulations were framed admittedly with the previous sanction of the State Government and by publication in the official Gazette, same can be amended only following

the same procedure and not otherwise. Therefore, the proposal/resolution passed by the Board of Directors, UPSWC by no stretch of imagination can be said to have the effect of either amending Regulation 12 of Staff Regulations or to bind UPSWC and its employees to be governed by such resolution/proposal which are inconsistent with the existing provisions contained in Staff Regulations."

23. We are also fortified in taking above view by referring to Section 21 of General Clauses Act, 1897, which reads as under : -

*"21 Power to issue, to include power to add to, amend, vary or rescind notifications, orders, rules or bye-laws.-Where, by any Central Act or Regulations a power to issue notifications, orders, rules or bye-laws is conferred, **then that power includes a power, exercisable in the like manner** and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued."*

(emphasis added)

24. Power to prescribe rate of interest, is conferred by Section 11AB, to be fixed by Central Government by notification in official gazette and such a Notification was actually issued on 12th September, 2003. Same could have been altered or modified or changed in same manner and not by referring to a general rule.

25. In that view of the matter, we find that there is no necessity to look into validity of Rule 8(3) of Rule, 2002 but since, matter has been argued on this aspect also in the alternative, we proceed to examine whether rate of interest specified in Rule 8(3) if applied to a case covered by Section 11AB, it would be inconsistent with Section 11AB so as to render it ultra vires.

26. Rate of interest under Rule 8(3) is 2% per month or Rs.1,000/- per day whichever is higher. Rule 8(3) as applicable before 1.4.2005 read as under : -

*" if the assessee fails to pay the amount of duty by the due date, he shall be liable to pay the outstanding amount along with an interest **at the rate of two per cent per month or rupees one thousand per day, whichever is higher**, for the period starting with the first day after due date till the date of actual payment of the outstanding amount ;*

*Provided that the **total amount of interest payable in terms of this sub-rule shall not exceed the amount of duty which has not been paid by due date;***

Provided further that till such time the amount of duty outstanding and the interest payable thereon are not paid, it shall be deemed that the goods in question in respect of which the duty and interest are outstanding, have been cleared without payment of duty, and where such duty and interest are not paid within a period of one month from the due date, the consequences and the penalties as provide din these rules shall follow."

(emphasis added)

27. It may also be noticed that Rule 8(1) and 8(3) of Rules, 2002 were substituted w.e.f. 1.4.2003 by amendment Notification dated 1.3.2003.

28. 2% per month will make rate of interest more than 24% per annum , but rate of Rs.1000/- per day can go to the extent of even more than 100% per annum. For example if the amount of default is Rs.1,00,000/- and there is delay of 365 days, then amount of interest would come to Rs.3,65,000/- but by applying proviso to Rule 8(3), it would be confined to Rs.1,00,000/- since it cannot exceed the amount of duty which has not been paid by due date. Still rate of interest would be 100%. This is obviously in the teeth of Section 11AB where rate of interest cannot be more than 36% per annum. Rate of interest at Rs.1,000/- per day, therefore in several cases may result in exceeding 36% per annum. Such higher rate beyond 36% is not permitted by Section 11AB, hence to that extent Rule 8(3), ex-facie is ultra vires of Section 11AB of Act, 1944.

29. There is another aspect of matter. Legislature vide Section 11AB required that rate of interest must be on per annum basis and not in any other manner, while Rule 8(3) provides rate of interest on per month or per day basis which is also not consistent with Section 11AB. It is for this reason, it appears to us, Rule 8(3) of Rule 2002, as framed w.e.f 1.3.2003 was not found in conformity with Section 11AB and this is fortified from the fact that Central Government issued Notification in official gazette as contemplated in Section 11AB, specifically, to provide rate of interest at 13% per annum. If recourse is taken to Rule 8(3) for the purpose of levying interest as already said, it would be ultra vires of Section 11AB.

30. We are also informed that several High Courts have already declared Rule 8(3), ultra vires of Section 11AB and in this regard we may refer to Rajasthan High Court judgment in **Lucid Colloids Limited Vs. Union of India, 2006(200) 377**, Gujrat High Court in **K.C. & Sons Appliances Pvt. Ltd. Vs. Union of India, 2014 (306) E.L.T. 249** and Madras High Court in **V.T. Dyers and Screen Printers Vs. Union of India, 2015 (322) E.L.T. 705**.

31. Probably realising this anomaly, and in order to bring Rule 8(3) in conformity with Section 11AB, Government also amended, by substitution Rule 8(3), vide Notification dated 31st March, 2005 and now it reads as under :

" If the assessee fails to pay the amount of duty by due date, he shall be liable to pay the outstanding amount along with interest at the rate specified by the Central Government vide notification under Section 11AB of the Act on the outstanding amount, for the period starting with the first day after due date till the date of actual payment of the outstanding amount. "

32. We find that amended Rule now brings into application, the Notification dated 12.9.2003 issued by Government by publishing in official gazette, prescribe rate of interest, consistent to Section 11AB.

33. With respect to another part, as to how delay in payment shall be computed, counsel for parties did not dispute that Rule 8(1)(Explanation-B) would be applicable and date of payment of duty shall be deemed to be the date on which cheque was received by Department provided cheque as and when presented to Bank by Department, got encashed. Rule 8(1) (Explanation-b) is very clear and explicit, reads as under :

" if the assessee deposits the duty by cheque, the date of presentation of the cheque in the bank designated by the Central Board of Excise and Customs for this purpose shall be deemed to be the date on which the duty has been paid subject to realization of that cheque."

34. Rule 8(1) (Explanation-b) makes it very clear that it is not the date on which duty is credited to the account of Department which shall be treated to be date of payment but it is the date on which cheque was received, shall be treated to be date of payment, provided cheque when presented in Bank, amount of cheque is realized. This Rule takes care of delay, if any, on the part of Department in not presenting cheque for encashment to Bank within reasonable time and for its own delay not to make Assessee, suffer. Rule Framing Authority recognizing the fact that one should not be allowed to take advantage of its own wrong, has made this aspect very clear but it appears that Respondent-Competent Authority, in the case in hand, has completely ignored or omitted to consider aforesaid provision. The provision being very clear, obviously we cannot appreciate such lapse particularly when a clear provision has been made by Rule Framing Authority and it is the responsibility of officers of Department that whenever they make assessment or raise demand of duty upon Assessee, they must observe and comply each and every provision of statute, strictly. In the present case since date of receipt of cheque by Department was ignored, and the date on which amount was realized by respondent, after presenting cheque in Bank, has been taken to be the date of payment, same cannot be sustained in view of Rule 8(1)(Explanation-b).

35. In the result, writ petition succeeds and is allowed. Impugned demand is set aside. Respondents are directed to determine rate of interest, if any, payable by petitioner, in respect of alleged delayed payment of duty, for which it is liable to pay interest, in the light of discussion made above, and in accordance with Law under Section 11AB, by computing such interest as per Notification dated 12 September, 2003 so long as it is not substituted or amended by any other provision, and secondly; for determining, whether there is any delay or not, it shall look into the date of deposit of cheque by petitioner and apply Rule 8(1)(Explanation-b), strictly.

36. In the facts and circumstances of the case, we make cost easy.

(2016) 8 ILRA 327
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE KAUSHAL JAYENDRA THAKER, J.

Writ Tax No.- 870 Of 2006
&
Writ Tax No.- 869 Of 2006

Ghaziabad Development Authority

...Petitioner

Versus

Union Of India & Ors.

...Respondents

Counsel for Petitioner:

Dhruv Agarwal, Dev Kant Pandey

Counsel for Respondents:

S.C.,A.N. Mahajan, B. Agrawal, D. Awasthi, G. Krishna, S. Chopra

The present petition has dispute relates to validity of orders passed by Income Tax Officer in purported exercise of powers under Section 201 (1) of Income Tax Act, 1961 demanding amount of tax deductible at source and interest under Section 201 (1A) in respect to Financial Year 2000-01 and Financial Year 2001-02.

Petitioner stated that in respect to assessment orders passed by Assessing Officer for disputed period of assessment in respect to PNBHFL and LICHFL, tax on the amount of interest received by both bodies was already paid by them and in support thereof copy of assessment orders of both aforesaid PNBHFL and LICHFL have been filed.

The rival submissions advanced by both the parties have given rise to following questions:-

- (i) Whether GDA was under an obligation to deduct TDS under Section 194A?
- (ii) Whether non-deduction of TDS was bona fide and for valid reasons?
- (iii) Whether ITO (TDS) had any power to demand amount of TDS from petitioner when principal assessee i.e. PNBHFL and LICHFL to whom amount of interest was paid, had themselves paid due tax on said amount of interest.?
- (iv) Whether ITO (TDS) was justified in imposing liability of interest under Section 201 (1A) of Act, 1961?

Court observed that the submission made by learned counsel has substance that any other interpretation would make such demand, a case of double taxation by Revenue in respect to same transaction. On income of interest received from GDA by PNBHFL and LICHFL, they have already paid due tax to department. If under impugned orders, again tax is allowed to be recovered from GDA, it will amount to realizing tax twice, which is not permissible in law.

In the present case, it is not disputed even by respondents that whatever tax was due on the amount of interest paid by GDA to PNBHFL and LICHFL, the same was paid by two recipient companies to Revenue. Final assessment orders in respect thereto were also passed. Income of GDA on its own was not taxable during relevant period by virtue of Section 10 (20A) though subsequently it has been omitted.

PNBHFL and LICHFL is concerned, there was some genuine doubt regarding their status. Both companies are public limited companies and subsidiaries of Punjab National Bank and Life Insurance Corporation of India. This caused some doubt whether TDS was deductible or not. However, for the purpose of adjudication of dispute in the present writ petition, court has not given any leverage or advantage to petitioner for alleged doubt and we have proceeded to decide the matter holding petitioner defaulter by violating requirement of deduction of TDS under Section 194A so as to attract action by concerned authority under Section 201 of Act, 1961.

Court held that impugned orders cannot be sustained. ITO (TDS) is required to find out whether there is any liability of interest on the amount of TDS deductible under Section 194A but not deducted and then from the date on which such amount was deductible and the date when actual tax was paid, to compute amount of interest payable by petitioner. In this regard, he will have to pass a fresh order. Impugned orders dated 5.4.2006 are set aside. ITO (TDS) shall pass fresh orders in the light of above directions.

Writ petitions are partly allowed.

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Kaushal Jayendra Thaker, J.)

1. Heard Sri Dhruv Agarwal for petitioner, Sri Krishna Agrawal for respondent no.1, Sri Manish Goyal for respondent nos. 2 and 3, and Sri Shambhu Chopra for respondent No.5.

2. In both these writ petitions, dispute relates to validity of orders passed by Income Tax Officer (TDS and Survey) (hereinafter referred to as "ITO (TDS)") in purported exercise of powers under Section 201 (1) of Income Tax Act, 1961 (hereinafter referred to as "Act, 1961") demanding amount of tax deductible at source (hereinafter referred to as "TDS") and interest under Section 201 (1A) in respect to Financial Year 2000-01 (Assessment Year 2001-02) and Financial Year 2001-02 (Assessment Year 2002-03).

3. The facts in brief giving rise to present dispute are as under.

4. Petitioner - Ghaziabad Development Authority (hereinafter referred to as "GDA") is a Statutory body constituted under provisions of U.P. Urban Planning and Development Act, 1973 (hereinafter referred to as "Act, 1973") for the purpose of undertaking planned development within area of Ghaziabad and others as notified by State Government while constituting GDA.

5. Petitioner in order to provide housing accommodation etc. borrows funds from various institutions from time to time. It also pays interest on said borrowed sum. For disputed period, petitioner paid interest to "Punjab National Bank Housing Finance Limited" (hereinafter referred to

as "PNBHFL") and "Life Insurance Corporation Housing Finance Limited" (hereinafter referred to as "LICHFL") as follows:-

Sl.No.	Financial Year/ Assess. Year	AMOUNT OF INTEREST PAID TO LICHFL	AMOUNT OF INTEREST PAID TO PNBHFL
1	2000-01/ 2001-02	Rs.8,13,07,509/-	Rs.2,05,11,232/-
2	2001-02/ 2002-03	Rs.6,64,22,867/-	Rs.1,67,00,556/-

6. GDA did not deduct any TDS on the aforesaid amount of interest paid to aforesaid two bodies. ITO (TDS) issued notice dated 13.2.2006 to GDA to show cause, why GDA be not treated as "assessee in default" and order under Section 201 (1) and (1A) of Act, 1961, be not passed. Petitioner vide reply dated 3.3.2006 informed ITO (TDS) that no TDS was deductible under Section 194A hence GDA cannot be held to be an "assessee in default" under Section 201 (1).

7. ITO (TDS) thereafter passed orders dated 5.4.2006 in respect to both assessment years demanding amount of TDS as tax, and, interest under Section 201 (1A) and also surcharge to the following effect:-

Sl. No.	Assess. Year	AMOUNT OF TDS	SURCHARGE	AMOUNT OF INTEREST	TOTAL
1	2001-02	Rs.2,03,63,740/-	Rs.1,71,80,520/-	Rs.26,47,281/-	Rs.4,01,91,541/-
2	2002-03	Rs.1,66,24,683/-	Rs.3,32,496/-	Rs.99,90,446/-	Rs.2,69,47,625/-

8. Petitioner has also stated that in respect to assessment orders passed by Assessing Officer for disputed period of assessment in respect to PNBHFL and LICHFL, tax on the amount of interest received by both bodies was already paid by them and in support thereof copy of assessment orders of both aforesaid PNBHFL and LICHFL have been filed.

9. Respondents have filed counter-affidavit stating that petitioner was under statutory obligation of deduction of TDS under Section 194A on the amount of interest paid to PNBHFL and LICHFL. Since no TDS was deducted and deposited with the department, therefore, competent authority was entitled to demand amount of TDS and interest thereon from GDA in exercise of powers under Section 201 of Act, 1961.

10. The rival submissions advanced by both the parties have given rise to following questions:-

- (i) Whether GDA was under an obligation to deduct TDS under Section 194A?
- (ii) Whether non-deduction of TDS was bona fide and for valid reasons?

(iii) Whether ITO (TDS) had any power to demand amount of TDS from petitioner when principal assessee i.e. PNBHFL and LICHFL to whom amount of interest was paid, had themselves paid due tax on said amount of interest.?

(iv) Whether ITO (TDS) was justified in imposing liability of interest under Section 201 (1A) of Act, 1961?

11. Section 194A(1) reads as under:-

"194A. (1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any income by way of interest other than income by way of interest on securities, shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force.

Explanation.--For the purposes of this section, where any income by way of interest as aforesaid is credited to any account, whether called "Interest payable account" or "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly." (emphasis added)

12. Sub-section (3) of Section 194A provides circumstances where TDS is not deductible, and, at the relevant time, it read as under:-

"(3) The provisions of sub-section (1) shall not apply-

(i) where the amount of such income or, as the case may be, the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the financial year by the person referred to in sub-section (1) to the account of, or to, the payee, does not exceed five thousand rupees:

Provided that in respect of the income credited or paid in respect of -

(a) time deposits with a banking company to which the Banking Regulation Act, 1949 (10 of 1949) applies (including any bank or banking institution referred to in section 51 of that Act); or

(b) time deposits with a co-operative society engaged in carrying on the business of banking;

(c) deposits with a public company which is formed and registered in India with the main object of carrying on the business of providing long-term finance for construction or

purchase of houses in India for residential purposes and which is eligible for deduction under clause (viii) of sub-section (1) of section 36,

the aforesaid amount shall be computed with reference to the income credited or paid by a branch of the banking company or the co-operative society or the public company, as the case may be;

(ii) [***]

(iii) to such income credited or paid to--

(a) any **banking company to which the Banking Regulation Act, 1949** (10 of 1949), **applies**, or any **co-operative society engaged** in carrying on the **business of banking** (including a co-operative land mortgage bank), or

(b) any **financial corporation established by or under a Central, State or Provincial Act**, or

(c) the **Life Insurance Corporation of India** established under the Life Insurance Corporation Act, 1956 (31 of 1956), or

(d) the **Unit Trust of India** established under the Unit Trust of India Act, 1963 (52 of 1963), or

(e) any **company or co-operative society carrying on the business of insurance**, or

(f) **such other institution**, association or body or class of institutions, associations or bodies **which the Central Government may**, for reasons to be recorded in writing, **notify in this behalf in the Official Gazette**;

(iv) to such **income credited or paid by a firm to a partner** of the firm;

(v) to such **income credited or paid by a co-operative society to a member** thereof or to any other co-operative society;

(vi) to **such income credited or paid** in respect of deposits **under any scheme framed by the Central Government and notified by it in this behalf in the Official Gazette**.

(vii) to **such income** credited or paid **in respect of deposits** (other than time deposits made on or after the 1st day of July, 1995) **with a banking company** to which the Banking Regulation Act, 1949 (10 of 1949) applies (including any bank or banking institution referred to in section 51 of that Act);

(viiia) to **such income credited or paid** in respect of-

(a) **deposits with a primary agricultural credit society** or a primary credit society or a co-operative land mortgage bank or a co-operative land development bank;

(b) **deposits** (other than time deposits made on or after the 1st day of July, 1995) **with a co-operative society**, other than a co-operative society or bank referred to in sub-clause (a), engaged in carrying on the business of banking;

(viii) to **such income credited or paid by the Central Government under any provision of this Act or the Indian Income-tax Act, 1922** (11 of 1922), or the Estate Duty Act, 1953 (34 of 1953), or the Wealth-tax Act, 1957 (27 of 1957), or the **Gift-tax Act, 1958** (18 of 1958), or the **Super Profits Tax Act, 1963** (14 of 1963), or the **Companies (Profits) Surtax Act, 1964** (7 of 1964), or the Interest-tax Act, 1974 (45 of 1974).

Explanation.-For the purposes of clauses (i),(vii) and (viiia), "time deposits" means deposits (excluding recurring deposits) repayable on the expiry of fixed periods."
(emphasis added)

13. Learned counsel for Revenue submitted that PNBHFL and LICHFL are neither banking companies to which Banking Regulations Act, 1949 (hereinafter referred to as "BRA, 1949") is applicable nor Financial Corporation established by or under a Central, State or Provincial Act nor LIC Housing Finance Limited can be said to be LIC of India itself established under LIC Act, 1956, nor is a company carrying on business of insurance and both were not covered by any of the exception under sub-section (3), therefore, liability of deduction of tax under Section 194A(1) was clear and unambiguous, still GDA made default in not deducting TDS on huge amount of interest paid to aforesaid two companies hence it is an "assessee in default" under Section 201 (1) of Act, 1961.

14. After going carefully through provisions of Section 194A (1) & (3), we are satisfied that neither PNBHFL nor LICHFL comes within any of the exceptions in respect where to TDS deductible under sub-section (1) of Section 194A was excepted. Therefore, GDA was in default when it did not deduct TDS on the amount of interest paid to these two companies. Issue 1 is answered in affirmative.

15. However, matter does not rest here for the reason that Section 201 takes care where some default has been committed in deduction of TDS. The liability or consequences of failure in deduction of TDS is neither unlimited nor undefined nor unspecific. To appreciate it, we may refer to Sections 200, 201 and 202 of Act, 1961, as they stood at the relevant time:-

"200. Any person deducting any sum in accordance with the provisions of sections 192 to 194, **section 194A**, section 194B, section 194BB, section 194C, section 194D, section 194E, section 194EE, section 194F, section 194G, section 194H, section 194I, section 194J, section

194K, section 194L, section 195, section 196A, section 196B, section 196C and section 196D **shall pay within the prescribed time, the sum so deducted to the credit of the Central Government or as the Board directs.**

201. (1) If any such person and in the cases referred to in Section 194, the principal officer and the company of which he is the principal officer does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required by or under this Act, he or it shall, without prejudice to any other consequences which he or it may incur, be deemed to be an "assessee in default" in respect of the tax:

Provided that no penalty shall be charged under section 221 from such person, principal officer or company unless the Assessing Officer is satisfied that such person or principal officer or company, as the case may be, has without good and sufficient reasons failed to deduct and pay the tax.

(1A) Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that sub-section **does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest at fifteen per cent per annum on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid.**

(2) Where the tax has not been paid as aforesaid after it is deducted, the amount of the tax together with the amount of simple interest thereon referred to in sub-section (1A) shall be a charge upon all the assets of the person, or the company, as the case may be, referred to in sub-section (1).

202. The power to recover tax by deduction under sections 192 to 194, section 194A, section 194B, section 194BB, section 194C, section 194D, section 194E, section 194EE, section 194F, section 194G, section 194H, section 194I, section 194J, section 194K, section 194L, section 195, section 196A, section 196B, section 196C and section 196D shall be without prejudice to any other mode of recovery." (emphasis added)

16. Section 200 requires a person, deducting any sum under Section 194A and others, to pay the same within prescribed time to the credit of Central Government or as Board directs. Therefore, if TDS has been deducted, it is more serious matter, if amount of TDS is kept by person, who has deducted it and fails to deposit same with income tax department.

17. Here is not a case where TDS was deducted by GDA but not paid within time with income-tax department. Here is a case where no TDS was deducted under Section 194A(1) at all.

18. Sub-section (1) of Section 201, by applying fiction, declares that the person who fails to deduct tax at source or deducted but not deposited as required under Act, 1961, is deemed to be an "assessee in default" in respect of tax without prejudice to any other consequence which he or it

may incur. Therefore, sub-section (1) declares such a person, an "assessee in default", in respect of tax, if TDS is not deducted, and, if deducted, but not paid.

19. Section 201 however itself provides two consequences, i.e. penalty under Section 221; and interest under Sub-section (1A) of itself. Proviso to sub-section (1), however, exempts a person from liability of penalty under Section 221 under certain conditions. It takes care of a person, who has committed default in deduction of TDS. Power has been conferred upon Assessing Officer to impose penalty but provision says that no such penalty shall be charged from such person, who is deemed to be an "assessee in default" in respect of tax, unless Assessing Officer is satisfied that such failure of deduction in tax is without good and sufficient reasons. After declaring a person, who has failed to deduct tax, deemed "assessee in default", by virtue of sub-section (1) of Section 201, the Statute, though provided for imposition of penalty upon such person under Section 221 but a safeguard is also provided in section 201 itself that such penalty shall not be leviable unless a positive finding is recorded by Assessing Officer that failure to deduct tax was without good and sufficient reasons. This satisfaction is a jurisdictional issue for the purpose of imposing penalty upon such defaulter. In other words the language of Statute makes it clear that failure to deduct tax, even if render such defaulter, an "assessee in default", still such default will be treated to have been committed for valid and good reasons, unless otherwise recorded by Assessing Officer for the purpose of imposing penalty.

20. In the present case, we are not informed that any procedure for imposition of penalty under Section 221 has been initiated by Assessing Officer against GDA meaning thereby we can safely assume that Assessing Officer has not found any ground to hold that default on the part of GDA in non deduction of TDS was without good and sufficient reasons.

21. Then comes sub-section (1A) of Section 201 which empowers income-tax department to demand interest on the amount of such tax i.e. tax which was deductible but not deducted or deducted but not deposited. Liability of interest is confined to the period on which date tax was deductible to period when tax was/is actually paid. Meaning thereby if tax has actually been paid, may be by "assessee in default" or by assessee to whom interest was actually paid, but TDS was not deducted, liability of interest under sub-section (1A) will be confined only to the period of date of deduction of TDS or when it was deductible, and date of actual payment of tax, irrespective of fact, who has paid tax to department. The reason is quite obvious. Tax deducted at source is not a tax or income of person who is deducting tax at source while making payment. Deduction at source is only to secure tax payable to Government. It is not a fresh levy. Income remains same. There may be occasions when person to whom payment is made, may be exempted from payment of tax. Deduction of tax at source is not a liability of tax under Act. It is only a mode of recovery of tax deducted. Section 201, by deeming fiction, failure to deduct tax by a person declares him or it an "assessee in default", so as to impose penalty and charge interest. But if tax is actually paid, it is not to be realized again from such person liable to deduct tax at source. In fact, Section 201 itself nowhere authorizes any authorities of Tax Department to demand or realize amount of TDS from the person who has failed to deduct or if deducted failed to deposit with Government.

22. We also find substance in the submission of learned counsel for petitioner that any other interpretation would make such demand, a case of double taxation by Revenue in respect to same transaction. On income of interest received from GDA by PNBHFL and LICHFL, they have already paid due tax to department. If under impugned orders, again tax is allowed to be recovered from GDA, it will amount to realizing tax twice, which is not permissible in law.

23. This question, we find, has specifically been considered by some courts. In **CIT Vs. Manager, M.P. State Co-operative Development Bank Ltd. (1982) 137 ITR 230 (MP)** there was a default in deduction of TDS tax on salary paid to employee by the employer. Regular assessment of employee was completed and he paid the entire tax due. Court, however, held that principal liability for payment of income-tax is on that person who receives income. Chapter XVII of Act 1961, provides for deduction of tax at source. Under Section 201(1) Income Tax Officer could not demand tax from the employer in respect of alleged default in deduction of TDS when due tax was already paid by employee and his regular assessment was completed.

24. Again a similar controversy arose in **CIT, Bhopal Vs. Divisional Manager, New India Assurance Co. Ltd. (1983) 140 ITR 818 (MP)** wherein there was a default on the part of employer in deduction of TDS on salary paid to employee. Regular assessment of employee was completed and whatever amount of tax was found due, paid by him. ITO (TDS), however, demanded further tax from employer in respect of tax, short deducted, relating to such employee. Court negated the said demand of ITO (TDS) and held that it had no jurisdiction under Section 201 of Act, 1961 to demand further tax from employer in respect of tax, short deducted, when regular assessment of employee was completed in respect of him. There was no jurisdiction under Section 201 to demand further tax from employer in respect of tax, short deducted, relating to such employer. This case has been followed and reiterated in **CIT Vs. Life Insurance Corporation (1987) 166 ITR 191 (MP)**.

25. Similar view was taken by Calcutta High Court in **Grindlays Bank Ltd. Vs. CIT (1992) 193 ITR 457 (Cal.)** wherein Court said that if tax has been realized once, it cannot be realized again, but that does not mean that assessee will not be liable for payment of interest or any legal consequence for its failure to deduct or to pay in accordance with law to Revenue.

26. In **CIT Vs. Dhanalakshmy Weaving Works (2000) 245 ITR 13 (Ker)**, Court read Section 201 of Act 1961 in the manner that sub-section (1) talks of levy of penalty for non-deduction or failure in deposit of deducted TDS while sub-section (1A) deals with levy of interest. It also held that sub-section (1A) which talks of interest is mandatory provision and if there is default in deduction of TDS, interest shall be leviable.

27. Learned counsel for Revenue also could not dispute that recently Amritsar Bench of Income Tax Appellant Tribunal has followed the same view in **M.S. Chahal Vs. Income Tax Officer (2004) 82 ITJ 841 (Asr)** decided on 31.12.2003 and that judgment has become final. Tribunal has found that deduction of tax at source is different from tax on total income.

Any amount of TDS is liable to be adjusted against actual demand. Since demands of recipient (in that case contractors) have been finalized and there remains no tax liability as per Revenue's own version, no recovery can be made from Assessee in this regard to the amount of which assessee failed to deduct, as that will amount to realization of tax, twice.

28. Under Section 201, person liable to deduct TDS, if has failed to do so, by a legal fiction, stands declared an "assessee in default" but Section 201 by itself imposes only liability of interest under sub-section (1A) and penalty under sub-section (1). There is no provision under Section 201 which permits any Income Tax Authority to demand amount of TDS or tax from such person unless and until a situation contemplated by sub-section (2) of Section 201 is found to exist, meaning thereby if tax is deducted but not paid at all. In such a case, amount of tax as well as interest payable under sub-section (1A) shall be a charge upon assets of such "assessee in default" but not otherwise, and not more than that.

29. The issue in our view has been finally settled in **Hindustan Coca Cola Beverage Pvt. Ltd. Vs. CIT (2007) 293 ITR 226 (SC)**. Therein M/s. Hindustan Coca Cola Beverage Pvt. Ltd. (hereinafter referred to as "HCCBPL") entered into an agreement with M/s. Pradeep Oil Corporation for use of their premises for receipt, storage and dispatch of goods belonging to aforesaid company. It also deducted tax under Section 194C on warehousing charges paid to M/s. Pradeep Oil Corporation treating it to be a contractual demand hence deduction of TDS admissible under Section 194C was 2%. Assessing Officer, however, took the view that warehousing charges are in the nature of rent as defined in explanation to Section 194 of Act, 1961 therefore tax ought to have been deducted 20% and not 2% under Section 194C as that was not applicable. Assessing Officer held HCCBPL as "assessee in default" and accordingly demanded amount of tax which was deductible and interest under Section 201 (1A). In appeal preferred by HCCBPL, Commissioner upheld the view taken by Assessing Officer that HCCBPL was "assessee in default" in respect of amount of short deduction on tax and liable to pay interest under Section 201 (1A). Further appeal was dismissed by High Court also. HCCBPL then submitted a rectification application before Tribunal stating that it has no objection regarding levy of interest under Section 201 (1A) but since warehouse owner namely M/s. Pradeep Oil Corporation was assessed on its income and due tax was recovered by Revenue from it, therefore no further tax towards alleged shortage of TDS could have been demanded from HCCBPL and this aspect was not considered earlier hence there is mistake. Tribunal allowed this application of HCCBPL and held that amount of tax was not leviable from M/s. Pradeep Corporation by Assessing Officer. Revenue came in appeal before High Court which was allowed by holding that Tribunal could not have reopened the matter. Supreme Court referring to circular No. 275/201/95-IT(B) dated 29.01.1997 issued by Central Board of Direct Taxes held that no recovery on tax could have been made from HCCBPL and set aside the judgment of High Court. Para 10, 11 & 13 of the judgment, referring to Circular dated 29.01.1997, read as under:-

"10. Be that as it may, the circular No. 275/201/95-IT(B) dated 29.01.1997 issued by Central Board of Direct Taxes, in our considered opinion, should put an end to the

controversy. The circular declares "no demand visualized under Section 201(1) of the Income-tax Act should be enforced after the tax deductor has satisfied the officer-in-charge of TDS, that taxes due have been paid by the deducted-assessee. However, this will not alter the liability to charge interest under Section 201(1A) of the Act till the date of payment of taxes by the deducted-assessee or the liability for penalty under Section 271C of the Income-tax Act."

11. In the instant case, the appellant had paid the interest under Section 201(1A) of the Act and there is no dispute that the tax due had been paid by deductee-assessee (M/s Pradeep Oil Corporation). It is not disputed before us that the circular is applicable to the facts situation on hand.

13. The impugned judgment of the High Court is accordingly set aside. The appeal is allowed with no order as to costs."

30. This Court has also now sealed the issue finally in the judgment, **Jagran Prakashan Limited Vs. The Deputy Commissioner of Income Tax (Tds) (2012) 345 ITR 288 (All)**. The judgment was delivered by Hon'ble Ashok Bhushan, J. (as His Lordship then was) and have answered the aforesaid question, in para 87, as under:-

"87. From the above provision, it is thus, clear that wherever the liability to pay tax was fastened on the person who failed to deduct the tax at source a specific provision was made for that purpose. In view of the forgoing discussions, we are of the considered opinion that in a case where tax has not been deducted at source, the short deducted tax cannot be realized from the deductor and the liability to pay such tax shall continue to be with the assessee direct, whose income is to be charged and a person who fails to deduct the tax at source, at best is liable for interest and penalty only. The above issues thus, are decided in favour of the petitioner."

31. In the present case, it is not disputed even by respondents that whatever tax was due on the amount of interest paid by GDA to PNBHFL and LICHFL, the same was paid by two recipient companies to Revenue. Final assessment orders in respect thereto were also passed. Income of GDA on its own was not taxable during relevant period by virtue of Section 10 (20A) though subsequently it has been omitted.

32. So far as status of PNBHFL and LICHFL is concerned, there was some genuine doubt regarding their status. Both companies are public limited companies and subsidiaries of Punjab National Bank and Life Insurance Corporation of India. This caused some doubt whether TDS was deductible or not. However, for the purpose of adjudication of dispute in the present writ petition, we have not given any leverage or advantage to petitioner for alleged doubt and we have proceeded to decide the matter holding petitioner defaulter by violating requirement of deduction of TDS under Section 194A so as to attract action by concerned authority under Section 201 of Act, 1961.

33. In view of above, demand of tax is patently illegal and without jurisdiction.

34. Moreover, ITO (TDS) has also demanded surcharge on the amount of TDS but has failed to appreciate that tax deductible at source is different from tax on total income and in absence of any specific provision, "assessee in default" under legal fiction by virtue of Section 201(1) cannot be saddled with liability of surcharge on the amount of TDS.

35. Petitioner has also challenged vires of Section 201 of Act, 1961, but when commenced arguments, gave up this plea and stated that he is confining his challenge only to validity of orders passed by ITO (TDS), impugned in writ petitions, and same may be considered in the light of relevant provisions of Act, 1961, and matter be decided accordingly. Hence, we have not looked into vires of Section 201 since that plea has been given up.

36. In view of above discussion, impugned orders cannot be sustained. ITO (TDS) is required to find out whether there is any liability of interest on the amount of TDS deductible under Section 194A but not deducted and then from the date on which such amount was deductible and the date when actual tax was paid, to compute amount of interest payable by petitioner. In this regard, he will have to pass a fresh order.

37. In the result, both writ petitions are partly allowed. Impugned orders dated 5.4.2006 are set aside. ITO (TDS) shall pass fresh orders in the light of above directions.

38. In view of above, parties shall bear cost equally.

(2016) 8 ILRA 339
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.08.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Writ Tax No.- 1316 Of 2012

Cantonment Board	...Petitioner
	Versus
Union Of India & Anr.	...Respondents

Counsel for Petitioner:
Shakti Dhar Dube

Counsel for Respondents:
Praveen Kumar Srivastava
Held

A writ of mandamus for recovery of "service charges" is **not maintainable** unless there exists a **clear statutory right in favour of the petitioner and a corresponding statutory obligation upon the respondents**.

Under the Cantonments Act, 1924, there was **no provision empowering the Cantonment Board to levy or recover "service charges"** from the Central Government.

The concept of "service charges" was introduced for the first time under **Section 109 of the Cantonments Act, 2006**, and therefore such charges can be levied **only prospectively** and not for periods prior to 2006.

Even under Section 109, liability to pay service charges arises only when:

Proper **computation is made**, and

Such computation is based on **guidelines issued by the Central/State Government**.

In absence of such guidelines and computation, **no enforceable liability arises**.

The petitioner failed to show **how the amount claimed was calculated in accordance with statutory provisions or guidelines**, hence the demand was unsustainable.

No **agreement or consensus** existed between the Cantonment Board and the respondents regarding payment of service charges, which is relevant in light of judicial precedents.

The claim involved **seriously disputed questions of fact** (such as nature of services rendered), which cannot be adjudicated in writ jurisdiction under Article 226.

Recovery of such dues, if any, must be pursued through **appropriate civil remedies (e.g., civil suit)** and not through writ proceedings.

Filing the writ petition for recovery of monetary dues without statutory backing was held to be an **abuse of process of law**.

Consequently, the writ petition was **dismissed with costs of ₹50,000**.

CASE LAW CITED

Rajkot Municipal Corporation v. Union of India
Union of India v. State of U.P.

Cantonment Board Varanasi v. Union of India
Cantonment Board Agra v. Union of India
Oriental Bank of Commerce v. Sunder Lal Jain
Bihar Eastern Gangetic Fishermen Cooperative Society Ltd. v. Sipahi Singh
Lekhraj Sathramdas Lalwani v. N.M. Shah
Dr. Uma Kant Saran v. State of Bihar

(Delivered by Hon'ble Sudhir Agarwal, J.

&

Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Petitioner before us, Cantonment Board, Kanpur (hereinafter referred to as "Board") has filed this writ petition under Article 226 of Constitution of India seeking a writ of mandamus commanding respondents i.e. Union of India through Ministry of Railway, New Delhi (hereinafter referred to as "MOR") and North Central Railway, Allahabad through its General Manager (hereinafter referred to as "NCR") to pay Rs.40,03,49,545/- towards minimum rate of "Service Charges" for the period of 1982-83 to 2012-13, along with interest at the rate of 18 per cent per annum till the date of payment. It is said that property of MOR and NCR is situated in Cantonment area, Kanpur, enjoying municipal facilities like approach roads, light, environmental and other facilities, directly as well as indirectly. Therefore, those properties cannot be absolved from liability of payment of "Service Charges" to petitioner- Cantonment Board.

2. Reliance is placed on Government of India, Ministry of Finance letters dated 10th May, 1954 and 29th March, 1967 wherein it was communicated that properties of Government of India are exempt from all taxes imposed by local bodies or State but Government of India agrees to pay tax atleast for service rendered by local body which will be termed as "Service Charge". Government of India, Ministry of Finance also issued a Circular dated 14th September, 1984 referring to procedure to be followed for computation of "Service Charge". Government of India, Ministry of Urban Development also issued a circular dated 26th April, 1994 stressing upon Ministry of Finance's earlier Circulars dated 10th May, 1954 and 29th March, 1967, and reiterating its general agreement for payment of "Service Charges" for the services rendered by local bodies.

3. Cantonment Board relied on Sections 108 and 109 of Cantonments Act, 2006 (hereinafter referred to as "Act, 2006") so as to entitle and empower to demand "Service Charges" from respondents. It is said that Chief Executive Officer, Cantonment Board, Kanpur sent a letter dated 5th September, 2011 demanding Rs.33,20,43,460/- from NCR Authorities as "Service Charge" for the period of 1st April, 1982 to 31st March, 2013. Since respondents failed to pay the aforesaid amount, Chief Executive Officer requested its Counsel, vide letter dated 14th September, 2012, to file a writ petition for recovery of Rs.40,03,49,545/- being "Service Charges" for the period 1st April, 1982 to 31st March, 2013. The computation of amount has been demonstrated in Annexure -3 to writ petition, for the period 1st April, 1982 to 31st March, 2010, i.e. for 28 years, as under :

Land Revenue	Rs.	2,25,87,99,200.00
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Rental Value-9% of Capital Value	Rs.	20,32,91,928.00
Property Tax-17.5% of Rental Value	Rs.	35,57,608.00
Service Charges-33-1/3% of percentage	Rs.	1,18,58,695.00

Total for 28 years = Rs.1,18,58,695 x 28 =Rs. 33,20,43,460/-

4. "Service charge" has been computed as Rs.33,20,43,460/- by multiplying Rs.1,18,58,695/- with 28 years. When we called upon learned counsel for petitioner to show, how a writ of mandamus would lie compelling respondents to pay the aforesaid amount, he placed reliance on Apex Court's order in **Rajkot Municipal Corporation and others Vs. Union of India and others, (2010-CALHN(SC)-3-168)** as also a Division Bench judgment of this Court in **Cantonment Board, Varansi through Chief Executive Officer Vs. Union of India and others, Writ Tax No. 1292 of 2011, decided on 3.10.2013.**

5. We also enquired as to how Act, 2006 is referable and applicable in respect to demand raised for the period before enforcement of the said Act, whereupon, learned counsel for petitioner stated that it had similar power of demand of "Service Charges" under Old Act also. We have to first examine authority of petitioners to raise such demand under Law.

6. Earlier, Cantonments Act, 1924 (hereinafter referred to as "Act, 1924") was enacted to consolidate and amend laws relating to Management of Cantonment. Chapter -V of Act, 1924 deals with 'Txation' running from Sections 60 to 105. General power of taxation is conferred by Section 60 and reads as under:

"60. General power of taxation .-(1) The Board may, with the previous sanction of the Central Government, impose in any cantonment any tax which , under any enactment for the time being in force, may be imposed in any municipality in the state wherein such cantonment is situated.

(2) Any tax imposed under this section shall take effect from the date of its notification in the Official Gazette or where any later date is specified in this behalf in the notification, from such later date. "

(emphasis added)

7. There is inbuilt machinery provided in Chapter V as to the manner in which a 'Tax' shall be imposed, assessment of 'Tax' and redressal or adjudication of dispute in respect of 'Tax', if any. Section 92 provides the manner of recovery of such 'Tax' and reads as under: -

" Recovery of tax.-(1) If the person liable for the payment of any tax does not, within thirty days from the service of the notice of demand, pay the amount due, or show sufficient cause for non-payment of the same to the satisfaction of the Executive Officer, such sum, with all costs of recovery, may be recovered under a warrant, issued in the form set forth in Schedule II, by

distress and sale of the movable property, or attachment and sale of the immovable property of the defaulter:

Provided that the Executive Officer shall not recover any sum the liability for which has been remitted on appeal under this Chapter:

Provided further that the sale of any immovable property attached under this subsection shall not be made, save under the orders of the Board.

(2) Every warrant issued under this section shall be signed by the Executive Officer.

8. It is not the case of petitioner that any demand of Tax has been raised with reference to Section 60 of Act, 1924, therefore impugned demand is not in reference to Section 60.

9. Every "Cantonment Board" is declared to be a Municipal Committee for the purposes of Municipal Taxation Act, 1881 (hereinafter referred to as "Act, 1881") by virtue of Section 97 of Act, 1924. Chapter XIII talks of water supply, lighting and drainage. Section 217 places an obligation upon Cantonment Board to provide or arrange for sufficient supply of pure water for domestic use where it does not already exist and reads as under : -

"217. Maintenance of water supply. *-(1) In every cantonment where a sufficient supply of pure water for domestic use does not already exist, the Board shall provide or arrange for the provision of such a supply.*

(2) The Board shall, as far as possible, make adequate provision that such supply shall be continuous throughout the year, and that the water shall be at all times pure and fit for human consumption."

10. In Section 222, Cantonment Board also have power to enter into an agreement for supply of water to owner, lessee or occupier of any building or land, on such terms and conditions as are consistent with Act, 1924 and Rules and Bye-laws, framed made thereunder, and reads as under: -

" 222. Supply of water under agreement. *- (1) The Board may, by agreement, supply, from any source of public water-supply, the owner, lessee or occupier of any building or land in the cantonment with any water for any purpose, other than a domestic purpose, on such terms and conditions, consistent with this Act and the rules and bye-laws made thereunder, as may be agreed upon between the Board and such owner, lessee or occupier.*

(2) The Board may withdraw such supply or curtail the quantity thereof at any time if it should appear necessary to do so for the purpose of maintaining sufficient supply of water for domestic use by inhabitants of the cantonment."

11. Section 232 empowers Cantonment Board to fix rate of charges for supply of water and to levy such charges. For ready reference we may quote Section 232 as under :

"232. Power to fix rates and charges.- A Board may fix the charges to be made for the establishment by them or through agency of communications from, and connections with, mains or pipes for the supply of water, or gas, or for meters or other appliances for measuring the quantity, or testing the quality thereof supplied, and may levy such charges accordingly."

12. Besides above, no provision has been brought to our notice which authorized petitioner - Cantonment Board to demand any charge from respondents towards alleged water supply etc. under the heading of 'Service Charges' under Act, 1924. Even charges for water supply are subject to condition that an agreement has been executed by Board with owner, lessee or occupier of any building or land for such supply under Section 222. In the present case, it is not a case of petitioner that there existed any such agreement between petitioner and respondents whereunder respondents have agreed to have any water supply from petitioner and it is supplying water to respondents under such agreement. Similarly no provision under Act, 1924 has been shown to us empowering petitioner to demand any amount towards its obligation on maintenance of drainage and lighting in Cantonment Board.

13. Act, 1924 has been substituted by Act, 2006 which has come into force on 18th December, 2006. Therein also Chapter V deals with 'Tax' as also 'Fees'. Therefore, for the first time, concept of 'Fees' has been inserted in Act, 2006. The nature or kinds of fees which can be charged by Board is contained in Section 67 which reads as under : -

"67. Charging of fees.- The Board shall, for the purposes of this Act, charge the following fees, namely:-

- (a) licence fee on vehicles and animals;*
- (b) licence fee on advertisements other than advertisements in newspapers;*
- (c) fee relating to maintenance of property records;*
- (d) processing fee on buildings payable along with application for sanction of the building plan;*
- (e) licence fee on entry of vehicles;*
- (f) betterment fee on the increase in land value caused by the execution of any development work; and*

(g) such other fee which the Board may by Regulation specify: Provided that the fee charged under clause (g) of this section shall not be less than the cost incurred by the Board for or in connection with the specific service to which the fee relates."

14. Section 66 deals with general power of 'Taxation' and it is the admitted case of petitioner that no tax on property of respondents is chargeable in view of Article 285 of Constitution of India. Procedure for recovery of 'Tax' has been prescribed under Section 101 of Act, 2006 which reads as under :-

"101. Recovery of tax.-(1) If the person liable for the payment of any tax does not, within thirty days from the service of the notice of demand, pay the amount due, or show sufficient cause for non- payment of the same to the satisfaction of the Chief Executive Officer, such sum, with all costs of recovery, may be recovered under a warrant, issued in the form set forth in Schedule II, by distress and sale of the movable property or attachment and sale of the immovable property of the defaulter: Provided that the Chief Executive Officer shall not recover any sum the liability for which has been remitted on appeal under this Chapter: Provided further that the sale of any immovable property attached under this sub- section shall not be made save under the orders of the Board.

(2) Every warrant issued under this section shall be signed by the Chief Executive Officer."

(emphasis added)

15. Section 108 declares that Cantonment Board will be 'Municipal Committee' for the purposes of 'Taxation' as per Municipal Taxation Act, 1881. Then there is Section 109 which reads as under :-

"109. Payment to be made to a Board as service charges by Central Government or State Government.- The Central or the State Government, as the case may be, shall pay to a Board annually service charges for providing collective municipal services or development work in a cantonment where the Central or the State Government properties are situated as worked out by the Board based on the guidelines issued in this behalf by the Central Government or the State Government. "

(emphasis added)

16. Section 109 of Act, 2006 for the first time empowered Cantonment Board to realise "Service Charges" from Central Government or State Government if their property is situated within the area of Cantonment Board and it is providing collective municipal services or development work in such Cantonment area. The aforesaid provision makes it obligatory on the part of Central Government or State Government to pay "Service Charges" annually to Cantonment Board but quantum of such "Service Charges" shall be worked out by Cantonment Board on the

guidelines issued in this behalf by Central Government or State Government. We are informed that similar provision did not exist in earlier Statute i.e. Act, 1924, and for the first time, it has been incorporated in Act, 2006. Secondly this provision shows that Central Government or State Government are liable to pay "Service Charges" annually to Cantonment Board where property is situated within the area of Board, in respect to municipal services or development work rendered by Cantonment Board, but such liability cannot be fastened upon two Governments, unless computation of liability is made by Cantonment Board, founded on the guidelines issued in this behalf by Central Government or State Government. Circulars issued by Central Government which are referred to in the writ petition i.e. dated 10th May, 1954, 29th March, 1967, 14th September, 1984 and 26th April, 1994 only say that "Service Charges" shall be paid by Central Government Department to Cantonment Board but in what manner such "Service Charges" shall be computed and what shall be services in respect where to the same shall be computed, is not stated in those Circulars. If there is any other guidelines issued by Central Government or State Government entitling or empowering Cantonment Board to compute "Service Charges" payable by Central Government or State Government, as the case may be, in respect of municipal services or development work rendered by petitioner, atleast none has been brought to our notice and in the demand notice also there is no such reference. Not only respondents but even Court has not been taken into confidence to tell as to how and on what basis computation has been made consistent with requirement of Section 109 of Act, 2006. Unless such computation is made, question of payment of "Service Charges" by respondents, would not arise.

17. We reiterate at this stage that even otherwise, Section 109 of Act, 2006, cannot be stretched retrospectively so as to demand "Service Charges" from respondents for a period when Act, 2006 was not in existence or operative and there was no similar provision like Section 109 in existence in Act, 1924. Thus service charge under Section 109 is leviable prospectively.

18. Further Chapter IX deals with Water Supply, Drainage and Sewage Collection and contains Sections 186 to 232. Section 193 provides for supply of water under agreement and reads as under : -

"193. Supply of water under agreement.- (1) Subject to the guidelines made by the Board in this regard, the Chief Executive Officer may, by agreement, supply, from any source of public water- supply, the owner, lessee or occupier of any building or land in the cantonment with any water for any purpose, other than a domestic purpose, on such terms and conditions, consistent with this Act and the rules and bye- laws made thereunder, as may be agreed upon between the Chief Executive Officer and such owner, lessee or occupier.

(2) The Chief Executive Officer may withdraw such supply or curtail the quantity thereof at any time if it should appear necessary to do so for the purpose of maintaining sufficient supply of water for domestic use by inhabitants of the cantonment."

(emphasis added)

19. For the purposes of supply of water or gas, Cantonment Board is conferred with the power to charge which it may levy from the occupier or owner of the building of land and it reads as under :

"206. Recovery of charges.- In any case in which the provisions of section 204 apply and in which the Board is not receiving a bulk supply of water under section 207, the water- tax, if any, imposed in the cantonment and all other rates arising out of the supply of water which may be imposed under the provisions of this Chapter as applied by section 204 shall be recovered by the Board, and all monies so recovered, or such proportion thereof as the Central Government may in each case determine, shall be paid by the Board to the Officer."

(emphasis added)

20. The impugned demand is not claimed to be under Section 193 or 206 of Act, 2006.

21. Learned counsel for petitioner however relied on the judgment of Supreme Court in **Rajkot Municipal Corporation & others Vs. Union of India and others**, Civil Appeal No(s). 9458-9463 of 2003 decided on 19.11.2009. We have gone through the aforesaid judgment at length. It was a bunch of appeals decided by Supreme Court, wherein appeals were filed by several Municipal Corporations of State of Gujrat, namely, Rajkot Municipal Corporation, Ahmedabad Municipal Corporation and Vadodara Municipal Corporation (hereinafter referred to as "Municipal Corporation"). These Municipal Corporations are statutory local municipal authorities under Bombay Provincial Municipal Corporation Act, 1949 (hereinafter referred to as "BPMC Act, 1949"). Under the provisions of BPMC Act, 1949, these Municipal Corporations were discharging duties of supplying water, conservancy / sewerage disposal and other general services like approach roads with street lighting, drainage etc. and in accordance with the provisions of BPMC Act, 1949, Rules and bye-laws framed thereunder, service charges payable by persons availing said benefit were determined. They were already raising bills according to the provisions under BPMC Act, 1949, Rules and Bye-laws framed thereunder to the Union of India including Railways and who were paying demand raised by Municipal Corporation.

22. In respect of some bills raised by Municipal Corporation, payments were not made, as result whereof Municipal Corporations proceeded to recover the dues as arrears of land revenue, exercising power under the aforesaid Act and property of Union of India and its departments were attached. This recovery as arrears of land revenue by adopting coercive method was challenged by Union of India and its Departments, filing several writ petitions before Gujarat High Court, claiming that property of Union of India is exempt from imposition of any tax by any local body or State under Article 285 of Constitution of India and, therefore, aforesaid recovery was illegal. The writ petitions were allowed and Gujarat High Court held that demand of service charges was in the nature of property tax and barred by Article 285(1) of Constitution of India.

23. In appeal, Supreme Court found that similar matter was already considered by it in **Union of India and other Versus State of U.P. and others, 2007 (11) SCC 324**, wherein it was

held that demand of charges for expenses incurred in supply of water or other services rendered under any statutory obligation, if raised, is a fee and not tax. Hence such charges are not exempt under Article 285 of the Constitution of India. Thereafter Court required Government of India to consider the matter and come to broad consensus so that any confrontation / dispute between Government and local statutory body may not arise. In furtherance thereof, Government of India filed an affidavit placing its agreement, in principles, for payment of "Service Charges" to Municipal Corporation, which provides services like water supply etc. in the following manner:-

" (i) It is liable to pay service charges to the municipal corporations for providing services like supply of water, conservancy/sewerage disposal, apart from general services like approach roads with street lights, drains etc.

(ii) It will pay service charges to the Municipal Corporations, for the services, as stated in its circulars dated 10.5.1954, 29.3.1967 and 26.8.1986, but will not pay any taxes.

(iii) Having regard to the fact that only service like supply of water could be metered and other services like drainage, solid waste management, approach roads, street lighting etc., could not be metered, the percentage of property tax will be worked out as service charges, on the basis of instructions issued by the Ministry of Finance.

(iv) The concerned Ministry of the Union to which the property belongs will enter into separate contracts with the respective Municipal corporation of services and payment of service charges and pay the bills for annual service charges regularly.

(v) Union of India and its departments will periodically review the arrangements with the respective municipal corporations or revisions in the rates of service charges.

(vi) Wherever, properties of state government are exempted, such exemption shall apply to properties of central government also. Under no circumstances, the service charges payable by the Union of India will be more than the service charges paid by the state government.

(vii) The arrangement will not affect the legal rights conferred by the appropriate laws, in regard to any property held by the Union."

24. Government of India also proposed the rate at which such "Service Charge" would be paid, and same are quoted in para 7 of judgment in **Rajkot Municipal Corporation and others Versus Union of India (supra)** which reads as under:-

"The Union of India has also stated that taking note of the relevant circumstances, it has decided to pay service charges at the following rates: (a) 75% of the property tax levied on private owners, where the properties of the Union are provided by the municipal corporations with all services/facilities as were provided to other areas within the municipal corporation: (b) 50% of the property tax levied on private owners, in regard to properties of the Union, where only some of

the services/facilities were availed; an (c) upto a maximum of one-third (33 and 1/3%) of the property tax levied on private owners in regard to properties which did not avail any of the services provided by the municipal corporation, as they were self-sufficient on account of all services being provided by the Union itself.

25. Government of India also clarified, where no Services were availed from municipal corporation, rate within the ceiling of 33-1/3% of property tax, will be negotiated and settled, having regard to relevant circumstances. With respect to Railway, it was said that since it owns properties virtually in every municipal corporation in India and normally, all its properties do not utilize services provided by municipal corporations, Railways proposed to pay only a token "Service Charge" of 5% or such other rate as may be agreed by mutual negotiation.

26. Municipal Corporations before Supreme Court submitted that they broadly agree to proposal submitted by Government of India. The stand taken by municipal corporations, quoted in para 9 of judgment in **Rajkot Municipal Corporation and others Versus Union of India (supra)** is as under:-

"9. Learned counsel for the appellants submitted that the appellant municipal corporations submitted that they were broadly in agreement with what has been stated and agreed by Union of India in the said affidavit. The appellant-Municipal Corporations also confirmed and agreed:

(i) that they will not levy or demand any "property tax" in respect of the properties belonging to Union of India and used for the purposes of the government;

(ii) that the demands will relates only to service charges for direct services like supply of water and conservancy/sewerage disposal services, and other general services such as approach roads with street lighting, drainage etc.;

(iii) that they broadly agreed to the rates of service charges agreed by Union of India; and

(iv) that if there is defaults or it negotiations with the concerned departments for in regard to service charges fail they will not take any coercive steps for recovery proceedings, but will take recourse to other remedies available to them in law for recovery.

27. Municipal Corporations however had reservation with regard to the proposal of Railways that it will pay only nominal "Service Charges" at 5 per cent of the property tax. Supreme Court disposed of all these appeals by giving following directions contained in Para 11 of judgment in **Rajkot Municipal Corporation and others Versus Union of India (supra)** :-

"11. In view of the above, there is no need to consider the appeals on merits. We dispose of appeals and pending applications by recording the following broad agreement between the parties:

(i) The Union of India and its departments will pay service charges for the services provided by the appellant's municipal corporations. They will not pay any property tax. The service charges will be paid at 75%, 50% and 33 1/3% respectively of the property tax levied on private owners, depending upon whether Union of India or its department is utilizing the full services, or partial services or nil services. The Union of India represented by its concerned department will enter into agreements/ understandings in regard to service charges for each of its properties, with the respective municipal corporations.

(ii) The above arrangement is open to modification of periodical revisions by mutual consent. In the event of resolution mechanism by reference to a three Member Mediation Committee consisting of a representative of the Central Government, a representative of the concerned municipal corporation and a senior representative (preferable the Secretary in charge of the department of municipal administration) of the State of Gujarat.

(iii) If Railways or any other department of Union of India owning a property changes the agreement/understanding unilaterally, or fail to reach a settlement through the Mediation Committee in regard to any disputes, or fails to clear the dues, it is open to the concerned Municipal Corporation to initiate such action, as it deems fit in accordance with law by approaching the jurisdictional courts/tribunal for final and interim reliefs.

(iv) The municipal corporations shall not resort to coercive steps (such as stoppage of supplies/services) nor resort to revenue recovery proceedings for recovery of any service charge dues from Union of India or its departments.

(v) The service charges payable by Union of India will under no circumstances be more than the service charges paid by state government for its properties. Wherever exemptions or concessions are granted to the properties belonging to the state government, the same shall also apply to the properties of Union of India.

(vi) If the Railways does not to abide by the four general circulars of the Union of India dated 10.5.1954, 29.3.1967, 28.5.1976 and 26.8.1986 and the general consensus set out above, it is open to municipal corporation to take such action as is permissible in law."

28. It is not the case of petitioner that it entered into an agreement with MOR and NCR for payment of any charges with respondents as contemplated in the aforesaid judgment in **Rajkot Municipal Corporation and others Versus Union of India (supra)**.

29. We have also gone through various Circulars of Government of India which have been referred by petitioner in the present writ petition. The first circular of Government of India,

Ministry of Finance is dated 10th May, 1954 says that Government of India in principle has decided that w.e.f. 1st April, 1954, in respect of Central Government properties, "Service Charge" shall be payable to the local bodies for services provided in respect of such properties of Government of India. Specific services would include not only water and electric supply, sewerage etc., but also general services such as street lighting, drainage, approach road and connecting road etc. Where water, electric supply and meter is metered, same shall be paid accordingly, but where it is not so metered or such services are not charged separately, a suitable consolidated percentage representing element of specific services will be paid by Government of India who will also enter into separate connection with concerned local authority for supply of water, electricity and/or any other services.

30. Then next circular is dated 29th March, 1967, and para 2 thereof containing decision of Government of India reads as under:-

"(2) The procedure for arriving at the quantum of service charges payable to the local bodies has been further examined by the Government of India and it has now been decided that the service charges should be calculated in the following manner ; -

(i) In respect of isolated Central Government properties where all services are availed of by the Central Government in the same manner as in respect of private properties, the Central Government will pay service charges equivalent to 75% of the property tax realized from private individuals service are being provided by the Central Government Departments themselves, the service charges will be calculated in the following manner :

(a) In the case of colonies which do not directly avail of civic services within the areas and are self-sufficient in all respects, the payment of service charges will be restricted to 33-1/3% of the normal rate of property tax applicable to private properties.

(b) In respect of colonies where only a partial use of the services is made, service charge will be paid as 50% of the normal property tax rate.

(c) In respect of colonies where all the services normally provided by the municipal body to the residents of other areas within its limits are being availed of, service charges will be paid as 75% of the property tax rate realized from private individuals.

(iii) The net ratable value/annual value for the purpose of these instructions shall be 9% of the "capital value" of the property concerned, both in respect of residential and non-residential properties. The "capital value" shall include the cost of acquiring or constructing the buildings including the cost of site, its preparation and any other capital expenditure incurred after acquisition or construction or when this is not known, the present value of the building including the value of site, as borne on CPWD records or those of the Department concerned.

(iv) The existing arrangements arrived at between the Railway authorities or any Central Government Department and local bodies in respect of property tax/service charges including the arrangements envisaged regarding central Government properties in Calcutta and as regards the properties in Delhi will not be disturbed by this decision. This decision of the Government of India conveyed in this letter may kindly be intimated to the local authorities within State.

31. Government of India, Ministry of Defence also issued a circular dated 21st May, 1984 with regard to computation of "Service Charges" and in this regard, taking reference to Section 64 of Act 1924, it is said that "Service Charge" shall be worked out, in the manner, stated therein and an illustration given in para 5 thereof reads as under:-

"(I) Area of land to be taken into account for adding to the capital cost of building,

(i)	Total area of Class A-1 land	=	A
(ii)	Deduct areas of forests, parade grounds, MEs roads (outside enclosed area on which public has a right of way), play ground, and rifle ranges on A-1 lands	=	B
(iii)	Net area of land to be taken into consideration	=	A-B=C
(II)(i)	Cost of buildings including cost of additions and alterations (permanent and temporary as per MES Register No. IAFWZ. 2168) including cost of electrification/water supply/sanitary arrangements.	=	P
(ii)	Cost of land-Area of land as arrived at above I.E. C multiplied by 40 times the current STR rate (or where the STR has not been prepared, present market value as certified by the DEO concerned)	=	Q
(iii)	Total cost of assets	=	P+Q=R
(iv)	Annual letting value	=	9% of R
(v)	Service charges to be claimed per annum		S x rate of property/ house Tax
			/Divided by 3

GOI, Min. of Def. (DG, DL&C) letter No. 9/5/C/L &C/72/Vol. II dated 21.5.1984."

32. A division Bench judgment of this Court in **Cantonment Board Varanasi through Chief Executive Officer Vs. Union of India & Others** rendered on 3rd October, 2013 in Writ Tax No. 1292 of 2011 is also relied by petitioner. Therein Cantonment Board, Varanasi and NCR entered into an agreement with respect to Services rendered by Cantonment Board according to which determination of "Service Charges" was admitted and not disputed. The question with reference to Cantonment Act, 1924 and 2006 was not examined therein.

33. There is another judgment of this Court in **Cantonment Board Agra Vs. Union of India and others, (2015) 2 ADJ 256**, wherein Court examined provisions of Act, 2006 and found that no recovery procedure has been prescribed under Act, 2006. Therefore, there was no statutory obligation on the part of respondents to make any payment. Hence, Court held that writ petition seeking mandamus for recovery will not lie and instead Cantonment Board may take resort to recover its dues, if any, by taking recourse to common law i.e. civil suit.

34. In the present case, in 2011, for the first time, impugned demand in respect of last 28 years and more has been raised by petitioner in relation to "Service Charge" which are not governed by Act, 1924. No computation was made as per Act, 2006.

35. In **Rajkot Municipal Corporation and others Vs. Union of India and others (supra)**, "Service Charges" were payable under provisions of BPMC Act, 1949 and there was no dispute about the same. In the case in hand, neither any agreement has been executed between petitioner and respondents as contemplated in **Rajkot Municipal Corporation and others Vs. Union of India and others (supra)** nor determination of alleged charges has been made by having a consensus between the petitioner and respondents. Moreover, there is a serious dispute as to what are the services which are being rendered by petitioner to respondents and whether any service at all, is being rendered or not. These are seriously disputed questions of fact and without adjudicating them, it is not permissible for petitioner to simply raise such a huge demand, that too, in respect of last several decades, for the first time in 2011, and thereafter by sending a simple letter to counsel to file writ petition before this Court. In order to seek a writ of mandamus, it is necessary to show that there exists a statutory right of petitioner to enforce the same and there must be corresponding statutory obligation to do something which the respondent(s) has failed or has done wrongly.

36. A writ of mandamus would not lie unless petitioner has a statutory right and corresponding statutory obligation upon respondents. In **Oriental Bank of Commerce Vs. Sunder Lal Jain and another, (2008) 2 SCC 280**, Court after referring to its earlier judgements in **Bihar Eastern Gangetic fishermen Cooperative Society Ltd. Vs. Sipahi Singh, (1977) 4 SCC 145; Lekhraj Sathramdas Lalwani Vs. N.M. Shah, AIR 1966 SC 334 and Dr. Uma Kant Saran Vs. State of Bihar, 1973 (1) SCC 485**, observed as under:

"There is abundant authority in favour of the proposition that a writ of mandamus can be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge the statutory obligation. The chief function of a writ is to compel performance of public duties prescribed by statute and to keep subordinate Tribunals and officer exercising public functions within the limit of their jurisdiction. It follows, therefore, that in order that mandamus may issue to compel the authorities to do something, it must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance....."

37. Despite repeated query, learned counsel for petitioner also could not show as to how a writ petition for such mandamus would be maintainable when similar writ of mandamus has already been declined by this Court in **Cantonment Board, Agra Vs. Union of India (supra)**.

38. In our view, on the part of statutory body like, Cantonment Board, filing of this writ petition to recover dues is nothing but a misuse of process of law which unnecessarily add burden to the already overburdened Court.

39. In our view, this writ petition is nothing but an abuse of process of law and deserves to be dismissed with exemplary cost.

40. Accordingly, writ petition is dismissed with costs which we quantify to Rs. 50,000/-

(2016) 8 ILRA 354
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.08.2016

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

First Appeal No.- 554 Of 2008
&
Connected With Other Cases

Purushottam

**...Appellant
Versus**

State Of U.P. & Anr.

...Respondents

Counsel for Appellant:

Radhey Shyam, U.P. Singh, V.B. Singh

Counsel for Respondents:

Smt. Rekha Pundir

These appeals arise from common judgment dated 31.5.2001 passed by the Court of VIIIth Additional District Judge, Ghaziabad in 79 land acquisition references, the leading reference being Land Acquisition Reference No.212 of 1990 (Bijendra v. State of U.P. and others) against which several first appeals were filed by National Thermal Power Corporation, through its General Manager as well as by the claimants. Several appeals were decided by the Division Bench by judgment dated 8.4.2015 passed in Leading First Appeal No.865 of 2002 (National Thermal Power Corporation Through its G.M. v. State of U.P. and others)

In view of the aforesaid, all the appeals are partly allowed in terms of the judgment dated 8.4.2015 passed in Leading First Appeal No.865 of 2002

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Ramesh Pundir, learned counsel for the appellant and Sri Yateendra, learned standing counsel for the State-respondents.

2. These appeals arise from common judgment dated 31.5.2001 passed by the Court of VIIIth Additional District Judge, Ghaziabad in 79 land acquisition references, the leading reference being Land Acquisition Reference No.212 of 1990 (Bijendra v. State of U.P. and others) against which several first appeals were filed by National Thermal Power Corporation, through its General Manager as well as by the claimants. Out of which 69 such appeals were decided by the Division Bench by judgment dated 8.4.2015 passed in Leading First Appeal No.865 of 2002 (National Thermal Power Corporation Through its G.M. v. State of U.P. and others) and other connected appeals.

3. By the aforesaid judgment, the Division Bench partly allowed the appeal as under :

"78. We are also of the view that considering the location and other potentiality of land acquired, as mentioned by S.L.A.O. and also noticed by Reference Court, the deduction of 35% is slightly on higher side and it should be 30% which would meet the ends of justice.

79. The correct and actual market rate as per award in question, therefore, would come to Rs. 40/- (round off) per sq. yard. The rest of the award with regard to amount of solatium, interest etc. is hereby confirmed.

80. In the result, the appeals preferred by claimant-tenure holders are partly allowed to the extent that deduction of 35% made by Reference Court is reduced to 30%. Similarly, the appeals preferred by N.T.P.C. are partly allowed to the extent that actual rate of compensation awarded by Reference Court stands reduced from Rs. 43/- per sq. yard to Rs. 40/- per sq. yard. The direction of Reference Court with respect to payment of solatium @ 30% and interest at different rates for different periods mentioned therein shall remain intact and is hereby confirmed.

81. All the appeals stand partly allowed in the manner as aforesaid. However, there shall be no order as to costs"

4. In view of the aforesaid, all the appeals are partly allowed in terms of the judgment dated 8.4.2015 passed in Leading First Appeal No.865 of 2002 (National Thermal Power Corporation Through its G.M. v. State of U.P. and others) and other connected appeals. The substitution applications in the aforenoted appeals are allowed and the delay in filing the substitution applications is condoned.

(2016) 8 ILRA 356
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.08.2016

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.

S.C.C. Revision No.- 4 Of 2016

Dinesh Sahu

...Revisionist

Versus

Krishna Pal Yadav

...Opposite Party

Counsel for Revisionist:

Ravi Nath , Jitendra Kumar Saxena

Counsel for Opposite Party:

Vikas Sharma

Present revision under Section 25 of the Provincial Small Cause Courts Act, 1887 assails the judgement rendered by the court below in SCC Suit No. 0700012 of 2013 whereby the suit filed by the respondent-plaintiff was decreed and a decree of eviction coupled with the arrears of rent at the rate of Rs. 1700/- per month alongwith damages has been issued in his favour.

The revisionist is a tenant of the shop in question. The revisionist having committed default in the payment of rent was issued a notice dated 4.12.2012 which was served on him on 5.12.2012. The notice issued to the revisionist was to be complied with on or before 4.1.2013 insofar as the payment of arrears of rent is concerned. The failure on the part of the revisionist-tenant in making payment of rent as claimed in terms of notice dated 4.12.2012, gave rise to the aforesaid suit which was filed on Feb. 19, 2013.

Court observed that the court below while adjudicating upon the issue at hand has failed to consider the material admission of the landlord which ought to have been considered in determination of the real question, namely, whether the revisionist-defendant committed default in the payment of rent until the period of notice and recording a finding that the revisionist was in arrears of rent as on the date of issuance of notice clearly lacks the sanction of statute and such an illegality on the face of the impugned judgement, calls for interference under the revisional jurisdiction of this Court envisaged by virtue of Section 25 of the Provincial Small Cause Courts Act, 1887.

The impugned judgement passed by the court below suffers from a patent illegality and the for the reasons recorded above, the same is hereby set aside and the matter is relegated to the court below for consideration.

The revision thus stands allowed in part.

(Delivered by Hon'ble Attau Rahman Masoodi, J.)

1. Heard Sri R.N. Tilhari, learned counsel for the revisionist and Sri Vikas Sharma, learned counsel, who has put in appearance on behalf of the respondent-plaintiff.

2. This revision under Section 25 of the Provincial Small Cause Courts Act, 1887 assails the judgement rendered by the court below in SCC Suit No. 0700012 of 2013 whereby the suit filed by the respondent-plaintiff was decreed and a decree of eviction coupled with the arrears of rent at the rate of Rs. 1700/- per month alongwith damages has been issued in his favour.

3. The brief facts of the case are that the revisionist is a tenant of the shop in question. The revisionist having committed default in the payment of rent was issued a notice dated 4.12.2012 which was served on him on 5.12.2012. The notice issued to the revisionist was to be complied with on or before 4.1.2013 insofar as the payment of arrears of rent is concerned. The failure on the part of the revisionist-tenant in making payment of rent as claimed in terms of notice dated 4.12.2012, gave rise to the aforesaid suit which was filed on Feb. 19, 2013. The first date of hearing of the suit was 23.5.2013 and the position of facts to this extent is undisputed between the parties. It is also undisputed that the revisionist-tenant made the compliance of Order XV Rule 5 CPC read with Section 20 (4) of the Rent Control Act by depositing the rent in terms of the notice dated 4.12.2012 inclusive of interest and damage coupled with a misc. expense justified to be deposited against the cost. Oral evidence was led before the court below which became a subject matter of consideration in the light of the pleadings on record.

4. According to the revisionist he had not fallen in default insofar as the payment of rent is concerned whereas the suit was filed by the landlord/respondent on the premise that there was a clear default in payment of rent. Not only that the payment of rent was disputed by the landlord but a case of clear default claiming higher rent was pleaded against the revisionist in the plaint filed by him before the court below. Issues came to be framed in the light of pleadings and evidence was accordingly adduced. Landlord Krishna Pal Yadav was cross-examined by the revisionist-tenant whose deposition reads as under:

“मैंने अन्तिम बार 31 दिसम्बर, 2012 को दिनेश साहू से किराया लेने से इन्कार किया था। बाद में गवाह ने बताया कि फरवरी माह का किराया दिनेश साहू ने नहीं दिया जो जनवरी व फरवरी का किराया था। दिनांक 08-07-2012 को दो-तीन लोगो के सामने कहा था कि मेरी दुकान बन गयी है और मैं खाली करके किराया दे दूँगा।”

5. The aforesaid statement is virtually the foundation of the present revision. Learned counsel for the revisionist raised the following points for consideration.

6. Learned counsel for the revisionist argued that the judgement impugned in the present revision suffers from a manifest error of law; firstly on the ground that the court below while adjudicating upon the aspect of default in payment of rent has not recorded a clear finding that the tenant defaulted in making payment of rent due upto the period of notice period i.e. 4.1.2013 as is evident from the finding recorded to the effect that the revisionist tenant has failed to pay the entire rent as on the date of issuance of notice. This finding according to the learned counsel for the revisionist does not satisfy the requirement of Section 20 (2) (a) of the Rent Control Act as the shop in question is regulated under the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972.

7. The second submission raised by the learned counsel for the revisionist is that there being a clear admission on the part of the landlord-respondent in terms recorded above, which clearly was an admission to be construed in favour of the revisionist for treating him to be a tenant not in default of payment of rent for the reason that the landlord himself has admitted to have refused to take the rent tendered by him. Once there was a clear admission on the part of the landlord having not accepted the rent tendered by the revisionist during the period of notice on 31.12.2002, the revisionist could not be treated to be a defaulter and consequently, a suit for eviction was not maintainable against him. The submissions on the count of striking off defence and the protection under Section 20 (4) have also been advanced.

8. Learned counsel for the respondent has vehemently refuted the submissions made by the learned counsel for the revisionist and while making his submissions, he has clearly made out from the material on record that the benefit of Section 20 (4) was not available to the revisionist being a joint owner of a house alongwith his brother. Insofar as the striking off defence under Order XV Rule 5 is concerned, learned counsel for the respondent, drawing attention of the Court to the conduct of the revisionist-tenant, as regards the deposit of rent, has pointed out that the rent admissible according to the revisionist was Rs. 1200/- and the revisionist having failed to establish this ground before the court below, remained in arrears of rent, as such, the benefit of striking off defence was not available to him.

9. From the perusal of record it is noticed that the deposit made by the revisionist-tenant in the manner explained in the application filed on 23.5.2013 satisfies the deposit of rent as envisaged under the statutory provision and the deposit of rent as claimed in the notice and adjustment of the amount already paid through money order does in no way prejudice his right to defend and as such the submission made by the learned counsel for the respondent on this ground falls and is not acceptable. The aspect of admission by the respondent to refuse the receipt of rent on 31.12.2012 is crucial to the very continuance of tenancy or termination thereof by notice. From the perusal of issue no. 4 on this aspect of the matter when scrutinized in the light of admission made, it is gathered that the court below has not dealt with the admission of the landlord to refuse the receipt of rent during the currency of the period of notice on 31.12.2012 at all and no finding on that premise has been recorded one way or the other so as to justify the revisionist having become a defaulter as to the payment of rent. Failure to consider this relevant aspect/evidence, to arrive at any decision for or against the tenant, is a material irregularity which is reflected on the face of record. This irregularity further goes to substantiate the case of the revisionist-defendant on the ground that the court below has failed to return a finding as regards the default in the payment of rent as on the date of expiry of notice whereas the only finding recorded by the court below is to the effect that the revisionist-tenant failed to deposit the arrears of rent as on the date of issuance of notice. In support of his submission, learned counsel for the revisionist has relied upon the decisions reported in **2006 (2) ARC 256 (Smt. Zohra and others v. IVth A.D.J., Varanasi and others)**; **2000 (1) Alld. Rent Cases 653 (Gokaran Singh v. Ist Additional District and Sessions Judge, Hardoi and others)**; **AIR 1981 SC 2085 (Ramji Dayawala & Sons (P.) Ltd. v. Invest Import)**; and **1983 Alld. Rent Cases 640 (Janardan Pandey v. Ist Addl. District Judge, Nainital and others)**.

10. Learned counsel for the respondent in order to distinguish the judgements relied upon, has cited the case of ***Kalyan Singh Chouhan v. C.P. Joshi [2011(29)LCD 512.***

11. Considering the rival submissions and in the light of judgements placed reliance upon, I am of the considered opinion that the court below while adjudicating upon the issue at hand has failed to consider the material admission of the landlord which ought to have been considered in determination of the real question, namely, whether the revisionist-defendant committed default in the payment of rent until the period of notice and recording a finding that the revisionist was in arrears of rent as on the date of issuance of notice clearly lacks the sanction of statute and such an illegality on the face of the impugned judgement, calls for interference under the revisional jurisdiction of this Court envisaged by virtue of Section 25 of the Provincial Small Cause Courts Act, 1887.

12. The impugned judgement passed by the court below suffers from a patent illegality and the for the reasons recorded above, the same is hereby set aside and the matter is relegated to the court below for consideration of all the material after affording opportunity to the parties concerned. The court below shall accordingly decide the proceedings afresh on the issue involved in which the revisionist undertakes to cooperate.

13. Since the matter is being remanded to the court below for determination of the rival rights, therefore, until the culmination of proceedings, a rent of Rs. 2500/- per month shall be deposited by the revisionist-tenant before the court below with effect from Feb. 2016,

14. The revision thus stands allowed in part. No order as to cost.

(2016) 8 ILRA 360
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.08.2016

BEFORE

THE HON'BLE MRS. VIJAY LAKSHMI, J.

Application U/S 482 No.- 12028 Of 2015
 &
 Application U/S 482 No.- 33103 Of 2014

Smt. Nawab Begum & Ors.

...Applicant

Versus

State Of U.P. & Anr.

...Opposite Parties

Counsel for the Applicant:

Rajjan Singh, M.J. Akhtar, Md. Imran Khan, V.M. Zaidi

Counsel for the Opposite Parties:

Govt. Advocate, Manish Tiwari

Criminal law — Section 482 Cr.P.C. — Quashing of entire proceedings — Case Crime No. 1042 of 2012 — Sections 420, 467, 468, 471, 120-B, 506 and 34 I.P.C. — Forged Will — Fake death certificate — Mutation in revenue records — Protest petition — Charge-sheet — Cognizance — Inordinate delay in lodging the F.I.R. — Disputed question of fact — Prima facie case — Disputed defence — Pre-trial — Discharge application — Applications dismissed.

The applicants by means of these applications, have invoked the inherent jurisdiction of this Court with prayer to quash the entire proceedings of Case Crime No. 1042 of 2012, under Sections 420, 467, 468, 471, 120-B, 506 and Section 34 I.P.C., Police Station Kotwali, district Muzaffar Nagar and to stay the effect and operation of the impugned orders dated 1.4.2014 and 12.12.2014 passed by Chief Judicial Magistrate, Muzaffar Nagar taking cognizance on the charge-sheets filed under aforesaid sections in this matter.(Para 2)

Held: (Para:-16-18)

1.The applicants cannot be given any benefit on the basis of aforesaid judgment as the facts of the instant case are entirely different. In the case of Savitri Pandey (supra), F.I.R. was lodged after a lapse of 19 years, but it was lodged against as many as fifteen persons, without even assigning their separate roles. To the contrary, in the instant case, specific roles have been assigned to the applicants and delay has also been explained.

2.In wake of above discussion, both the applications appear to be devoid of merit and are liable to be dismissed. The prayer for quashing the entire proceedings and impugned orders passed in the aforesaid cases is liable to be refused.

3.Accordingly both these applications are **dismissed**. Interim order, if any stands vacated.

Case Law discussed:

1.R.P. Kapur Vs. State of Punjab, A.I.R. 1960 S.C. 866 — para 13

2.State of Haryana Vs. Bhajan Lal, 1992 SCC (Cr.) 426 — para 13

3.State of Bihar Vs. P.P. Sharma, 1992 SCC (Cr.) 192 — para 13

- 4.Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, 2005 SCC (Cr.) 283— para 13
5.A.R.C.J. Vs. Nimra Carglass Technics (P) Ltd., (2016) 1 SCC 348 — para 13
6.V.P. Srivastava Vs. Indian Explosives Ltd. & others, 2010 (SC) SCC 361 — para 9
7.Md. Ibrahim and others Vs. State of Bihar and another, 2010 (Sup) AIR (SC) 347 — para 9
8.Savitri Pandey and another Vs. State of U.P. and others, 2015 (90) ACC 721 — paras 9, 15, 16

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. Both these applications under section 482 Cr.P.C., were connected vide order dated 23.8.2016 of this Court and are hereby being decided by this common order.

2. The applicants by means of these applications, have invoked the inherent jurisdiction of this Court with prayer to quash the entire proceedings of Case Crime No. 1042 of 2012, under Sections 420, 467, 468, 471, 120-B, 506 and Section 34 I.P.C., Police Station Kotwali, district Muzaffar Nagar and to stay the effect and operation of the impugned orders dated 1.4.2014 and 12.12.2014 passed by Chief Judicial Magistrate, Muzaffar Nagar taking cognizance on the charge-sheets filed under aforesaid sections in this matter.

3. Heard Sri V.M. Zaidi, learned counsel for the applicants, Sri Manish Tiwary, learned counsel for opposite party no. 2 as well as learned A.G.A. representing the State. Perused the record.

4. Some background facts, in brief, are that an F.I.R. was lodged by O.P. No. 2/complainant Syed Hussain at Police Station Kotwali, district Muzaffar Nagar on 21.9.2012 stating therein that he resides at Aligarh and his brother resides at Noida. Their mother Late Manzoor Fatma was a resident of village Bilaspur, Police Station Nai Mandi, district Muzaffar Nagar. The accused applicants, fabricated a forged Will of Manzoor Fatima with intention to grab her property showing therein that Manzoor Fatima has bequeathed all her property to accused applicants Mohd. Shahid and Mohd. Suhail i.e. the two sons of accused applicant Mohd Arif. Then they prepared a fake death certificate before her death showing that Late Manzoor Fatma had died on 25.3.2004 whereas, she died on 15.1.2006 in Aligarh Medical Hospital. It was further alleged in the F.I.R. that Mohd. Shahid and Mohd. Suhail in connivance with other accused persons, got their names mutated in the revenue records on the basis of the aforesaid forged Will and death certificate. When first informant came to know about all these facts, he filed his objection before the revenue court and lodged the F.I.R. against the applicants on 21.9.2012.

5. However, the I.O. after concluding the investigation submitted Final Report in the matter on 8.11.2013. Against the Final Report, opposite party no. 2 filed protest petition on 1.1.2013, which was allowed by learned C.J.M., Muzaffar Nagar vide order dated 20.5.2013 and the I.O. was directed to conduct further investigation in the case. After further investigation, the I.O. submitted charge-sheet in the matter on 13.3.2014 against the applicants Mohd. Suhail and Mohd. Shahid on which cognizance was taken by learned C.J.M. vide impugned order dated 1.4.2014. Later,

chargesheet against applicants Mohd. Arif, Smt. Nawab Begum and Zahoor Mehdi on 2.12.2014, on which the learned Magistrate took cognizance by the impugned order dated 12.12.2014.

6. Both these orders of taking cognizance against the applicants have been challenged before this Court by learned counsel for the applicants, contending that Manzoor Fatima, who was the owner of the disputed property, was the real sister of the father of applicant Mohd. Arif. It is contended that she executed a Will dated 3.2.1998 in favour of minor sons of Mohd Arif. At that time no body in the family raised objection against the said Will. After her death the applicants Mohd. Shahid and Mohd. Suhail applied for mutation of their names over the property in dispute and as there was no objection from any one at that time, the mutation was done on 19.6.2006 but even at the time of mutation there was no objection by the opposite parties. It was only after a long gap of 14 years from the alleged fabrication of Will, the O.P. No. 2 lodged the F.I.R. against the applicants on 21.9.2012. The police, without taking into consideration this inordinate delay and without a proper investigation submitted charge-sheets against the applicants including even the two minors namely Mohd. Shahid and Mohd. Suhail. The learned Magistrate also, without application of mind to these facts, mechanically took cognizance on the said charge-sheets.

7. It is further contended that applicant no. 3 filed a suit for partition of the disputed property on 21.12.2012 in which a family settlement took place in the year 2014 and as per terms of settlement, Mohd. Shahid and Mohd. Suhail, i.e. the two sons Mohd. Arif, gave up their claims in favour of the complainant/opposite party no. 2. Accordingly, the names of Mohd. Shahid and Mohd. Suhail were struck down from the revenue records and the names of heirs of Late Manzoor Fatma were recorded in their place, hence the dispute got finally settled between the parties.

8. The grievance of the applicants is that despite the family settlement and even after the names of Mohd. Shahid and Mohd. Suhail being struck down from the revenue records, the opposite party no. 2 moved the protest petition against the applicants.

9. Learned counsel has next contended that there is inordinate delay of about more than 14 years in lodging the F.I.R., which makes the prosecution case wholly doubtful and clearly shows that it was lodged with malafide intention, just in order to harass the applicants. It is further contended that no offence under Section 420 or 120-B I.P.C. is made out against the applicants due to lack of "mensrea" on their part as there was no intention either to cheat or to deprive the first informant or any other persons from his property. Learned counsel has submitted that neither the alleged forged Will, nor the alleged forged death certificate, was ever used by the applicants. Hence there was no wrongful gain to the applicants and no wrongful loss to the opposite party no. 2. Moreover, the alleged Will being unregistered, was like a waste paper and the applicants were not benefited in any manner due to this Will. Learned counsel has lastly argued that as at the time of execution of Will, both applicants Mohd. Shahid and Mohd. Suhail were minors, hence no offence is made out against them. In support of his contention learned counsel for the applicants has placed reliance on the judgments passed by Hon'ble Supreme Court in the cases of **V.P. Srivastava Vs. Indian Explosives Ltd, & others; 2010 (SC) SCC 361, Md. Ibrahim and others Vs. State of**

Bihar and another; 2010 (sup) AIR (SC) 347 and Savitri Pandey and another Vs. State of U.P. and others; 2015 (90) ACC 721.

10. Per contra, learned counsel for opposite party no. 2 has contended that the crime was completed when the applicants, with dishonest intention, had prepared the forged Will and had fabricated the death certificate showing the date of death of mother of opposite party no. 2 as 25.3.2004, where as, she actually died on 15.1.2006 as per medical college records, where she breathed her last. It is further contended that no compromise or settlement, ever took place between the applicants and opposite party no. 2 and if merely due to fear of their conviction, the applicants gave up their claims in favour of the complainant, it cannot be said that it was due to some settlement and no offence was committed by them. Learned counsel for the opposite party no. 2 has submitted that there is sufficient prima facie evidence available in support of the fact that the applicants manufactured the forged death certificate and Will with fraudulent and dishonest intention, which is clearly evident from the fact that the applicants got mutated their names in the revenue records on the basis of those false and fake documents and when their guilty conduct was detected, they gave up their claims even after the mutation of their names in the revenue records.

11. With regard to delay in lodging the F.I.R., learned counsel for opposite party no. 2 has submitted that the delay has been properly explained by the complainant in the F.I.R. itself. The applicants and his brother, who are the two sons of Late Manzoor Fatima were living outside in connection with their job. Hence they could not get any knowledge about the act of accused applicants and as soon as they got the knowledge about the preparation of forged will and forged death certificate, and about the mutation of the names of sons of Mohd. Arif in revenue records, they lodged the F.I.R. Moreso, the charge-sheet and the entire proceedings of criminal case cannot be quashed only on the ground of delay in lodging the F.I.R. specially, when the delay has been properly explained. It is further contended that the applicants have used the forged death certificate in the mutation proceedings and on the basis of those false papers, their names were entered into the revenue record. Hence it cannot be said that there was no wrongful gain to the applicants. It is further submitted that whatever has been argued by learned counsel for the applicants is the proposed disputed defence which, as per settled legal position, cannot be looked into at the threshold of a case i.e. at the very initial stage when only charge-sheet has been filed. It is lastly submitted that no benefit can be given to the applicants on the basis of the case laws cited by learned counsel for the applicants because the facts before the Hon'ble Supreme Court in all these cases are entirely different from the facts of instant case.

12. Considered the rival submissions advanced by the parties.

13. From the perusal of the material on record and looking into the facts of the case, at this stage it cannot be said that no offence is made out against the applicants. All the submissions made at bar relates to the disputed question of fact, which cannot be adjudicated upon by this Court in exercise of power conferred under Section 482 Cr.P.C.. At this stage only prima facie case is to be seen in the light of the law laid down by Supreme Court in cases of **R.P. Kapur Vs. State of Punjab, A.I.R. 1960 S.C. 866, State of Haryana Vs. Bhajan Lal, 1992 SCC (Cr.) 426, State of**

Bihar Vs. P.P.Sharma, 1992 SCC (Cr.) 192, Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another (Para-10) 2005 SCC (Cr.) 283 and recently in **A.R.C.J. Vs. Nimra Carglass Technics (P) Ltd. (2016) 1 SCC 348**. The submissions made by the learned counsel for the applicants call for adjudication on pure questions of fact which may be adequately adjudicated upon only by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court in this case. This Court does not deem it proper, and therefore cannot be persuaded to have a pre-trial before the actual trial begins. All the submissions made at bar by Sri V.M. Zaidi, learned counsel for the applicants, are the disputed defence of the accused, which cannot be considered at this stage. Moreover, the applicants have got a right of discharge through a proper application for the said purpose and they are free to take all the submissions taken here in the said discharge application before the Trial Court.

14. I have carefully gone through all the judgments cited by learned counsel for the applicants and I am of the considered view that none of these judgments are applicable to the instant case.

15. Much stress has been laid by learned counsel for the applicants on the delay in lodging the F.I.R. in the instant case, relying on the law laid down in **Savitri Pandey's** case (supra) in which the Hon'ble Apex Court had quashed the F.I.R.

16. The applicants cannot be given any benefit on the basis of aforesaid judgment as the facts of the instant case are entirely different. In the case of **Savitri Pandey** (supra), F.I.R. was lodged after a lapse of 19 years, but it was lodged against as many as fifteen persons, without even assigning their separate roles. To the contrary, in the instant case, specific roles have been assigned to the applicants and delay has also been explained.

17. In wake of above discussion, both the applications appear to be devoid of merit and are liable to be dismissed. The prayer for quashing the entire proceedings and impugned orders passed in the aforesaid cases is liable to be refused.

18. Accordingly both these applications are dismissed. Interim order, if any stands vacated.

19. However, it is open for the applicants to move the discharge applications before the court concerned at the appropriate stage and to put forth all the aforesaid submissions before the trial court and if any such application is moved by them before the court concerned, it shall be disposed of by a reasoned order.

(2016) 8 ILRA 365
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.08.2016

BEFORE

THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Application U/S 482 No.- 23654 Of 2016

Smt. Girja Devi & Ors.

...Applicants

Versus

State Of U.P. & Anr.

...Opposite Parties

Counsel for the Applicants:

Divya Ojha

Counsel for the Opposite Parties:

G.A.

Criminal law —Section 482 CrPC — Criminal Appeal — Order of acquittal — Case instituted upon complaint — Section 378(4) CrPC — Special leave to appeal — Without grant of leave — Proceedings illegal and without jurisdiction — Subhash Chand Vs. State (Delhi Admin) — Proceedings stayed.

The proceedings of criminal Complaint Case No. 2133 of 2014 (Smit. Prema Devi Vs. Smt. Girja Devi & others) was carried out for prosecution on four accused persons (present applicants) for offences under sections 500 and 501 IPC. After affording opportunity to prosecution and defence side, the Judicial Magistrate, Court No.-10, Jhansi had passed judgment dated 12.2.2015 by which accused persons were acquitted of the charges.(Para 2)

Against said judgment dated 12.2.2015 passed by the trial court, a Criminal Appeal No. 23 of 2015 (Smt. Prema Devi Vs. State of UP & others) was preferred by complainant of the original case. In this appeal the respondents (present applicants) had moved application 16-B for quashing the proceedings of the said appeal. After affording opportunity of hearing to the parties, the Additional Sessions Judge, Court No.-10, Jhansi has rejected the said Application No. 16-B and fixed the date for hearing of the appeal. Against said order of Sessions Court, present application has been preferred by accused of original case.(Para 3)

Held: (Para:-8,9,13)

1. This is settled legal position that without any formal grant of leave to appeal by High Court, the proceedings of appeal on behalf of complainant cannot be carried out against order of acquittal in case instituted upon complaint. If no special leave is granted to complainant, he cannot appeal against order of acquittal in complaint case.

2. Therefore the arguments of learned counsel for the applicants are apparently acceptable.

3. Till further orders, proceedings of Criminal Appeal No. 23 of 2015, Smt. Prema Devi Vs. State of UP & others, under section 372 CrPC, police station Prem Nagar, District Jhansi pending in the court of Addl. Sessions Judge, Jhansi shall remain **stayed**.

Case Law discussed:

1. Subhash Chand Vs. State (Delhi Admin), (2013) 2 SCC 17 — para 7

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. Present Ms. Divya Ojha for applicants and AGA for the OP No.-1 State. Heard and perused the records.

2. The proceedings of criminal Complaint Case No. 2133 of 2014 (Smt. Prema Devi Vs. Smt. Girja Devi & others) was carried out for prosecution on four accused persons (present applicants) for offences under sections 500 and 501 IPC. After affording opportunity to prosecution and defence side, the Judicial Magistrate, Court No.-10, Jhansi had passed judgment dated 12.2.2015 by which accused persons were acquitted of the charges.

3. Against said judgment dated 12.2.2015 passed by the trial court, a Criminal Appeal No. 23 of 2015 (Smt. Prema Devi Vs. State of UP & others) was preferred by complainant of the original case. In this appeal the respondents (present applicants) had moved application 16-B for quashing the proceedings of the said appeal. After affording opportunity of hearing to the parties, the Additional Sessions Judge, Court No.-10, Jhansi has rejected the said Application No. 16-B and fixed the date for hearing of the appeal. Against said order of Sessions Court, present application has been preferred by accused of original case.

4. Learned counsel for the applicants contended that impugned order dated 27.6.2016 is erroneous because under section 378(4) CrPC, appeal against acquittal can be admitted only after grant of leave to special appeal by this court. She submitted that since this mandatory formality has not been complied with in proceedings of Criminal Appeal no. 23 of 2015 so the proceedings before lower sessions court is illegal and without jurisdiction. She cited case of Subhash Chand Vs. State (Delhi Admin), (2013) 2 SCC 17.

5. These contentions were refuted by the learned AGA and who contended that such matter has been referred by Single Judge of this Court to Division Bench for consideration. Since there appears direct judgment of Hon'ble Apex Court, therefore, the contentions of learned AGA are not acceptable.

6. **Section 378(4) of CrPC** reads as under:

378 (4). "If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court."

7. **Subhash Chand Vs. State (Delhi Admin), (2013) 2 SCC 17** the Apex Court had held :

"19. Sub-section (4) of Section 378 makes provision for appeal against an order of acquittal passed in a case instituted upon complaint. It states that in such case if the complainant makes an application to the High Court and the High Court grants special leave to appeal, the complainant may present such an appeal to the High Court. This sub-section speaks of "special leave" as against sub-section (3) relating to other appeals which speaks of "leave". Thus, the complainant's appeal against an order of acquittal is a category by itself. The complainant could be a private person or a public servant. This is evident from sub-section (5) which refers to application filed for "special leave" by the complainant. It grants six months' period of limitation to a complainant who is a public servant and sixty days in every other case for filing application. Sub-section (6) is important. It states that if in any case the complainant's application for "special leave" under sub-section (4) is refused no appeal from the order of acquittal shall lie under sub-section (1) or under sub-section (2). Thus, if "special leave" is not granted to the complainant to appeal against an order of acquittal the matter must end there. Neither the District Magistrate nor the State Government can appeal against that order of acquittal. The idea appears to be to accord quietus to the case in such a situation."

8. This is settled legal position that without any formal grant of leave to appeal by High Court, the proceedings of appeal on behalf of complainant cannot be carried out against order of acquittal in case instituted upon complaint. If no special leave is granted to complainant, he cannot appeal against order of acquittal in complaint case.

9. Therefore the arguments of learned counsel for the applicants are apparently acceptable.

10. Notice on behalf of State has been accepted by the AGA. Issue notice to opposite party no.-2.

11. The respondents may file counter-affidavit within three weeks. After it rejoinder affidavit may be filed within two weeks.

12. List thereafter.

13. Till further orders, proceedings of Criminal Appeal No. 23 of 2015, Smt. Prema Devi Vs. State of UP & others, under section 372 CrPC, police station Prem Nagar, District Jhansi pending in the court of Addl. Sessions Judge, Jhansi shall remain stayed.

(2016) 8 ILRA 368
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Central Excise Appeal No.- 214 Of 2016

Commissioner, Service Tax Commissionerate, Noida Versus M/S Atrenta India Pvt. Ltd. Noida	...Appellant ...Respondent
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Counsel for the Appellant:
Krishna Agarawal

Counsel for the Respondent:

Central Excise Act, 1944 – Cenvat Credit — Refund — Period prior to registration — Service tax registration — Condition precedent — Notification 5/2006-C.E. (N.T.) — Rule 5 Cenvat Credit Rules 2004 — Input service used in providing output service exported — Refund cannot be denied — Appeal dismissed

This appeal has arisen from judgment and order dated 15.12.2015 passed by Customs, Excise & Service Tax Appellate Tribunal, Allahabad (hereinafter referred to as "Tribunal") in Excise Appeal Nos. 52520 and 53049 of 2014 whereby Tribunal has rejected appeal of Revenue against order passed by Commissioner allowing refund to Assessee.(Para 1)

Learned Counsel for appellant contended that Assessee was registered with Department on 20.12.2011 but refund was claimed for the period earlier thereto, i.e April 2011 to September 2011, and no refund therefore, could have been claimed when Assessee was not registered(Para 2)

Held (Paras:- 15,20-23)

1.We do not find anything in the aforesaid rules which require registration as a condition or eligibility to claim refund. Even Form-A no where suggests that any such condition must be observed.

2.The judgement of Madras High Court therefore, was clearly rendered in the facts of that case. Be that as it may, we are inclined to accept the view taken by Karnataka High Court considering the fact that in the rules of refund of Cenvat credit, we do not find any such requirement of registration as a condition precedent or eligibility condition for claiming refund.

3.Moreover, if refund is otherwise admissible to a party by a Tax Department, interpretation to the Statute which justify refund to the party must be given for the reason that State or Tax Department cannot be expected to retain Revenue which legally is refundable to the party. It should not be allowed to be retained when legally Revenue is not entitled to such money.

4. Moreover, in Formica India Division v. Collector of Central Excise 1995(77) E.L.T 511 (S.C.) Court has also observed that refund should not be denied on technical grounds. This shows that a view which does not contradict with any express fiscal provision, should be taken in favour of Assessee, if there is any scope of two views.

5. In view of above discussions, we answer the aforesaid question against appellant and **dismissed** this appeal.

Case Law discussed:

1. mPortal India Wireless Solutions P. Ltd. Vs. C.S.T., Bangalore, 2012 (27) S.T.R. 134 (Kar.) — paras 3, 9, 11, 16
2. Commissioner of Central Excise, Coimbatore Vs. Sutham Nylocots — paras 3, 17, 18, 19
3. Commissioner of Service Tax Chennai Vs. E-Care India Pvt. Ltd., 2011 (022) S.T.R. 0529 — para 9
4. M/s Sutham Nylocots Vs. CCE, 2005 (188) E.L.T. 26 — para 9
5. M/s Intellirisk Management India Pvt. Ltd. Vs. CCE Noida — para 10
6. M/s IQORR India Services Pvt. Ltd. Vs. CCE Noida — para 10
7. Formica India Division Vs. Collector of Central Excise, 1995 (77) E.L.T. 511 (S.C.) — para 22

(Delivered by Hon'ble Sudhir Agarwal, J.

&

Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. This appeal has arisen from judgment and order dated 15.12.2015 passed by Customs, Excise & Service Tax Appellate Tribunal, Allahabad (hereinafter referred to as "Tribunal") in Excise Appeal Nos. 52520 and 53049 of 2014 whereby Tribunal has rejected appeal of Revenue against order passed by Commissioner allowing refund to Assessee.

2. Learned Counsel for appellant contended that Assessee was registered with Department on 20.12.2011 but refund was claimed for the period earlier thereto, i.e April 2011 to September 2011, and no refund therefore, could have been claimed when Assessee was not registered.

3. Shri Krishna Agarwal learned counsel appearing for appellant relied on a Madras High Court decision in ***Commissioner of Central Excise, Coimbatore versus Sutham Nylocots*** wherein refund of duty for the period prior to registration of Assessee was denied. We find that in the present case, Tribunal has followed a judgment of Karnataka High Court in mPortal India Wireless Sollution P.Ltd. vs.C.S.T, Bangalore wherein it has been held that registration with Department is not a pre requisit for claiming Cenvat Credit and therefore, refund cannot be denied for this reason above.

4. Thus the only question up for consideration in this appeal is "whether appellant is justified in denying refund to the Assessee for the period, prior to his registration with Department".

5. The Assessee M/s Atrenta India Private Limited is engaged in providing Information Services namely Information Technology Software Service falling under section 65(105)(zzzze) of Chapter V of Finance Act, 1994 (hereinafter referred to as 'Finance Act, 1994').

6. Application for the period July 2011 to September 2011 was filed for claiming refund of Rs.6,09,808/- on 28.9.2012.

7. Application was rejected by Assistant Commissioner, Customs & Central Excise Division-1 Noida (hereinafter referred to as "ACCCE"). The ground taken by ACCCE is that Assessee was not registered during claim period hence not eligible to take refund of Cenvat Credit under rule 3 of Rules, 2004 read with Rule 4 of Service Tax Rules 1994.

8. Assessee preferred an appeal before Commissioner (Appeals) who allowed the same by order dated 28.10.2013 and directed ACCCE to examine to claim of refund subject to verification of documents etc.

9. Commissioner (Appeals) held that Adjudicating Authority wrongly interpreted Section 69 of Finance Act 1994 read with Rule 4 of Export of Services Rule 2005 in observing that Assessee was required to pay service tax, hence, was obliged to obtain service tax registration. Commissioner (Appeals) held that service provided by Assessee were chargeable to 'Service Tax' under section 65(105) of Finance Act 1994 but the same was not liable to pay service tax in terms of Rule 4 of Export of Services Rules 2005. It also referred and relied on Tribunal's decisions in **Commissioner of Service Tax Chennai vs. E-Care India Pvt.Ltd.2011 (022) STR 0529** and **M/s Sutham Nylocots vs.CCE, 2005 (188) ELT 26**. It held that in view of Karnataka High Court judgment in **mPortal India Wireless Solutions P.Ltd. versus C.S.T Bangalore 2012 (27) S.T.R.134 (Kar.)**, service tax registration was not mandatory for refund of accumulated Cenvat credit tax, paid on inputs Services, used for export services.

10. It is also said that a similar view that non registration of unit cannot be a basis for denial of refund especially when there is no such condition in notification for allowing benefit of Cenvat credit in terms of Rule 5 of Cenvat Credit Rule, 2004 was taken by Tribunal at Delhi in **M/s Intellirisk Management India Pvt.Ltd. vs.CCE Noida in Excise Appeal No.2216-2217 of 2010** and **M/s IQORR India Services Pvt.Ltd. vs.GCE, Noida** in Excise Appeal No.2218-2223 of 2010 which have been accepted by Commissioner of Central Excise, Noida.

11. Appellant thereafter filed appeal before Tribunal at Allahabad which has been dismissed by impugned judgment and order relying on the judgment of Karnataka High Court in **mPortal India Wireless Solutions P.Ltd.(Supra)**.

12. Learned counsel for appellant has placed before us the rules made for refund of Cenvat Credit vide Notification:5/2006-C.E(N.T) dated 14.3.2006. The aforesaid rules have been framed in exercise of powers conferred by rule 5 of CENVAT Credit Rules 2004 and in supersession of earlier Notification. It provides that refund of Cenvat Credit shall be allowed in respect of:

(a). Input or input service used in the manufacture of final product which is cleared for export under bond or letter of undertaking:

(b). Input or input service used in providing output service which has been exported without payment of service tax.

13. Rule 2 & 3 state that claim for refund would be submitted not once for any quarter in a calendar year and by manufacturer or provider of output service by submitting an application in Form-A. The said rules are quoted as under:

“(2) The claims for such refund are submitted not more than once for any quarter in a calendar year

Provided that where, -

The average export clearances of final products or the output services in value terms is fifty percent or more of the total clearances of final products or output services, as the case may be, in the preceding quarter; or

The claim is filed by Export Oriented Unit, the claim for such refund may be submitted for each calendar month

(3) The manufacturer or provider of output service, as the case may be, submits an application in Form A annexed to this notification to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, in whose jurisdiction.

(a) the factory from which the final products are exported is situated, along with the Shipping Bill or Bill of Export, duly certified by the officer of customs to the effect that goods have in fact been exported; or

(b) the registered premises of the service provider from which output services are exported is situated, along with a copy of the invoice and a certificate from the bank certifying realization of export proceeds.”

14. Rule 4 provides that refund is allowed only in those circumstances where a manufacturer or provider of output service is not in a position to utilize the input credit or input service credit allowed under rule 3 of said rules against goods exported during the quarter or month to which the claim relates.

15. We do not find anything in the aforesaid rules which require registration as a condition or eligibility to claim refund. Even Form-A nowhere suggests that any such condition must be observed.

16. Karnataka High Court in **mPortal India Wireless Solutions P.Ltd. (Supra)** has said in paragraph 7, as under:

“ Insofar as requirement of registration with the department as a condition precedent for claiming Cenvat credit is concerned, learned counsel appearing for both parties were unable to point out any provision in the Cenvat Credit Rules which impose such restriction. In the absence of a statutory provision which prescribes that registration is mandatory and that if such a registration is not made the assessee is not entitled to the benefit of refund, the three authorities committed a serious error in rejecting the claim for refund on the ground which is not existence in law. Therefore, said finding recorded by the Tribunal as well as by the lower authorities cannot be sustained. Accordingly, it is set aside.”

17. In **Commercial of Central Excise versus Sutham Nylocotes (Supra)**, the decision of Madras High Court, relied by appellant, three issues which came up for consideration:

1. *Whether the Appellate Tribunal is correct in setting aside the orders passed by the lower authorities with regard to payment of interest for the period in dispute namely, 1-4-2001 to 31-1-2002 when Section 11AB of Central Excise Act, 1944, which stands amended with effect from 11.5.2001?*

2. *Whether the Appellate Tribunal is correct in holding that the respondent has not misstated the description of the goods with intent to evade payment of duty when the respondent has not disputed the descriptions of the goods as proposed by the Department and paid the duty?*

3. *Whether the Appellate Tribunal is correct in holding that since the respondent has now registered with the Excise Department and is following the procedures and hence the respondent can legitimately claim the benefit of Modvat credit on the yarns used in the manufacture of fabrics for the period in dispute?*

18. The third issue was considered by Madras High Court in paragraphs 16 to 18 of the judgment and it has observed that Assessee had not obtained Central Excise Registration Certificate while manufacturing industrial fabrics and had not followed any Central Excise procedural formalities while clearing such industrial fabrics. This fact was not admitted by Assessee. First Appellate Authority held that Assessee had not fulfilled several conditions stipulated statutorily such as duty paid, nature of inputs, use of duty paid inputs in the manufacture of dutiable finished goods to substantiate their claim for Cenvat credit. Having said so, Madras High Court has further observed in paragraph 17 that-

“First Appellate Authority pointed out that the Assessee had not satisfactorily explained before the original authority or substantiated before the First Appellate Authority that they are entitled to claim for Cenvat credit. This finding of fact recorded by the First Appellate Authority has not been set at naught by Tribunal rather no reasons have been given by Tribunal for permitting the credit to be availed by Assessee.”

19. It is in this background, Madras High Court in ***Commissioner of Central Excise versus Sutham Nylocots (Supra)*** said in paragraph-18, as under:

“Admittedly, at the relevant point of time, Assessee was not registered with the Department and in fact, it subsequently obtained registration from the Department and therefore, if at all Assessee is entitled to any credit it would accrue only subsequent to the date of registration with the Department. Even though Assessee claimed exemption on the ground that they had subsequently registered with the Department, as regards liability as found in the order of adjudication as well as in the order of Tribunal, we do not find any justifiable ground to accept the plea of Assessee based on the exemption Notification alone that the registration being not a mandatory one, Assessee would be entitled to the benefit of Modvat credit. “

20. The judgement of ***Madras High Court*** therefore, was clearly rendered in the facts of that case. Be that as it may, we are inclined to accept the view taken by ***Karnataka High Court*** considering the fact that in the rules of refund of Cenvat credit, we do not find any such requirement of registration as a condition precedent or eligibility condition for claiming refund.

21. Moreover, if refund is otherwise admissible to a party by a Tax Department, interpretation to the Statute which justify refund to the party must be given for the reason that State or Tax Department cannot be expected to retain Revenue which legally is refundable to the party. It should not be allowed to be retained when legally Revenue is not entitled to such money.

22. Moreover, in ***Formica India Division v. Collector of Central Excise 1995(77) E.L.T 511 (S.C.)*** Court has also observed that refund should not be denied on technical grounds. This shows that a view which does not contradict with any express fiscal provision, should be taken in favour of Assessee, if there is any scope of two views.

23. In view of above discussions, we answer the aforesaid question against appellant and ***dismissed*** this appeal.

BEFORE

Civil Revision No.- 123 Of 2016

1. The facts of this case reveal that the minor was residing at Saharanpur with his parents. He was removed from there and shifted to Meerut on account of compelling circumstances otherwise he would have continued to live at Saharanpur had the unfortunate tragic incident leading to the death of his mother had not taken

place. Therefore, the place of shifting of the minor under compulsion would not be regarded as the place where he 'ordinarily resides' and that Saharanpur alone would be the place of his residence.

2. In the case at hand neither the minor nor his parents ever had any intention to make Meerut their place of ordinary residence or abode or that of the child. They were living in Saharanpur and were having their abode at that place but for the aforesaid the unfortunate and tragic incident.

3. Accordingly, Saharanpur was the place where the minor ordinarily resided before his shifting to Meerut under the compelling circumstances.

4. In view of above, the court below has not committed any error of law or jurisdiction in rejecting the application/objection raised by the revisionist regarding the jurisdiction of the court.

5. This apart there is another aspect of the matter. The High Court in exercise of powers under Section 24 C.P.C. is competent to shift a case from one court of the district to a court of competent jurisdiction in another district. Therefore, even if the aforesaid case for any reason does not lie at Saharanpur or is treated to be within the jurisdiction of Meerut, it would stand transferred to Saharanpur to facilitate its decision where the maternal grandfather of the minor had chosen to file the application under Sections 7 and 8 of the Guardians and Wards Act, 1890 as any shifting of the case from Saharanpur to Meerut would not only cause inconvenience and delay but would also give rise to apprehension to the applicants that they will not get justice at Meerut where the contesting opposite parties are residing.

6. In view of the aforesaid facts and circumstances, I find no reason to disturb order impugned passed by the court below and **dismisses** the revision with no order as to costs.

Case Law discussed:

1. Jagdish Chandra Gupta Vs. Dr. Kumari Vimla Gupta, AIR 2003 All. 317 — para 31
2. Ruchi Majoo Vs. Sanjeev Majoo, (2011) 6 SCC 479 — para 33

(Delivered by Hon'ble Pankaj Mithal, J.)

1. A couple Ashwani Singh and Smt. Geetu Singh were residing at Saharanpur along with their minor son Aditya Singh @ Adi, now aged about 2 and 1/2 years.

2. The husband Ashwani Singh happened to be originally resident of Meerut whereas the wife Geetu Singh of Bareilly.

3. On 16.11.2014 Geetu Singh died in Saharanpur at her residence and in connection with her death, her husband Ashwani Singh and parents of the husband Smt. Munesh Singh and Pitamber Singh were arrested. In these circumstances, as there was no one to take care of the minor, he was given in custody of Prem Prakash, maternal uncle (Mama) of the husband, who lived at Meerut. Accordingly, the minor started living with Prem Prakash at Meerut w.e.f. 16.11.2014 after the unfortunate death of his mother. Later the parents of the husband were released on bail but he himself continues to be in jail.

4. The maternal grandfather (Nana) Vijay Pal Singh of the minor on 09.12.2014 moved an application under Section 7 & 8 of the Guardians and Wards Act, 1890 in the court of District

Judge, Saharanpur for his appointment as the guardian of the minor and his property. In the said application, the father and the grandparents of the minor and maternal uncle of the father of the minor, were all arrayed as the defendants.

5. The parents of the father of the minor on being released from jail moved an application taking an objection that the proceedings for appointment of the guardian of the minor are not maintainable at Saharanpur and that as the minor is ordinarily resident of Meerut, the court at Meerut alone would have jurisdiction over the matter.

6. The application after contest has been rejected on 17.02.2016 by the impugned order passed by the court below.

7. I have heard Sri Manish Goyal learned counsel for the revisionists and Sri R.D. Yadav, learned counsel appearing for the respondent no. 1.

8. The respondent no. 2 and 3 had not participated in the proceedings in the court below and are treated to be non contesting parties for the purpose of adjudication of this revision.

9. Sri Yadav raised an objection that the order is appealable under Section 47 of the Act and the revision is not maintainable.

10. Section 47 of the Act provides for the types of orders passed under the Act which are appealable to the High Court. The list of appealable orders does not specify that an order passed regarding the jurisdiction of the court is appealable.

11. Sri Yadav submits that the order is appealable under Clause (b) of Section 47 of the Act.

12. The aforesaid clause provides for an appeal against the order passed under Section 9 (3) of the Act directing for returning of the application for the appointment of a guardian. The order impugned is not an order directing for return of the application under Section 9 (3) of the Act rather it is an order rejecting application raising objection to territorial jurisdiction. Accordingly, it is not appealable under Section 47 of the Act.

13. Sri Yadav has next argued that the order impugned is not revisable as it is interlocutory in nature.

14. There is no doubt that the order impugned is interlocutory in nature. It is not appealable as held above. However, by the said order, the court below has finally decided one stage of the proceedings regarding jurisdiction of the court and as such it falls within the category of the case decided.

15. The order impugned rules about the jurisdiction of the court to entertain application under Section 7/ 8 of the Act and as such decides the issue of jurisdiction.

16. It is settled law that any issue decided by the trial court in a suit is revisable, if no appeal is provided against it. Accordingly, as the impugned order decides the issue of jurisdiction of the Court finally, it is a case decided and revisable under Section 115 CPC.

17. In view of the above, the objection that the impugned order is not revisable is overruled and the revision is held to be maintainable.

18. The submission of Sri Manish Goyal, learned counsel for the revisionists is that under Section 9 of the Act an application for an appoint of a guardian of a person of the minor and of his property can be filed in the district court where the minor 'ordinarily resides' or in a district having jurisdiction of a place where he has property. Since in the present case at the relevant time i.e. at the time of filing the application, the minor was admittedly residing at Meerut, the court at Saharanpur has no jurisdiction to decide the same.

19. Sri Yadav contends that the minor at the time of incident in which his mother died was living at Saharanpur where his father was working, therefore, the court at Saharanpur alone has the jurisdiction over the matter.

20. Section 9 (1) of the Act provides that in respect of guardianship of a person of minor, the application shall be made to the district court having jurisdiction of the place where the minor ordinarily resides. In other words, the jurisdiction of the court for the purpose of filing an application for appointment of a guardian of the person of a minor would depend upon the place where the minor ordinarily resides.

21. Section 9 (2) of the Act lays down that in respect of the guardianship of the property of the minor, the application may be made either to the district court where the minor ordinarily resides or to the district court having jurisdiction of a place where the property of the minor is situate.

22. A combined reading of both the sub sections 1 & 2 of Section 9 of the Act would reveal that in both the cases the application for guardianship of a person of the minor and his property would lie before the district court having jurisdiction of the place where the minor ordinarily resides.

23. In view of the above, in order to ascertain the jurisdiction of the court where the application under Section 7/8 of the Act in the instant case has to be moved is to decide the place where the minor 'ordinarily resides'.

24. The phrase "the minor ordinarily resides" used in Section 9 of the Act is crucial for determining the jurisdiction of the District Court for the purposes of filing an application under Section 7/8 of the Act for the appointment of a guardian of a minor.

25. There is no dispute that at the time of the incident dated 16.11.2014 when the mother of the minor died, he was residing at Saharanpur with her parents where his father was working. However, at the time when the application for appointment of guardian was filed he was actually residing at Meerut with the maternal uncle (Mama) of his father in whose custody he was entrusted as his mother had died and the father was put behind the bars.

26. In the peculiar facts and circumstances of the case, it would be seen that the minor was residing at Saharanpur and that he started living at Meerut under the compelling circumstances.

27. Section 9 of the Act does not use the phrase "ordinarily residing" rather uses the phrase "ordinarily resides". The expression "ordinarily resides" and "ordinarily residing" are not synonymous and are not interchangeable but contemplates two different situations.

28. The two phrases have a distinct meaning. The expression "ordinarily residing" is of present continuous tense and denotes the actual place of living whereas the expression "ordinarily resides" refers to the place where a person is expected or supposed to be living. A place of living under compulsion howsoever long it may be cannot be treated as a place where the person ordinarily resides.

29. A place of permanent abode of a person or where he actually resides or is supposed to reside is the place of his ordinary residence. It normally follows that the children of such a person would be deemed to ordinarily reside at the same place. Since the parents of the minor in the present case were residing and having a permanent abode at Saharanpur irrespective of their place of origin, they would to be treated as ordinarily residing at Saharanpur. Accordingly, the minor would also be deemed to be ordinarily residing at that place.

30. The place where the minor was forced to shift to live with the maternal uncle (Mama) of his father that is Meerut on account of the unfortunate and tragic death of his mother would not make him to be ordinarily resident of the said place.

31. In **Jagdish Chandra Gupta Vs. Dr. Kumari Vimla Gupta AIR 2003 All. 317** a Learned Single Judge of this court observed that the place where the minor ordinarily resides means a place where he is expected to reside but for the special circumstances and it excludes the places to which he may be removed at or about the time of the presentation of application for appointment of guardian. The test is to find out the place where the minor was ordinarily residing and where his residence would have continued but for his removal to a different place.

32. The facts of this case reveal that the minor was residing at Saharanpur with his parents. He was removed from there and shifted to Meerut on account of compelling circumstances

otherwise he would have continued to live at Saharanpur had the unfortunate tragic incident leading to the death of his mother had not taken place. Therefore, the place of shifting of the minor under compulsion would not be regarded as the place where he 'ordinarily resides' and that Saharanpur alone would be the place of his residence.

33. The expression "where minor ordinarily resides" used in Section 9 of the Act come up for consideration before the Supreme Court in the case of **Ruchi Majoo vs. Sanjeev Majoo (2011) 6 SCC 479**. The Court held the place of ordinary residence of a person depends much on the intention of the person whether he wants to make the place as his ordinary abode.

34. In the case at hand neither the minor nor his parents ever had any intention to make Meerut their place of ordinary residence or abode or that of the child. They were living in Saharanpur and were having their abode at that place but for the aforesaid the unfortunate and tragic incident.

35. Accordingly, Saharanpur was the place where the minor ordinarily resided before his shifting to Meerut under the compelling circumstances.

36. In view of above, the court below has not committed any error of law or jurisdiction in rejecting the application/objection raised by the revisionist regarding the jurisdiction of the court.

37. This apart there is another aspect of the matter. The High Court in exercise of powers under Section 24 C.P.C. is competent to shift a case from one court of the district to a court of competent jurisdiction in another district. Therefore, even if the aforesaid case for any reason does not lie at Saharanpur or is treated to be within the jurisdiction of Meerut, it would stand transferred to Saharanpur to facilitate its decision where the maternal grand-father of the minor had chosen to file the application under Sections 7 and 8 of the Guardians and Wards Act, 1890 as any shifting of the case from Saharanpur to Meerut would not only cause inconvenience and delay but would also give rise to apprehension to the applicants that they will not get justice at Meerut where the contesting opposite parties are residing.

38. In view of the aforesaid facts and circumstances, I find no reason to disturb order impugned passed by the court below and dismisses the revision with no order as to costs.

(2016) 8 ILRA 380
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.08.2016

BEFORE

THE HON'BLE ADITYA NATH MITTAL, J.

Contempt No.- 1055 Of 2010

Bhagwan Das Srivastava

...Applicant

Versus

Sri Rajesh Kumar Singh

...Opposite Party

Counsel for the Applicant:

S.P. Singh, R.P. Singh

Counsel for the Opposite Party:

D R Mishra, Ajay Kumar

Contempt petition — Disobedience and non compliance — Judgment and order dated 21.01.2010 — Consequential benefits — Suspension and departmental inquiry quashed — Forged High School mark-sheet — Fraud — Misrepresentation — Misleading the Court — No willful disobedience — Contempt petition dismissed.

Learned counsel for the petitioner has submitted that despite of the order dated 21.01.2010 passed by the writ court, the opposite parties have not paid the consequential benefits to the petitioner, while the order of suspension and departmental inquiry was quashed by the writ court. It has also been submitted that while passing the order dated 27.12.2012, which is annexed as Annexure-5 to the short counter affidavit filed on behalf of opposite party no. 4, no opportunity of hearing was afforded to the petitioner, therefore, he was not aware of that order.(Para 5)

On the other hand, learned counsel appearing for opposite party no. 4, has submitted that not only the mark-sheet of High School of the petitioner was found to be forged, but the petitioner has obtained the said order by mentioning the Appeal No. 44430 of 1997, District Basic Education Officer, Pilibhit Vs. U.P. Public Service Tribunal in Allahabad High Court, while the actual number of the writ petition was Writ-A No. 44450 of 1997, Adhyaksh Zila Parishad and another Vs. U.P. State Public Service Tribunal and another, thereby the petitioner again committed forgery. Therefore, there is no willful disobedience of the order passed by the writ court(Para 6)

Held:(Para:-16-18,21-22)

1.The Principal Secretary, after verification of the facts, came to the conclusion that roll number 73784 of High School Examination, 1961 was allotted to Km. Kunti daughter of Shri Vishnu Das and the said roll number was not allotted to the petitioner- Bhagwan Das Srivastava. It also reveals that on the mark-sheet, the roll number was mentioned as 73847 and a candidate in the name of Bhagawan Das Srivastava son of Badri Prasad had appeared in the High School Examination,1961 from Shri Ramchandra Municipal Intermediate College, Bisalpur, Pilibhit having date of birth of 02.02.1943 and he was declared fail. Upon this basis, the petitioner was suspended on 23.09.1970. The inquiry was conducted against the petitioner after serving the charge-sheet upon him and in that sequence, the petitioner has not submitted any reply to the charge-sheet, but has submitted his resignation. The Principal Secretary has come to the clear conclusion that

the petitioner has obtained the job on the basis of the forged High School mark-sheet/certificate. Therefore, he is not entitled for any consequential benefits for the suspension period since 23.09.1970 to 31.08.1998.

2.From the aforesaid conduct of the petitioner, it appears that the petitioner adopted forged methods since very inception of the job. He manipulated the mark-sheet and the certificate of the High School examination and obtained the job on the forged mark-sheet /certificate of the High School examination. He was under obligation to have filed the reply to the charge-sheet, but instead of filing the reply to the charge-sheet, he submitted his resignation, upon which the department passed the order which was challenged before the Public Services Tribunal. The conduct of forgery did not end there but also continued by filing Writ Petition No. 222 (S/B) of 2004 upon the wrong facts and mentioning wrong Appeal No. 44430 of 1997. The order dated 27.12.2012 has been passed in compliance with the order dated 06.07.2012 passed in Writ-A No. 32253 of 2012, Rupesh Gangwar Vs. State of U.P. and others, in which the petitioner was also opposite party no.5. From the conduct of the petitioner, it appears that he avoided the disciplinary inquiry as well as he willfully did not appear before the competent authority, who issued written information which was served personally upon the petitioner regarding compliance of the order dated 06.07.2012 passed in WritA No. 32253 of 2012, Rupesh Gangwar Vs. State of U.P. and others .

3.In the aforesaid circumstances, I am of the opinion that no contempt is made out against the opposite party and have no hesitation to say that the opposite party should have lodged the First Information Report against the petitioner for submitting a false and fabricated High School mark-sheet and certificate and no leniency should have been shown for such a fraudulent person, who has wasted the precious time of the Court as well as of the Public Services Tribunal. Further the opposite party may recover all the payments made to the petitioner consequent to his appointment, as arrears of land revenue.

4.Having considered the facts and circumstances of the case, I am of the opinion that this contempt petition is liable to be dismissed.

5.This contempt petition is accordingly **dismissed**.

Case Law discussed:

(Delivered by Hon'ble Aditya Nath Mittal, J.)

1. Heard learned counsel for the petitioner, learned Standing counsel and perused the record.

2. This contempt petition has been filed with the prayer for disobedience and non compliance of judgment and order dated 21.01.2010 passed by this Court in Writ Petition No. 222 (S/B) of 2004.

3. The operative portion of the judgment and order dated 21.01.2010 passed by the writ court is reproduced here below:-

"Though we find that the contempt petition was barred by the limitation, the respondents appears to have refuse to implement the order and to give all consequential benefits

including pay allowances and seniority to the petitioner on the ground that the Basic Shiksha Adhikari has filed an appeal against petitioner. Learned Standing Counsel has not able to provide any positive information in this regard. No appeal is maintainable against the judgment of the U.P. Public Service Tribunal. A writ petition is maintainable, but that the District Basic Education Officer appears to have either wrongly mentioned the number of the writ petition, or is under some wrong impression. It is admitted that the order of the tribunal dated 30.5.1997 was not stayed and thus the petitioner is entitled to all consequential benefits, of the order by which the suspension and departmental inquiry was quashed. The writ petition is consequentially allowed to the extent that the petitioner will be allowed all the consequential benefits, which has been deprived to him so far, subject to the result of any writ petition filed against the judgment. The order shall be complied within a period of three months from the date of production of a certified copy of this order before the respondent."

4. Short counter affidavit has been filed on behalf of opposite party no. 4.

5. Learned counsel for the petitioner has submitted that despite of the order dated 21.01.2010 passed by the writ court, the opposite parties have not paid the consequential benefits to the petitioner, while the order of suspension and departmental inquiry was quashed by the writ court. It has also been submitted that while passing the order dated 27.12.2012, which is annexed as Annexure-5 to the short counter affidavit filed on behalf of opposite party no. 4, no opportunity of hearing was afforded to the petitioner, therefore, he was not aware of that order.

6. On the other hand, learned counsel appearing for opposite party no. 4, has submitted that not only the mark-sheet of High School of the petitioner was found to be forged, but the petitioner has obtained the said order by mentioning the Appeal No. 44430 of 1997, District Basic Education Officer, Pilibhit Vs. U.P. Public Service Tribunal in Allahabad High Court, while the actual number of the writ petition was Writ-A No. 44450 of 1997, Adhyaksh Zila Parishad and another Vs. U.P. State Public Service Tribunal and another, thereby the petitioner again committed forgery. Therefore, there is no willful disobedience of the order passed by the writ court.

7. From the perusal of the order dated 21.01.2010 passed in Writ Petition No. 222 (S/B) of 2004, it appears that the petitioner has mentioned that the District Basic Education Officer has reinstated the petitioner on 31.08.1998 and preferred an Appeal No. 44430 of 1997, District Basic Education Officer, Pilibhit, Vs. U.P. State Public Service Tribunal in Allahabad High Court. In the order dated 21.01.2010, it has also come that the petitioner was required to find out the status of the appeal and as per the inquiry report, Writ Petition No. 44430 of 1997, Km. Mamta Tiwari Vs. State of U.P. and others was still pending.

8. In paras 11 and 12 of the short counter affidavit filed by opposite party no 4, the following averments have been made specifically:-

"11. That it is submitted that the petitioner Bhagwan Das Srivastava has not come with clean hands before this Hon'ble Court, as he had forged his High School Mark-sheet and

obtained the order of reinstatement dated 31.8.1998 by mentioning Appeal No. 44430 of 1997 (Annexure No.3 to the contempt petition) instead of Writ A No. 44450 of 1997 (Adhyaksh Zila Parishad and another Vs. U.P. State Public Service Tribunal and another) which is a forged document.

12. That from the aforesaid submission the High Court found that the petitioner Bhagwan Das Srivastava, has obtained the judgment and order dated 21.01.2010 by playing fraud, misrepresentation and misleading this Hon'ble High Court."

9. In reply to the aforesaid averments, the petitioner has simply denied the facts and has not specifically controverted the fact that the petitioner has obtained the judgment and order dated 21.01.2010 by playing fraud, misrepresentation and misleading the Court.

10. In the short counter affidavit filed on behalf of opposite party no. 4, it has also been mentioned that the petitioner has not come with clean hands as he has obtained the job on forged High School mark-sheet and further obtained the order of the reinstatement dated 31.08.1998 by mentioning the wrong appeal number.

11. In view of the specific allegations, no specific reply to the paras 11 and 12 of the short counter affidavit filed on behalf of opposite party no. 4 has been given, which goes to show the high handedness of the petitioner. Further Annexure R.A.1 has been filed regarding Writ-A No. 44450 of 1997, Adhyaksh Zila Parishad and another Vs. U.P. State Public Service Tribunal and another, which has been dismissed for non prosecution vide order dated 02.02.2010. It also appears that Appeal No. 44430 of 1997 absolutely does not belong to the petitioner and he has concealed the fact regarding the dismissal of Writ-A No. 44450 of 1997 from the Court.

12. Alongwith the short counter affidavit, a copy of the order dated 06.07.2012 passed in Writ- A No. 32253 of 2012, Rupesh Gangwar Vs. State of U.P. and others has been filed as Annexure No. 4. This Court vide order dated 6.7.2012 disposed of the said writ petition with the following observations:-

"In view of specific allegation that respondent no. 5 was failed in the High School examination and the mark sheet filed by him for the purpose of appointment in the institution is forged, it is desirable to provide that respondent no. 1 shall himself summon the original records pertaining to appointment of respondent no. 5 and shall get his High School mark sheet verified from the Board of High School & Intermediate, U.P. at Allahabad. If after verification it is found that respondent no. 5 in fact has failed in the High School examination and the mark sheet filed by his for the purpose of appointment is a forged document, he shall issue necessary orders for recall/review application being filed before the Public Services Tribunal brining to its knowledge the fact that a person who has failed in the High School examination can never be appointed in an aided and recognized institution nor there can be an order for payment of salary from the state exchequer.

Let the aforesaid exercise be completed within four weeks from the date a certified copy of this order is filed before the respondent no.1. The respondent no. 1 shall pass a reasoned speaking order after affording opportunity of hearing to respondent no. 5."

13. Opposite party no. 4 has passed a detailed speaking and reasoned order on 27.12.2012 in compliance with the order dated 06.07.2012 passed by this Court at Allahabad in Writ- A No. 32253 of 2012, Rupesh Gangwar Vs. State of U.P. and others, in which the present petitioner was also opposite party no.5.

14. The perusal of the said order dated 27.12.2012 reveals that the present petitioner was required to submit his original document regarding High School mark-sheet/certificate for compliance of the order dated 6.7.2012 passed in Writ-A No. 32253 of 2012, Rupesh Gangwar Vs. State of U.P. and others. The petitioner was informed by letter nos. 3179/79-5-12 dated 7.11.2012 and 3297/79-5-12 dated 26.11.2012 through District Basic Education Officer, Pilibhit, which were personally served upon the petitioner on 27.11.2012, but in view of that notice, the petitioner had neither appeared before the competent authority nor prayed for any adjournment.

15. Again another opportunity of hearing was given to the petitioner by letter dated 07.12.2012, which was personally served upon the petitioner on 10.10.2012 (It appears to be a typographical mistake and appears to be 10.12.2012), but even then despite of personal service, the petitioner has not appeared before the competent authority. In this regard, the submission of learned counsel for the petitioner that the petitioner had no information, has no substance because in the order dated 27.12.2012, the specific letter numbers as well as dates have been mentioned by the Principal Secretary, as such, there is no reason to disbelieve that.

16. The Principal Secretary, after verification of the facts, came to the conclusion that roll number 73784 of High School Examination, 1961 was allotted to Km. Kunti daughter of Shri Vishnu Das and the said roll number was not allotted to the petitioner- Bhagwan Das Srivastava. It also reveals that on the mark-sheet, the roll number was mentioned as 73847 and a candidate in the name of Bhagawan Das Srivastava son of Badri Prasad had appeared in the High School Examination, 1961 from Shri Ramchandra Municipal Intermediate College, Bisalpur, Pilibhit having date of birth of 02.02.1943 and he was declared fail. Upon this basis, the petitioner was suspended on 23.09.1970. The inquiry was conducted against the petitioner after serving the charge-sheet upon him and in that sequence, the petitioner has not submitted any reply to the charge-sheet, but has submitted his resignation. The Principal Secretary has come to the clear conclusion that the petitioner has obtained the job on the basis of the forged High School mark-sheet/certificate. Therefore, he is not entitled for any consequential benefits for the suspension period since 23.09.1970 to 31.08.1998.

17. From the aforesaid conduct of the petitioner, it appears that the petitioner adopted forged methods since very inception of the job. He manipulated the mark-sheet and the certificate of the High School examination and obtained the job on the forged mark-sheet /certificate of the High School examination. He was under obligation to have filed the reply to the charge-sheet, but

instead of filing the reply to the charge-sheet, he submitted his resignation, upon which the department passed the order which was challenged before the Public Services Tribunal. The conduct of forgery did not end there but also continued by filing Writ Petition No. 222 (S/B) of 2004 upon the wrong facts and mentioning wrong Appeal No. 44430 of 1997. The order dated 27.12.2012 has been passed in compliance with the order dated 06.07.2012 passed in Writ-A No. 32253 of 2012, Rupesh Gangwar Vs. State of U.P. and others, in which the petitioner was also opposite party no.5. From the conduct of the petitioner, it appears that he avoided the disciplinary inquiry as well as he willfully did not appear before the competent authority, who issued written information which was served personally upon the petitioner regarding compliance of the order dated 06.07.2012 passed in Writ-A No. 32253 of 2012, Rupesh Gangwar Vs. State of U.P. and others .

18. In the aforesaid circumstances, I am of the opinion that no contempt is made out against the opposite party and have no hesitation to say that the opposite party should have lodged the First Information Report against the petitioner for submitting a false and fabricated High School mark-sheet and certificate and no leniency should have been shown for such a fraudulent person, who has wasted the precious time of the Court as well as of the Public Services Tribunal. Further the opposite party may recover all the payments made to the petitioner consequent to his appointment, as arrears of land revenue.

19. Teaching is a very pious and noble profession and the disciples learn from their "Guru" the lessons of book as well as lessons of life, but when the "Guru" himself is a corrupt person, he destroys the whole of the society and such corrupt teachers also damage the high standards of morality and ethics.

20. When the petitioner was himself was a High School failed candidate and indulged in obtaining the job of teacher by playing fraud, then it can very well be imagined, that what good lessons he could have taught to his students. Certainly, he could have spoiled the career of thousands of students during his job of teacher after reinstatement since 1998 to the date of his retirement in the year 2009. This damage to the society cannot be compensated in terms of money. At the same time demanding consequential benefits of his so called service, goes to show that he has no shame for his misdeeds.

21. Having considered the facts and circumstances of the case, I am of the opinion that this contempt petition is liable to be dismissed.

22. This contempt petition is accordingly **dismissed**.

(2016) 8 ILRA 386
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.08.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 1332 Of 2015

Sunil Kumar @ Jyoti

...Applicant

Versus

State Of U.P

...Opposite Party

Counsel for the Applicant:

Prabhakar Dwivedi, Smt. Vidya Yadav

Counsel for the Opposite Party:

Govt. Advocate

Criminal Law — Bail application — Case Crime No.167 of 2013 — Sections 498-A, 304-B, 302 I.P.C. and 3/4 D.P. Act — Husband of the deceased — Burn injuries — Delay in lodging the F.I.R. — Medical treatment — Inquest proceedings — Period of detention — Unlikelihood of early conclusion of trial — Bail granted

This bail application has been moved seeking the release of applicant on bail in connection with Case Crime No.167 of 2013, u/s 498-A, 304-B, 302 I.P.C. and 3/4 D.P. Act, P.S.-Raipurwa, District Kanpur Nagar. (Para 1)

Submission of counsel for the applicant is that applicant is the husband of the deceased and the incident is said to have taken place on 16.9.2013 in which the deceased received burn injuries and subsequently died on 23.9.2013 as a result thereof. Further submission is that the allegations of demanding the dowry and illtreating the wife are all false and concocted. It has been further submitted that actually the deceased accidentally got burnt and was thereafter immediately rushed to the hospital for providing medical succour to her. Even at the time of incident, the applicant tried to save her and in that process he himself received some burn injuries. Counsel has drawn the attention of the Court to Annexure No.4 which is the paper issued by Regency Hospital, Kanpur after the death in which it has been clearly mentioned that the deceased was brought to the hospital by her husband Sunil Kumar, the applicant. Several papers regarding medical treatment of the deceased have also been annexed as Annexure No.2 starting from Page-22 up till 52 of this application. The attention has also been drawn to Annexure No.3 which contains the medical papers with regard to treatment of applicant himself. It has been further pointed out that the inquest proceedings of the deceased took place on the date of the death i.e. 23.9.2013 itself and amongst the witnesses of inquest proceedings not only the brother of the applicant namely Prakash was one of the witnesses, the first informant, who is mother of the deceased, was also one of the witnesses in the inquest proceedings. Submission is that after the incident, the information about the same was immediately given to the parental side who had soon thereafter arrived and were all the time visiting the hospital. Counsel has also drawn the attention of the Court to Annexure No.7 which contains the photographs of cremation of the deceased in which also it has been pointed out that the husband is very much present. The contention is that after the deceased succumbed to her injuries the dead-body was handed over to the applicant who himself managed the cremation of the deceased and performed her last rites. Argument raised is that it is so significant to note that the F.I.R. of the case was lodged on 28.9.2013. Submission is that had there been any truth in the

allegations of demanding the dowry or committing cruelty upon the deceased then it is wholly incomprehensible as to how and in what circumstances the first informant or any other members of her family still chose not to report the matter earlier and would be waiting for so long. Further submission is that the deceased also did not die on the day of occurrence and battled for life for several days after 15.9.2013 up till 23.9.2013. The next submission is that it is not the case in which the first informant was not having the knowledge about the occurrence or happenings with the deceased. Further contention is that if the background of cruelty and the history of demanding the dowry was existing already then after the deceased got burnt the most natural instinct of the first informant would have been to bring this matter before the police to investigate. Conspicuously enough even when the first informant was herself the witness of inquest proceedings, neither on that date when the police officers were very much present nor till even a few days thereafter she ever reported the matter. It was only on 28.9.2013 that after confabulations and concerts the F.I.R. was lodged which is obviously the result of afterthought with the purpose to blackmail the applicant. Submission is that the post incident conduct of the applicant in carrying the wife to the hospital, incurring huge expenditure with regard to her treatment and performing all the duties as husband even after her death are all circumstances which are compatible with the innocence of the applicant and are wholly inconsistent with his guilt. Further submission is that the extra-ordinary delay in reporting the matter despite the time and opportunity being available is also a very strong circumstance which goes a long way to indicate that subsequently developed story of ill-treating and demanding the dowry is not very credible in nature. Contention is that the final adjudication on the point of guilt or innocence of the accused can be done after proper trial but as of now the aforesaid circumstances create a strong prima facie case for bail in favour of applicant. Much emphasis has been laid by the counsel on the detention period and it has been pointed out that the applicant is languishing in jail since 27.01.2014 virtually without any trial and there is hardly any hope of early conclusion of trial. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required. It has also been pointed out that the applicant is not having any criminal antecedents.(Para 4)

Held: (Paras:-6-7)

1.After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, this Court is of the view that the applicant may be **enlarged on bail.**

2.Let the applicant-Sunil Kumar @ Jyoti, involved in Case Crime No.167 of 2013, u/s 498-A, 304-B, 302 I.P.C. and ¾ D.P. Act, P.S.Raipurwa, District-Kanpur Nagar be released on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions:-

(1)The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2)The applicant will personally appear on each and every date in the court and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice

Case Law discussed:

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. This bail application has been moved seeking the release of applicant on bail in connection with Case Crime No.167 of 2013, u/s 498-A, 304-B, 302 I.P.C. and D.P. Act, P.S.-Raipurwa, District-Kanpur Nagar.

2. Heard learned counsel for the applicant and learned A.G.A.

3. Perused the record.

4. Submission of counsel for the applicant is that applicant is the husband of the deceased and the incident is said to have taken place on 16.9.2013 in which the deceased received burn injuries and subsequently died on 23.9.2013 as a result thereof. Further submission is that the allegations of demanding the dowry and ill-treating the wife are all false and concocted. It has been further submitted that actually the deceased accidentally got burnt and was thereafter immediately rushed to the hospital for providing medical succour to her. Even at the time of incident, the applicant tried to save her and in that process he himself received some burn injuries. Counsel has drawn the attention of the Court to Annexure No.4 which is the paper issued by Regency Hospital, Kanpur after the death in which it has been clearly mentioned that the deceased was brought to the hospital by her husband Sunil Kumar, the applicant. Several papers regarding medical treatment of the deceased have also been annexed as Annexure No.2 starting from Page-22 up till 52 of this application. The attention has also been drawn to Annexure No.3 which contains the medical papers with regard to treatment of applicant himself. It has been further pointed out that the inquest proceedings of the deceased took place on the date of the death i.e. 23.9.2013 itself and amongst the witnesses of inquest proceedings not only the brother of the applicant namely Prakash was one of the witnesses, the first informant, who is mother of the deceased, was also one of the witnesses in the inquest proceedings. Submission is that after the incident, the information about the same was immediately given to the parental side who had soon thereafter arrived and were all the time visiting the hospital. Counsel has also drawn the attention of the Court to Annexure No.7 which contains the photographs of cremation of the deceased in which also it has been pointed out that the husband is very much present. The contention is that after the deceased succumbed to her injuries the dead-body was handed over to the applicant who himself managed the cremation of the deceased and performed her last rites. Argument raised is that it is so significant to note that the F.I.R. of the case was lodged on 28.9.2013. Submission is that had there been any truth in the allegations of demanding the dowry or committing cruelty upon the deceased then it is wholly incomprehensible as to how and in what circumstances the first informant or any other members of her family still chose not to report the matter earlier and would be waiting for so long. Further submission is that the deceased also did not die on the day of occurrence and battled for life for several days after 15.9.2013 up till 23.9.2013. The next submission is that it is not the case in which the first informant was not having the knowledge about the occurrence or happenings with the deceased. Further contention is that if the background of cruelty and the history of demanding the dowry was existing already then after the deceased got burnt the most natural instinct of the first informant would have been to bring this matter before the police to investigate. Conspicuously enough even when the first informant was herself the witness of inquest proceedings, neither on that date when the police officers were very much present nor till even a few days thereafter she ever reported the matter. It was only on 28.9.2013 that after confabulations and concerts the F.I.R. was lodged which is obviously the result of afterthought with the purpose to blackmail the applicant. Submission is that the post incident conduct of

the applicant in carrying the wife to the hospital, incurring huge expenditure with regard to her treatment and performing all the duties as husband even after her death are all circumstances which are compatible with the innocence of the applicant and are wholly inconsistent with his guilt. Further submission is that the extra-ordinary delay in reporting the matter despite the time and opportunity being available is also a very strong circumstance which goes a long way to indicate that subsequently developed story of ill-treating and demanding the dowry is not very credible in nature. Contention is that the final adjudication on the point of guilt or innocence of the accused can be done after proper trial but as of now the aforesaid circumstances create a strong prima facie case for bail in favour of applicant. Much emphasis has been laid by the counsel on the detention period and it has been pointed out that the applicant is languishing in jail since 27.01.2014 virtually without any trial and there is hardly any hope of early conclusion of trial. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required. It has also been pointed out that the applicant is not having any criminal antecedents.

5. Learned A.G.A. has opposed the prayer for bail.

6. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, this Court is of the view that the applicant may be enlarged on bail.

7. Let the applicant-Sunil Kumar @ Jyoti, involved in Case Crime No.167 of 2013, u/s 498-A, 304-B, 302 I.P.C. and D.P. Act, P.S.-Raipurwa, District-Kanpur Nagar be released on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(1) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicant will personally appear on each and every date in the court and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

8. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

9. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merits of the case.

(2016) 8 ILRA 390
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.08.2016

BEFORE

THE HON'BLE MRS. VIJAY LAKSHMI, J.

Criminal Revision No.- 1563 Of 2016
 &
 Criminal Revision No.- 1606 Of 2016

Ashok Kumar

...Revisionist

Versus

State Of U.P. & Ors.

...Opposite Parties

Counsel for the Revisionist:

Ram Kumar Sinha

Counsel for the Opposite Parties:

Govt. Advocate

Criminal law—Criminal Revision — Final Report — Protest petition — Section 190 Cr.P.C. — Section 200 and 202 Cr.P.C. — Chapter XV Cr.P.C. — Cognizance — Evidence on case diary — Statements under Section 161 Cr.P.C. — Injury report — Summoning order — Revisions dismissed.

As both these revisions arise out of the same impugned order dated 29.2.2016 passed by learned Additional Chief Judicial Magistrate, Court No. 3, Etawah in the same Case Crime No. 194 of 2013 under Sections 307, 504 and 506 I.P.C., Police Station Civil Lines, district Etawah on the same Final Report No. 172 of 2013 (Jagvir Singh Vs. Jaswant and others), both are hereby being disposed of by this common order.(Para-1)

The revisionists in both these revisions are the accused persons of the same occurrence, which is said to have taken place on 23.4.2013, when one Lalji, the elder brother of the first informant, was going to some other village to meet his married daughter. At about 7.00 P.M. when he reached near the canal, he was intercepted by the accused persons reaching there on two motorcycles. One motorcycle blocked his way from the front side and the other from the back side. It has been alleged that the accused revisionists Jaswant, Amar Singh and Chet Ram alongwith one unknown person alighted from those motorcycles and surrounded the elder brother of the first informant/opposite party no. 3 from all sides. One of them exhorted with the words "BAHUT PAIRVI KARTA HAI, SAALE KO JAAN SE MAAR DO". On this, accused revisionists Jaswant took out a country made pistol and fired on Lal Ji. The fire hit on the inner side of joint of the left elbow of Lal Ji causing a through and through injury. Thereafter, seeing a car coming on that road, all the accused persons ran away from the spot on their motorcycles. The persons sitting in the car, saw Lal Ji lying on the road in an injured condition, they took him to the hospital and telephoned the police. The FIR of the incident was lodged on the same day, by the younger brother of injured at P.S. Civil Lines, Etawah, which was registered as Case Crime No. 194 of 2013 under Section 307 I.P.C. and investigation proceeded. During investigation the name of unknown accused came to light as Ashok (sole revisionist in CrI. Revision No. 1563 of 2016). However, after investigation, the I.O. submitted Final Report in the matter.(Para-2)

The first informant filed protest petition against the Final Report mentioning in detail about his own statement and statement of his injured elder brother Lal Ji recorded by the I.O. under Section 161 Cr.P.C. Besides it, he also mentioned about the recovery of cycle of Lal Ji from the place of occurrence by the police, the recovery of blood stained clothes of Lal Ji given by him to the police and the recovery memos prepared by the police with regard to aforesaid recoveries. In the protest petition it was alleged by the complainant that the I.O., in connivance with the accused persons, has submitted Final Report, ignoring the aforesaid statements of the witnesses including that of the injured, recorded under Section 161 Cr.P.C. in which he has fully supported the F.I.R. version and without even considering the injury report, corroborating the manner of occurrence, as mentioned in the F.I.R.(Para-3)

Held:(Paras:- 19-21)

1.In Ahibaran Singh's case (supra) also the Magistrate had treated the protest petition as complaint case. Hence it was held by this Court that before passing the summoning order, if the case is such, as triable by the court of sessions, the procedure provided under Section 202 (2) and 204(2) Cr.P.C. has to be complied with.

2.In view of the well settled and clear legal position as discussed above, both these revisions appear to be without any substance and are liable to be dismissed at the admission stage itself.

3.Both the revisions are accordingly **dismissed**.

Case Law discussed:

- 1.Ahibaran Singh Vs. State of Uttar Pradesh, Laws (ALL) 1982-9-29 — para 6
- 2.Kallu Vs. Shahid Ali, 1995 Cr.L.J. 3489 — para 6
- 3.Ghanshyam Singh and others Vs. State & Arun Kumar, 2014 (3) ACR 2380 — paras 6, 17, 18
- 4.Ranjeet Singh & others Vs. State of U.P., 2000 (1) JIC 399 — para 11
- 5.Dharam Pal and others Vs. State of Haryana and another, (2014) 3 SCC 306 — paras 15, 16

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. As both these revisions arise out of the same impugned order dated 29.2.2016 passed by learned Additional Chief Judicial Magistrate, Court No. 3, Etawah in the same Case Crime No. 194 of 2013 under Sections 307, 504 and 506 I.P.C., Police Station Civil Lines, district Etawah on the same Final Report No. 172 of 2013 (Jagvir Singh Vs. Jaswant and others), both are hereby being disposed of by this common order.

2. The revisionists in both these revisions are the accused persons of the same occurrence, which is said to have taken place on 23.4.2013, when one Lalji, the elder brother of the first informant, was going to some other village to meet his married daughter. At about 7.00 P.M. when he reached near the canal, he was intercepted by the accused persons reaching there on two motorcycles. One motorcycle blocked his way from the front side and the other from the back side. It has been alleged that the accused revisionists Jaswant, Amar Singh and Chet Ram alongwith one unknown person alighted from those motorcycles and surrounded the elder brother of the first informant/opposite party no. 3 from all sides. One of them exhorted with the words "BAHUT PAIRVI KARTA HAI, SAALE KO JAAN SE MAAR DO". On this, accused revisionists Jaswant took out a country made pistol and fired on Lal Ji. The fire hit on the inner side of joint of the left elbow of Lal Ji causing a through and through injury. Thereafter, seeing a car coming on that road, all the accused persons ran away from the spot on their motorcycles. The persons sitting in the car,

saw Lal Ji lying on the road in an injured condition, they took him to the hospital and telephoned the police. The FIR of the incident was lodged on the same day, by the younger brother of injured at P.S. Civil Lines, Etawah, which was registered as Case Crime No. 194 of 2013 under Section 307 I.P.C. and investigation proceeded. During investigation the name of unknown accused came to light as Ashok (sole revisionist in Crl. Revision No. 1563 of 2016). However, after investigation, the I.O. submitted Final Report in the matter.

3. The first informant filed protest petition against the Final Report mentioning in detail about his own statement and statement of his injured elder brother Lal Ji recorded by the I.O. under Section 161 Cr.P.C. Besides it, he also mentioned about the recovery of cycle of Lal Ji from the place of occurrence by the police, the recovery of blood stained clothes of Lal Ji given by him to the police and the recovery memos prepared by the police with regard to aforesaid recoveries. In the protest petition it was alleged by the complainant that the I.O., in connivance with the accused persons, has submitted Final Report, ignoring the aforesaid statements of the witnesses including that of the injured, recorded under Section 161 Cr.P.C. in which he has fully supported the F.I.R. version and without even considering the injury report, corroborating the manner of occurrence, as mentioned in the F.I.R.

4. Learned Magistrate after considering all these facts, found that sufficient prima facie evidence was available on the case diary for allowing the protest petition and for summoning the accused persons under Sections 307, 504 and 506 I.P.C. Accordingly, it allowed the protest petition, quashed the final Report No. No. 172 of 2013 dated 3.5.2013 and summoned all the named accused persons vide impugned order with a further direction that the case shall proceed as a State case.

5. The legality and correctness of the aforesaid order passed by the learned Magistrate has been challenged in this revision mainly on the ground that the learned Magistrate, while passing the impugned order dated 29.2.2016, has not adopted the proper procedure required to be followed on a protest petition. Learned counsel for the revisionist has vehemently argued that the learned Magistrate, before issuing summons against the revisionists, was obliged to follow the procedure as laid down in Chapter XV of Cr.P.C. and it was only after recording the statements of the witnesses under Sections 200 and 202 Cr.P.C., that he could have summoned the accused/revisionists. Whereas, in the present case, the learned Magistrate, directly took cognizance on the protest petition and issued the summons without recording the statement of the complainant and the witnesses under Section 200 and 202 Cr.P.C.

6. In support of his contentions learned counsel for the revisionists has placed reliance on some judgments passed by the coordinate benches of this Court in the cases of **Ahibaran Singh Vs. State of Uttar Pradesh; Laws (ALL)-1982-9-29, Kallu Vs. Shahid Ali; 1995 Cr.L.J. 3489 and Ghan Shyam Singh and others Vs. State & Arun Kumar; 2014 (3) ACR 2380.**

7. Learned A.G.A. has opposed the revision, contending that there is no illegality in the impugned summoning order passed by the Magistrate and the learned Magistrate has rightly exercised the jurisdiction vested in him.

8. Considered the rival submissions.

9. The law regarding the issue involved in this revision is well settled.

10. If in any case the final report is submitted by the police, against which protest petition is filed by first informant then magistrate has following three options:-

1-He may accept the final report and drop the proceedings, or

2-He may direct the police for further investigation, or

3-He may summon the accused on further two grounds:-

(A) If he chooses to summon the accused on the basis of evidence collected by the Investigation officer, he may do so directly without any further evidence. or (B) If accused is summoned on the basis of protest petition, relying on extraneous material filed with protest petition, then he has to follow the procedure laid down under chapter XV of Cr. P.C. i.e. to treat the protest petition as complaint and record the evidence u/s 200 and 202 Cr P.C. and cognizance cannot be taken on the basis of extraneous material u/s 190 (1)(b) Cr .P.C, without following the aforesaid procedure."

11. A Full Bench of this court in the case of ***Ranjeet Singh & others Vs. State of U.P. 2000(1) JIC 399***, discussing various case laws has observed that after concluding the investigation, if final report is filed by the police, the three options open before the Magistrate are (1) He may accept the report and drop the proceeding, or (2) He may disagree with the report and take the view that there is sufficient ground for proceeding further, take cognizance of the offence and issue proceeds, or (3) He may direct further investigation to be made by the Police under sub-section (3) of Section 156.

12. **Section 190 of Cr.P.C.** provides for the law relating to cognizance of offence by the Magistrate, according to which the Magistrate may take cognizance of any offence under the following three situations :-

(a) upon receiving a complaint of facts which constitute such offence.

(b) Upon a police report of such facts.

(c) Upon information received from any person other than a police officer of upon his own knowledge, that such offence has been committed.

13. It is only when the Magistrate takes cognizance under section 190 (a) or Section 190 (c) that he is required to follow the procedure prescribed under Chapter XV Cr.P.C. In so far as the cognizance under Section 190 (b) is concerned, if the Magistrate is satisfied that sufficient material is available on case diary to make out a prima facie case against the accused, it can directly issue summons to them as has been done in the instant case.

14. The impugned order of the case in hand clearly shows that learned Magistrate has neither treated the protest petition as a complaint case nor has considered any extraneous material. The learned Magistrate has summoned the accused-revisionists only on the basis of evidence already available on case diary, collected by the I.O. during investigation viz. the statements of first informant and his injured brother recorded under Section 161 Cr.P.C., the recovery memo of blood stained clothes and cycle prepared by the police and the injury report of the victim. Relying on the aforesaid evidence and expressing its view that only due to the reason that some witnesses have not supported the prosecution case during their interrogation by I.O. under Section 161 Cr.P.C., the submission of Final Report by the I.O. does not appear to be justifiable, the learned Magistrate allowed the protest petition, quashed the Final Report and summoned the accused revisionists directly taking cognizance on such protest petition, further directing that the case to proceed as State case.

15. The same issue has been considered by the Constitution Bench of 5 Judges of Hon'ble Apex Court in the land mark case of **Dharam Pal and others Vs. State of Haryana and another; 2014 (3) SCC 306**. In this case the Apex Court framed 6 questions for consideration and question no. 3, which is reproduced below, involved the same issue :-

"Q III- Having decided to issue summons against the Appellants, was the Magistrate required to follow the procedure of a complaint case and to take evidence before committing them to the Court of Session to stand trial or whether he was justified in issuing summons against them without following such procedure?"

16. Answering the abovesaid question in para 25 of the judgment, the Hon'ble Apex Court held as under :-

"25. This brings us to the third question as to the procedure to be followed by the Magistrate if he was satisfied that a prima facie case had been made out to go to trial despite the final report submitted by the police. In such an event, if the Magistrate decided to proceed against the persons accused, he would have to proceed on the basis of the police report itself and either inquire into the matter or commit it to the Court of Session if the same was found to be triable by the Session Court."

17. The judgment rendered by a coordinate bench of this Court in **Ghanshyam Singh's** case (supra) on which learned counsel has placed heavy reliance, is of no use to him, because the facts are entirely different. In **Ghanshyam Singh's** case during pendency of the Final Report the informant had filed his own affidavit and also the affidavits of 3 more persons before the

Magistrate in support of the allegations made in the F.I.R. and the learned Magistrate had taken into consideration those affidavits too, while taking cognizance.

18. Para 6 of the judgment in **Ghanshyam Singh's** case clearly shows that in that case the cognizance was taken by the Magistrate under Section 190 (1)(c) i.e. after considering the extraneous materials filed before him, during pendency of Protest petition. Under this situation, the revision was allowed by the coordinate Bench of this Court.

19. In **Ahibaran Singh's** case (supra) also the Magistrate had treated the protest petition as complaint case. Hence it was held by this Court that before passing the summoning order, if the case is such, as triable by the court of sessions, the procedure provided under Section 202 (2) and 204(2) Cr.P.C. has to be complied with.

20. In view of the well settled and clear legal position as discussed above, both these revisions appear to be without any substance and are liable to be dismissed at the admission stage itself.

21. Both the revisions are accordingly dismissed.

(2016) 8 ILRA 396
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.08.2016

BEFORE

THE HON'BLE AJAI LAMBA, J.
THE HON'BLE RAVINDRA NATH MISHRA-II, J.

Misc. Bench No.- 20500 Of 2016

Narendra Kumar
State Of U.P. & Ors.

...Petitioner
Versus
...Respondents

Counsel for the Petitioner:
Vijay Kumar Pandey

Counsel for the Respondents:
Govt. Advocate

Constitutional law—Writ petition — Certiorari — Quashing First Information Report — Sections 419, 420, 467, 468 and 471 I.P.C. — Survey Lekhpal — Tampering in revenue record — Manipulation — Forging — Correction of record — Section 33 and Section 39 Revenue Act — Civil/revenue/criminal proceedings — Cognizable offence — Criminal proceedings cannot be quashed — Petition dismissed.

This petition seeks issuance of a writ in the nature of Certiorari quashing First Information Report bearing Case Crime No. 0264 of 2015, under Sections 419, 420, 467, 468 & 471 I.P.C., Police Station Safipur, District Unnao.(Para 1)

Allegation against the petitioner in the impugned F.I.R., in brief, is that the petitioner is serving as Survey Lekhpal, prepared record through manipulation, tampering and forging, which does not depict the actual fact. (Para 2)

In the contention of learned counsel for the petitioner, the issue of wrong entries in the revenue record was brought before this Court. This Court issued certain directions. In compliance of the directions, the private respondents filed application under Section 33 read with section 39 of the Revenue Act for correction of record. The adjudicating authority/Sub Divisional Magistrate, Safipur, District Unnao vide order dated 30.7.2015 found tampering in the record and consequently impugned criminal proceedings have been initiated.(Para 3)

Held: (8-10,12)

1.We have taken note of fact that criminal proceedings have been initiated by Sub Divisional Magistrate, Safipur, District Unnao, who in fact found tampering in the record. A person, particularly a public servant/public authority is required to report commission of cognizable offence in case an incident/transaction indicates commission of such an offence.

2.The principle laid down in the above extracted portion of judgement rendered in Smapurna Nand Tiwari's case (supra) shall apply to the case of the petitioner also. Criminal proceedings, in peculiar facts and

circumstances of the case, cannot be quashed in writ jurisdiction only because revision petition is pending in regard to the issue involved. The adjudicating authority viz. the Sub Divisional Magistrate, Safipur, District Unnao has already recorded a finding with reasons that revenue record has been interpolated. In these circumstances, initiation of criminal proceedings is surely warranted.

3. We are also of the considered opinion that this Court while issuing direction on the petition of the private respondents specifically provided that ".....In case any tampering has been done in the Revenue record, then it shall be incumbent to the competent authority to lodge F.I.R.....". Under the circumstances, the initiation of criminal proceedings is not illegal, as such an eventuality was envisaged by this Court while dealing with the claim of the relevant parties. The petition is **dismissed**.

Case Law discussed:

1. Smapurna Nand Tiwari Vs. State of U.P. and others — para 7
2. Iqbal Singh Marwah and another Vs. Meenakshi Marwah and another, (2005) 4 SCC 370 — paras 7, 11, 12
3. M.S. Sheriff Vs. State of Madras and others, AIR 1954 SC 397 — para 11

(Delivered by Hon'ble Ajai Lamba, J.
&
Hon'ble Ravindra Nath Mishra-II, J.)

1. This petition seeks issuance of a writ in the nature of Certiorari quashing First Information Report bearing Case Crime No. 0264 of 2015, under Sections 419, 420, 467, 468 & 471 I.P.C., Police Station Safipur, District Unnao.

2. Allegation against the petitioner in the impugned F.I.R., in brief, is that the petitioner is serving as Survey Lekhpal, prepared record through manipulation, tampering and forging, which does not depict the actual fact.

3. In the contention of learned counsel for the petitioner, the issue of wrong entries in the revenue record was brought before this Court. This Court issued certain directions. In compliance of the directions, the private respondents filed application under Section 33 read with section 39 of the Revenue Act for correction of record. The adjudicating authority/Sub Divisional Magistrate, Safipur, District Unnao vide order dated 30.7.2015 found tampering in the record and consequently impugned criminal proceedings have been initiated.

4. It has been pleaded on behalf of the petitioner that the issue of correction in revenue record has not attained finality and is pending adjudication before the revisional court. In such circumstances, criminal proceedings could not have been initiated against the petitioner. Impugned F.I.R. is liable to be quashed because criminal proceedings and proceedings on the revenue side cannot co-exist.

5. We have considered the contention of learned counsel for the petitioner in context of facts and circumstances of the case. This Court issued directions in the following terms:

"..... Revenue record, on the ground of alleged tampering in favour of private respondent. Option is open to the petitioner under Section 33 read with Section 39 of Revenue Act for correction of record. In case application is moved, the appropriate authority has ample power to find out whether any tampering has been done. In case any tampering has been done in the Revenue record, then it shall be incumbent to the competent authority to lodge F.I.R. and proceed against the person who are responsible for tampering in the Revenue record and correct and record accordingly. In case such application is moved, the competent authority shall proceed accordingly expeditiously. Since we have not entered into the merit of the controversy, issuance of notice to private respondent is dispensed with.

Subject to above, the writ petition is finally disposed of. "

6. It is evident that the issue of wrong entries in the Revenue Record has been adjudicated by the authorities on the revenue side. Vide order dated 30.7.2015, a specific finding has been recorded that the record has been manipulated/tampered with/forged and new persons have been entered as lessee in the record.

7. Civil/revenue/criminal proceedings can continue in regard to common incident/transaction, if the facts and circumstances so warrant. This aspect has been considered by this Court, while relying on a judgement of Hon'ble Supreme Court of India in judgement dated 6.10.2015 rendered in Writ Petition No. 9279 (MB) of 2015: **Smapurna Nand Tiwari Vs. State of U.P. and others**. Paras 11 to 15 of the said judgement read as under:

"11. The issue whether simultaneous civil and criminal proceedings can continue in regard to a common incident/ transaction, has been considered by the Hon'ble Supreme Court of India in (2005) 4 SCC 370 : **Iqbal Singh Marwah and another Vs. Meenakshi Marwah and another (5 JJ)**, Paragraph 32 of the said judgement reads as under :-

"32.Coming to the last contention that an effort should be made to avoid conflict of findings between the civil and criminal Courts, it is necessary to point out that the standard of proof required in the two proceedings are entirely different. Civil cases are decided on the basis of preponderance of evidence while in a criminal case the entire burden lies on the prosecution and proof beyond reasonable doubt has to be given. There is neither any statutory provision nor any legal principle that the findings recorded in one proceeding may be treated as final or binding in the other, as both the cases have to be decided on the basis of the evidence adduced therein. While examining a similar contention in an appeal against an order directing filing of a complaint under Section 476 of the old Code, the following observations made by a Constitution Bench in **M.S. Sheriff vs. The State of Madras and others** give a complete answer to the problem posed [AIR 1954 SC 397] (AIR p. 399, paras 15-16) :

"(15) As between the civil and the criminal proceedings we are of the opinion that the criminal matters should be given precedence. There is some difference of opinion in the High Courts of India on this point. No hard and fast rule can be laid down but we do not consider

that the possibility of conflicting decisions in the civil and criminal Courts is a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one Court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment.

(16) Another factor which weighs with us is that a civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust.

This, however, is not a hard and fast rule. Special considerations obtaining in any particular case might make some other course more expedient and just. For example, the civil case or the other criminal proceeding may be so near its end as to make it inexpedient to stay it in order to give precedence to a prosecution ordered under Section 476. But in this case we are of the view that the civil suits should be stayed till the criminal proceedings have finished."

(Emphasis supplied by us)

12. From the above extracted portion of the judgement rendered in Iqbal Singh Marwah's case(supra), it becomes evident that the standard of proof required in civil proceedings and criminal proceedings is entirely different. Civil cases are decided on the basis of preponderance of evidence while in a criminal case, the entire burden of proving that offence has been committed lies on the prosecution, and proof beyond reasonable doubt is required to be shown to the court. Because both the cases have to be decided on the basis of the evidence adduced in each of the cases, findings recorded in one proceeding cannot be treated as final or binding on the other.

13. It has further been elucidated by the Hon'ble Supreme Court of India that criminal matter should be given precedence. Civil litigation often drags on for long time whereas it is undesirable that a criminal prosecution should wait. It has been suggested that in case criminal prosecution is stayed, evidence is likely to be lost or destroyed. Public interest demands that the criminal justice should be swift and sure ; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with fair and impartial trial. It has further been said that this however, is not a hard and fast rule. Special circumstances might require a different course of action. In given circumstances, it might be expedient to stay a particular proceeding.

14. Applying the above noted principle of law to the facts of this case, we find that at the time of consideration of facts and circumstances of the matter being adjudicated, the Lokpal

found interpolation of record and commission of certain cognizable offence. Under the circumstances, it has been observed by the Lokpal that criminal proceedings be initiated.

15. In the considered opinion of this court, in case a matter is being taken up by a public authority/ public servant, and in the course of proceedings, facts and circumstances prima facie indicate commission of cognizable offence, ordinarily, it is desirable for such authority to issue appropriate directions to initiate criminal proceedings. "

8. We have taken note of fact that criminal proceedings have been initiated by Sub Divisional Magistrate, Safipur, District Unnao, who in fact found tampering in the record. A person, particularly a public servant/public authority is required to report commission of cognizable offence in case an incident/transaction indicates commission of such an offence.

9. The principle laid down in the above extracted portion of judgement rendered in Smapurna Nand Tiwari's case (supra) shall apply to the case of the petitioner also. Criminal proceedings, in peculiar facts and circumstances of the case, cannot be quashed in writ jurisdiction only because revision petition is pending in regard to the issue involved. The adjudicating authority viz. the Sub Divisional Magistrate, Safipur, District Unnao has already recorded a finding with reasons that revenue record has been interpolated. In these circumstances, initiation of criminal proceedings is surely warranted.

10. We are also of the considered opinion that this Court while issuing direction on the petition of the private respondents specifically provided that ".....In case any tampering has been done in the Revenue record, then it shall be incumbent to the competent authority to lodge F.I.R.....". Under the circumstances, the initiation of criminal proceedings is not illegal, as such an eventuality was envisaged by this Court while dealing with the claim of the relevant parties.

11. Consequently, we find no ground to interfere in extraordinary writ jurisdiction.

12. The petition is dismissed.

(2016) 8 ILRA 401
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.08.2016

BEFORE

THE HON'BLE DILIP B. BHOSALE, CHIEF JUSTICE
THE HON'BLE RAJAN ROY, J.

Misc. Bench No.- 20528 Of 2016

Jagdish Narayan Shukla

...Petitioner

Versus

State Of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

J.N. Shukla (In Person)

Counsel for the Respondents:

C.S.C, A.S.G., Rishad Murtaza

Constitutional law —Public interest litigation — Writ petition — Mandamus — Transfer of Chief Secretary — Allegations based on newspaper reports — CBI enquiry — Central Vigilance Commission — Serious allegations — Non-joinder of necessary party — Habitual litigant — Frivolous petitions — Baseless and reckless allegations — Abuse of process — Petition dismissed with costs

This petition, in the nature of public interest, filed by an Editor of Nishpaksh Pratidin Daily Newspaper, seeks the following reliefs:

"(i) issue a writ, order or direction in the nature of

Mandamus commanding the opposite parties to post Mr. Singhal to some other post and to appoint an able person with reputation and integrity for the post of Chief Secretary of the State.

(ii) issue a writ, order or direction in the nature of Mandamus directing respondents No.3, 4 and 5 to take into consideration the companies as mentioned as aforesaid which are running by the relatives of the present Chief Secretary and to investigate in detail and if found to be bogus and inoperative, to proceed prosecution against them as per law." (Para 2)

From bare perusal of the prayers, it is clear that the petitioner seeks reliefs against Mr. Singhal, Chief Secretary of the State Government, making serious allegations against him, without adding him as a party-respondent in the writ petition.

(Para

3)

Held: (13-15)

1.At this stage, we would also like to reproduce the following observations made by this Court in Misc. Bench No. 8216 of 2016, Hindu Personal Law Board, through Ashok Pande vs. Union of India, through Cabinet Secretary, Government of India & Ors., decided on 19.4.2016:

"It has become necessary for the Court to issue this direction in the exercise of its writ jurisdiction under Article 226 of the Constitution to ensure that valuable time of the Court is not wasted in thoroughly frivolous cases which have no bearing on matters of public interest. Habitual litigants are increasingly flooding the Courts with frivolous petitions. PILs are filed to cover almost every topic under the sun. Many of them are

exercises for garnering publicity. Some are intended to stall public projects, often at the behest of a competitor. This tends to destroy the sanctity of PILs as a powerful instrument of securing socio-economic justice to the marginalised and underprivileged. The time of the Court is exhausted in dealing with frivolous cases with no genuine cause of public concern. This pernicious tendency has to be firmly stopped by providing orders for anticipatory costs.

This is a means of securing an eventual award of costs in the case of a habitual litigant who, as here, has a track record of misconceived filings. Unless this is done, the Court would become a helpless spectator to the loss of public time and resources in dealing with motivated litigation. When lakhs of cases await judicial decision - including those of undertrials and convicts languishing in jail for years - the Court cannot allow the institution of administering justice to become a hapless victim of frivolous filings. Parliament, or the State legislature, may have to step in to legislate on the malady of vexatious litigation. That is a legislative function. In the meantime, realistic costs must be deployed if the process of the Court is to be protected against litigious exploitation."

2.The petitioner, in the present case, has so far, we are informed, filed more than fifty PILs in this Court. Yesterday also, we dismissed one of the PILs filed by him. While making submissions and responding to our queries, we find him noncooperative, adamant and contentious.

3.In view of above, and having considered that the petitioner has not made Mr. Singhal as a party to the petition and has made serious and baseless allegations against him, we **dismiss** this writ petition with costs quantified at Rs.25,000/-, which shall be payable to the U.P. State Legal Services Authority.

Case Law discussed:

1.Center for Public Interest Litigation and another Vs. Union of India and another — para 7

2.Hindu Personal Law Board through Ashok Pande Vs. Union of India and others — para 13

(Delivered by Hon'ble Dilip B. Bhosale, Chief Justice
&
Hon'ble Rajan Roy, J.)

1. Heard Mr. Jagdish Narayan Shukla, petitioner-in-person and learned Advocate General with Smt. Bulbul Godiyal, learned Additional Advocate General for the State-respondents.

2. This petition, in the nature of public interest, filed by an Editor of Nishpaksh Pratidin Daily Newspaper, seeks the following reliefs:

"(i) issue a writ, order or direction in the nature of Mandamus commanding the opposite parties to post Mr. Singhal to some other post and to appoint an able person with reputation and integrity for the post of Chief Secretary of the State.

(ii) issue a writ, order or direction in the nature of Mandamus directing respondents No.3, 4 and 5 to take into consideration the companies as mentioned as aforesaid which are running by the relatives of the present Chief Secretary and to investigate in detail and if found to be bogus and inoperative, to proceed prosecution against them as per law."

3. From bare perusal of the prayers, it is clear that the petitioner seeks reliefs against Mr. Singhal, Chief Secretary of the State Government, making serious allegations against him, without adding him as a party-respondent in the writ petition.

4. We have heard the petitioner-in-person. He submitted that a CBI enquiry, ordered by Central Vigilance Commission (for short "CVC") is pending against Mr. Singhal and in view thereof, the State Government ought not to have appointed him as the Chief Secretary. He further submitted that the State Government should transfer him to some other post and appoint an able person with reputation and integrity as Chief Secretary of the State. Insofar as the second prayer is concerned, he did not make any submission.

5. We have perused the writ petition. In paragraph 12 of the writ petition and ground C thereof, the petitioner has made the following averments:

"12. That when Mr. Singhal was working as Joint Secretary with respondent No.3- Government of India in the Ministry of Fertilizer in the year 2010 a Chief Vigilance Commission's inquiry was ordered against him for his controversial orders to import fertilizers. Later the probe was handed over to the Central Bureau of Investigation which is still in existence and the inquiry is pending and it is due to that reason that he was returned back to this home cadre prematurely. The matter has been reported in the Times of India on 17th August, 2016, the true copy of the same is being annexed herewith as **Annexure No.1** to this petition."

C. Because there are various grave charges of irregularities and corrupt practices against Mr. Deepak Singhal in discharge of his official duties as is evident from various news paper reporting in which several inquiries by C.B.I. or C.V.C. are going on. As such, there are probabilities to a great extent for him to manipulate and tamper with the evidences sitting on key posts and, hence, the petitioner has grave apprehension in the present case also."

6. Perusal of paragraph 12 shows that the allegations are based on newspaper reports. The petitioner has also placed on record a newspaper cutting of his own newspaper in support of the allegations apart from other newspaper reports.

7. The petitioner, in support, has placed heavy reliance upon the judgment of the Supreme Court in **Center for Public Interest Litigation and Anr. vs. Union of India and Anr.**, Writ Petition (Civil) 387 of 2005, decided on 6.10.2005. He invited our attention to the following paragraphs of the said judgment:

"We do not think it necessary to delve into the question of maintainability of the writ petition as the same, as noted at the threshold appears to be an offshoot of the earlier petition.

A time has come when the postings of officers holding sensitive posts should be done in transparent manner giving no scope for any grievance. It is true that grievances can be made or allegations can be levelled for ulterior motive or with the intention of damaging the

reputation of an officer who is likely to be appointed in a sensitive post, very often at the behest of persons angling for the post. In the peculiar background facts it was really desirable for the State Government to steer clear of controversy and not to post respondent No.3 as the Chief Secretary. By doing it, it has unnecessarily created further complications and invited criticism. We, therefore, direct the State Government to transfer the respondent No.3 to some other post in the cadre/grade to which she belonged. The question of her suitability to be included in the cadre/grade, shall be examined in the writ petition itself. For the present, we do not express any opinion on that issue. The necessary steps for effectuating our order shall be taken within seven days. We make it clear that we have not expressed any opinion on the merits of the allegations as the matter is pending before the High Court and Justice Thomas Commission."

8. Advocate General, on the other hand, on instructions, submitted that no enquiry of whatsoever nature is pending against Mr. Singhal with the CBI either independently or at the instance of CVC. In other words, he submitted that the CBI is not investigating any allegation or crime or conducting any enquiry against Mr. Singhal either independently or at the instance of CVC. He also placed on record a copy of the letter issued by CVC dated 21.1.2015 stating that there is nothing adverse on records of the Commission in respect of Shri Deepak Singhal, IAS (UP:82). Further the Advocate General placed on record a list of about 55 petitions/PILs filed by the petitioner in person to contend that he is habitual litigant, known for making absolutely baseless, reckless and scandalous allegations against everybody, like Mr. Singhal. He also invited our attention to one of the orders passed by a Division Bench on 19.4.2011 in Misc. Bench No. 4188 of 2010 filed by the petitioner in person wherein it is observed that "the petitioner, who appears in person, does not even have the courtesy and decency to address the Court properly or maintain its decorum." Our experience is not different. Further observations made by the Division Bench in the said case are also worthy and noticeable, which reads thus:

"The petitioner, who appears in person, does not even have the courtesy and decency to address the Court properly or maintain its decorum. The Court queried of him whether he has filed any complaint under the provisions of Rule 4(6) of the U.P. Employment Guarantee Grievance Redressal Mechanism Rules, 2009, which provides that any citizen of India including the petitioner herein or any registered non-government institution may make complaints, if there is any misappropriation of funds through fake Muster Roll or in other words if the funds are misappropriated, can file complaint. The Court could have appreciated, if the petitioner had filed complaint and no action has been taken by the respondent authorities, then this Court could have intervened to protect the large public interest and public revenue. The Court can even take cognizance of the matter without there being a complaint, if the matter is of such momentous importance that the exercise of jurisdiction under Article 226 and 227 of the Constitution is necessary.

We find that in the instant case the petitioner has failed to discharge his duties as he has not filed any complaint under the provisions of existing Rules. We make it clear that if the petitioner herein approaches the Court in any other matter and does not behave in the Court, as an individual should, it will be open to the Court to consider debarring him from appearing in person.

In the light of that, we are not inclined to interfere in the matter in extraordinary writ jurisdiction."

9. In another writ petition bearing Misc. Bench No. 1278 of 2016 filed by the petitioner in person, the Division Bench, while dismissing the said writ petition vide order dated 22.1.2016 observed that "We decline to entertain the petition since we are not satisfied in regard to the bona fides and credentials of the petitioner."

10. One more Division Bench made severe observation against the petitioner in person in Writ Petition No. 552 (M/B) of 2015, while disposing of the said writ petition by order dated 23.2.2015. It is not out of place to mention that the petitioner had filed a writ petition bearing Misc. Bench No. 6615 of 2014 seeking similar relief against an Engineer-in-Chief of New Okhla Industrial Development Authority relying upon the same decision as aforesaid and the said writ petition was dismissed by a Coordinate Bench of this Court with the observation that the relief claimed essentially related to service matters in respect of which a Public Interest Litigation does not lie and also that the decision relied upon, as aforesaid, was distinguishable on facts, as in the said case a chargesheet had been filed against the Chief Secretary, State of U.P. before the Special C.B.I. Court.

11. The Advocate General also placed several such orders on record. He then invited our attention to one more order dated 24.8.2016 passed in Misc. Bench No. 19827 of 2016 filed by one Tripuresh Tripathi against Sri Deepak Singhal. That writ petition also came to be dismissed. In that petition, the petitioner Tripathi had challenge the appointment of Mr. Singhal contending that it was not in accordance with Rule 7 of the Indian Administrative Services Cadre Rules, 1954. It would be appropriate to reproduce the following observations made in the order dated 24.8.2016, which read thus:

"Sri Onkar Pandey holding brief of petitioner's counsel has prayed for an adjournment. We are not inclined to adjourn such an issue allegedly involving public interest in a service matter and we find that the petition has been filed in a cavalier fashion trying to draw similes from rules which are not relevant. Even otherwise there is no substance in the allegation with regard to the rules as the Chief Secretary has to be appointed by the State Government.

The petition appears to have been filed only with a view to keep something pending without any substance in it and therefore the request of adjournment is neither bona fide nor are we of the opinion that it should be adjourned. This attitude of getting such petitions filed and keep them pending consumes the valuable time of the Court and, therefore, the request of adjournment is declined."

12. In this backdrop, we perused the judgment relied upon by the petitioner in person. In our opinion, the observations made in the said judgment, in particular, the paragraph quoted above, are of no avail to the petitioner. It is clear from perusal of the said judgment that CBI had filed

charge sheet against the then Chief Secretary of the State after obtaining sanction from the Central Government.

13. At this stage, we would also like to reproduce the following observations made by this Court in Misc. Bench No. 8216 of 2016, **Hindu Personal Law Board, through Ashok Pande vs. Union of India, through Cabinet Secretary, Government of India & Ors.**, decided on 19.4.2016:

"It has become necessary for the Court to issue this direction in the exercise of its writ jurisdiction under Article 226 of the Constitution to ensure that valuable time of the Court is not wasted in thoroughly frivolous cases which have no bearing on matters of public interest. Habitual litigants are increasingly flooding the Courts with frivolous petitions. PILs are filed to cover almost every topic under the sun. Many of them are exercises for garnering publicity. Some are intended to stall public projects, often at the behest of a competitor. This tends to destroy the sanctity of PILs as a powerful instrument of securing socio-economic justice to the marginalised and underprivileged. The time of the Court is exhausted in dealing with frivolous cases with no genuine cause of public concern. This pernicious tendency has to be firmly stopped by providing orders for anticipatory costs. This is a means of securing an eventual award of costs in the case of a habitual litigant who, as here, has a track record of misconceived filings. Unless this is done, the Court would become a helpless spectator to the loss of public time and resources in dealing with motivated litigation. When lakhs of cases await judicial decision - including those of undertrials and convicts languishing in jail for years - the Court cannot allow the institution of administering justice to become a hapless victim of frivolous filings. Parliament, or the State legislature, may have to step in to legislate on the malady of vexatious litigation. That is a legislative function. In the meantime, realistic costs must be deployed if the process of the Court is to be protected against litigious exploitation."

14. The petitioner, in the present case, has so far, we are informed, filed more than fifty PILs in this Court. Yesterday also, we dismissed one of the PILs filed by him. While making submissions and responding to our queries, we find him non-cooperative, adamant and contentious.

15. In view of above, and having considered that the petitioner has not made Mr. Singhal as a party to the petition and has made serious and baseless allegations against him, we dismiss this writ petition with costs quantified at Rs.25,000/-, which shall be payable to the U.P. State Legal Services Authority.

(2016) 8 ILRA 407
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.08.2016

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Sales/Trade Tax Revision No.- 941 Of 2005
&
Sales/Trade Tax Revision No.- 942 Of 2005

M/S D.C. Food Products

...Applicant

Versus

Commissioner Of Trade Tax, U.P. Lucknow

...Opposite Party

Counsel for the Applicant:

S.D. Singh, Harshvardhan Gupta

Counsel for the Opposite Party:

C.S.C.

Central Sales Tax Act, 1956 – Section 14 (vi) (i) – “groundnut” – roasted groundnuts – declared goods – circular dated 20 July 1979 – Commissioner Trade Tax U.P. – roasted groundnuts covered under entry “groundnut” – benefit of Section 14 – circular dated 24 May 2004 – annulled earlier circular – unclassified commodity – Law Department – Gopuram Gram Mill Company v. State of Andhra Pradesh – Milak Brothers v. Union of India – Usha Martin – Paper Products – Ratan Melting – 1979 circular continued to hold the field – 2004 circular – prospective operation – transactions prior to 24 May 2004.

While the revision raises the question as to whether roasted groundnuts stand covered under the entry “groundnut” as used in clause (vi) (i) of section 14 of the Central Sales Tax Act, 1956 [1956 Act] the sole issue upon which submissions have been advanced center and revolve around a circular dated 20 July 1979 [1979 Circular] issued by the Commissioner Trade Tax U.P. which had purported to hold that roasted groundnuts would stand covered under the aforementioned entry. The dispute arises as a consequence of a subsequent circular dated 24 May 2004 [2004 Circular] which proceeded to annul the earlier circular.(Para 3)

Held: (Paras 14,19-25)

1.Now it needs to be borne in mind that no judgment of this Court or for that matter the Supreme Court directly deals/dealt with the issue of whether roasted groundnut would be liable to be treated as falling within the ambit of the entry ‘groundnut’ as used in clause (vi) (i) of section 14. Milak, it becomes relevant to note, was a judgment rendered with reference to the Customs Tariff Act, 1975 and was not really dealing with section 14 of the 1956 Act. While the interpretation accorded to groundnut in the said judgment may be said to veer around or tend to support the submission of the revisionist, the Court would be justified in treading with caution before applying a judgment which has come to be rendered with reference to the provisions of another statute. This more so when the Court finds that the Customs Tariff Act 1975 did not employ the words “that is to say”. Similarly Gopuram while dealing with the provisions of the 1956 Act, was construing “gram” and whether parched or fried gram would stand covered. Of course Gopuram does stress upon and underline the significance of the phrase “that is to say” in section 14 and holds that no expansive meaning can

be accorded to commodities which stand mentioned therein. Therefore it would be safe to say that there is no authoritative pronouncement on the issue as to whether roasted groundnut would stand covered under clause (vi) (i) of section 14. The 1979 circular in unequivocal terms held out that roasted groundnuts would be liable to be considered as falling within the ambit of clause (vi) (i). The 2004 circular represented an authoritative yet paradigm shift from what was permitted to hold the field for decades namely, the 1979 circular. The 2004 circular, it may be noted, did not rest itself upon a declaration of the law that roasted groundnut would not be covered. It was based upon the opinion of the Law Department of the State which in turn rested upon the interpretation to section 14 as accorded to it by the Supreme Court in *Gopuram*. This Court, it must be noted, is not called upon to test the correctness of the opinion expressed therein nor must it be understood to have ruled upon its validity. All that the Court is called upon to consider and answer essentially is whether the 2004 circular would have the effect of effacing the benefits derived by the revisionist from and under the 1979 circular.

2. What is discernible from the law as declared by the Supreme Court is that circulars issued by departmental authorities in exercise of statutory powers is clearly binding on them though not on courts or tribunals. They have been rightly described as representing the views and understanding of the department of the statutory provisions. They continue to hold the field till the view expressed and embodied therein is overruled or eclipsed by an authoritative pronouncement of the High Court or the Supreme Court. Once a precedent comes to be handed down and entered which enunciates the law on the point at variance with what the circular purported to hold, the circular must necessarily give way. At such a juncture a party cannot contend that the circular would continue to operate even though it may run contrary to a binding verdict or declaration of law by a High Court or the Supreme Court. The primary purpose as noted by the Supreme Court in holding the department to the views taken and expressed in such circulars is to ensure a uniform practice and to enable the trade to arrange its business accordingly.

3. If the above principles as enunciated by the Supreme Court are borne in mind it is clear and apparent that the revisionist was justified in proceeding to arrange its affairs in accordance with the 1979 circular. The 1979 circular was issued by the Commissioner of Trade Tax U.P. who was duly empowered in terms of rule 4 of the U.P. Trade Tax Rules, 1948. This circular was clearly binding upon the other subordinate authorities working under and administering the 1948 Act. In any view of the matter the revisionist could not have been held liable to pay additional tax and denied the benefits flowing from section 14. Its actions were based entirely upon the 1979 circular which continued to hold the field till 24 May 2004 when the second circular came to be issued. All transactions prior to 24 May 2004 were therefore liable to be treated in accordance with the provisions of the 1979 circular.

4. That then takes us to the issue of whether the 2004 circular had the effect of impacting transactions which had already been subjected to tax prior thereto. To this the answer must obviously be in the negative.

5. As noted above, the 1979 circular continued to hold the field for decades. The 2004 circular represented a considered and definitive shift in the stand and understanding of the department on the subject. It represented a paradigm change of position and thought. The said circular was neither explanatory in character nor was it an instrument to clear conflicting views and opinions. The letter dated 3 March 2001 addressed by the Assistant Commissioner (Law), Trade Tax, U.P., it becomes worthy of note, was merely a communication of the Assistant Commissioner (Law). It was not a circular issued by the Commissioner of Trade Tax in exercise of statutory powers. It did not have the effect of overriding or rescinding the 1979 circular. The 2004 circular can be rightly described as an outcome of a revisit and a reconsideration of the vexed issue of taxability of roasted groundnut and whether it was liable to be treated as an unclassified item. However the moment one arrives at the conclusion that the 2004 circular was merely an outcome of an exercise of "revisit" and "reconsideration" and not an expression of opinion based upon an authoritative pronouncement of law by a competent court, it must be treated as having prospective operation.

6. While arriving at the above conclusions, the Court has also weighed in consideration the flux in the legal position and the fact that the issue of taxability of roasted groundnut as an unclassified item was/is an issue not free from debate and question. In such a situation as the Supreme Court held in Usha Martin benefit of doubt must be given to the assessee and that opinion which is in its favor must be given effect to.

7. One last submission of Sri B.K. Pandey which needs to be noticed and considered is his contention that the 2004 circular declared the 1979 circular as void and a nullity and therefore the views expressed therein would be deemed to have never operated. With respect, this Court is unable to countenance the said submission. The Commissioner Trade Tax U.P. it needs to be noted is not a court. The power to declare the law is vested in and with a court. The power to issue a declaration of nullity does not inhere in the Commissioner. The submission itself is based upon principles, applicable to the issue of decrees and declarations by courts. The 2004 circular therefore did not have the effect of effacing the 1979 circular with retrospective effect.

8. In light of the above, this Court holds that question no. 2 must be answered in favor of the revisionist and it be held that prior to the promulgation of the 2004 circular the 1979 circular held the field and all transactions in roasted groundnuts as entered into by the assessee be subjected to tax in accordance therewith.

Case Law discussed:

1. Gopuram Gram Mill Company v. State of Andhra Pradesh, (1994) 95 STC 358— paras 5,10,13, 14
2. Milak Brothers v. Union of India, 1991 Supp (1) SCC 71 — paras 7, 8, 10, 14
3. Collector of Central Excise, Patna v. Usha Martin Industries, (1997) 7 SCC 47 — paras 9, 16, 23
4. Paper Products Ltd. v. Commissioner of Central Excise, (1999) 7 SCC 84 — paras 9, 17
5. State of Karnataka v. Sri Lakshmi Coconut Industries, (1997) 11 SCC 621 — para 9
6. KBB Nuts Pvt. Ltd. v. Commissioner of Value Added Tax, ST. Appl. No. 5/2014 (Delhi High Court, decided on 28 March 2014) — para 9
7. Commissioner of Central Excise, Bolpur v. Ratan Melting & Wire Industries, 2008 NTN (Vol. 38) 206 — paras 11, 18
8. Kalyani Packaging Industry v. Union of India, (2004) 6 SCC 719 — para 18

(Delivered by Hon'ble Yashwant Varma, J.)

1. Heard Sri S.D. Singh, learned Senior Counsel for the revisionist and Sri B.K. Pandey, learned standing counsel for the respondent.

2. These revisions raise the following questions of law:

“A. Whether roasted groundnuts are declared goods under Section 14 (vi) (i) of the Central Sales Tax, 1956?

B. Whether in view of the circular dated 20.07.1979 issued by the Commissioner of Trade Tax, U.P Lucknow groundnuts could be taxed as an unclassified commodity prior to 23.05.04?”

3. While the revision raises the question as to whether roasted groundnuts stand covered under the entry “groundnut” as used in clause (vi) (i) of section 14 of the Central Sales Tax Act, 1956 [1956 Act] the sole issue upon which submissions have been advanced center and revolve around a circular dated 20 July 1979 [1979 Circular] issued by the Commissioner Trade Tax U.P.

which had purported to hold that roasted groundnuts would stand covered under the aforementioned entry. The dispute arises as a consequence of a subsequent circular dated 24 May 2004 [2004 Circular] which proceeded to annul the earlier circular.

4. In terms of the 1979 Circular, the Commissioner, Trade Tax U.P. clarified that roasted groundnuts were liable to be treated as comprised in clause (vi) (i) of Section 14 of the 1956 Act. The entry under clause (vi) and with which we are concerned reads thus:

“(vi) Oilseeds, that is say. –

(i) Groundnut or Peanut (*Arachis hypogaea*);”

From the submission of the learned counsel for the revisionist, it transpires that based upon the aforesaid circular, the revisionist assessee treated roasted groundnut manufactured by it as being covered by the aforesaid entry and therefore entitled to the benefits flowing from Section 14 of the 1956 Act. This position is stated to have continued till the 2004 circular came to be issued by the Commissioner, Trade Tax. The relevant part of the said

circular reads as follows:

“ वषय :- रोस्टेड ग्राउण्ड नट सीड्स पर व्यापार कर देयता के सम्बन्ध में।

कृपया इस कार्यालय के परिपत्र संख्या- व ध-1-(1) ओ-2-(79-80)-1041/मुख्यालय दिनांक 20-7-1979 का सन्दर्भ ग्रहण करें जिसके द्वारा कच्ची मूँगफली पर कर अदा कये जाने के पश्चात उसको भूँकर पुनः बेचने पर करदेयता के सम्बन्ध में यह सूचित किया गया था कि केन्द्रीय बिक्रीकर अधिनियम की धारा-14 के खण्ड-6 के उपखण्ड-1 के अनुसार मूँगफली चाहे वह कच्ची हो या भुनी हुई, तिलहन ही मानी जायेगी। इसके उपरान्त इस कार्यालय के पत्र संख्या- व ध-1(1) ओ-2-(98-99) 2298/व्यापार कर दिनांक 3-3-2001 के द्वारा इसे अवर्गीकृत वस्तु की भाँति करयोग्य माना गया था। उक्त वस्तु की करदेयता के सम्बन्ध में परिपत्र संख्या- व ध -1-(1) ओ-2-(79-80)-1041/मुख्यालय दिनांक 20-7-1979 व पत्र संख्या- व ध-1-(1) ओ-2-(98-99)-2298/मुख्यालय दिनांक 03-03-2001 के कारण भुनी हुई मूँगफली की करदेयता के सम्बन्ध में ववाद उत्पन्न हो गया था। इस ववाद को समाप्त करने हेतु प्रकरण शासन को पुनः सन्दर्भित किया गया था।

शासन द्वारा न्याय विभाग से परामर्श के उपरान्त अपने पत्र संख्या-क0नि0-2-680/11-2004-9(62)/2001 दिनांक 21-4-2004 से सूचित किया है :-

“ क प्रकरण में न्याय विभाग का अभमत प्राप्त किया गया। न्याय विभाग द्वारा माननीय उच्चतम न्यायालय द्वारा प्रतिपादित व ध व्यवस्था के अवलोकनोपरान्त यह अभमत व्यक्त किया गया है कि तले भुने मूँगफली के दाने, कच्ची मूँगफली के दानों से भन्न वस्तु है। अतः इसे अवर्गीकृत वस्तु की श्रेणी में रखे जाने में कोई व धक कठिनाई प्रतीत नहीं हो रही है।” सन्दर्भित निर्णय सर्वश्री गोपुरम ग्राम मल कम्पनी बनाम स्टेट ऑफ आन्ध्र प्रदेश के वाद में माननीय सर्वोच्च न्यायालय की तीन सदस्यीय पीठ द्वारा दिनांक 23-8-1994 (1995 STC-358) को पारित

निर्णय है। उपरोक्त के परिप्रेक्ष्य में मुख्यालय का परिपत्र संख्या- व ध 1-1(1)-ओ-2(79-80)-1041/मुख्यालय दिनांक 20-7-79 निष्प्रभावी समझा जायेगा।

(दीपक संघल)

क मशनर व्यापार कर, उत्तर प्रदेश।

5. As a perusal of the 2004 Circular would show and establish, the opinion of the Law Department of the State Government is stated to have been obtained to clarify as to whether roasted groundnut would stand covered by the entry “groundnut” as used in clause (vi) (i) of Section 14. This reference to the Law Department itself is stated to have been occasioned on account of a conflict between the circular dated 1979 circular and the letter dated 3 March 2001 addressed by the Assistant Commissioner (Law), Trade Tax, U.P. The Law Department basing its opinion on a judgment rendered by the Supreme Court in **Gopuram Gram Mill Company and another Vs. State of Andhra Pradesh** [1994 (95) STC 358] held that groundnut as specified in clause (vi) (i) of Section 14 would not encompass roasted groundnut. Accepting the said opinion as submitted by the Law Department, the Commissioner clarified accordingly and passed directions annulling the earlier circular dated 20 July 1979.

6. It becomes relevant to note here that the present revisions themselves relate to the Assessment Years 1998-99 and 1999-2000 and in respect of which assessment orders were passed on 20 March 2001 and 29 August 2001. The first appellate authority affirmed these orders by a common order dated 7 February 2002 and the Tribunal by its judgment dated 3 June 2005. The dates noted above would show that the assessee was assessed to tax and denied the benefits of section 14 prior to the issuance of the 2004 circular.

7. Sri S.D. Singh has advanced the following submissions:

A. The 1979 circular of the Commissioner continued to hold the field till it was overridden on 24 May 2004. He submits that therefore the assessee was liable to the benefit of the said circular and that the assessing authority as well as the first appellate authority had clearly committed an illegality in proceeding to hold that roasted groundnuts were not liable to be accorded the benefit of Section 14 of the 1956 Act.

B. The 1979 circular issued by the Commissioner, Trade Tax was to the benefit of the assessee and it was based upon the same that the assessee structured its business dealings. The subsequent 2004 circular cannot retroactively take away a benefit which stood conferred upon the assessee.

C. Tax under the U.P. Trade Tax Act 1948 [1948 Act], is an indirect impost, which a selling dealer is entitled to pass on to a purchaser. In the transactions effected during the course of the two assessment years in question, the tax liability which was passed onto the purchaser was

based upon the understanding that the 1979 circular applied. Accordingly it was submitted that no retrospective liability could have been imposed upon the revisionist.

D. The issue of whether roasted groundnuts stood covered by the entry “groundnut” as employed in clause (vi) (i) of Section 14 viewed in the absence of circular of the 20 July 1979 was a contentious issue or at least one which was/is open to debate. He refers what the Supreme Court held in **Milak Brothers Vs. Union of India**[1991 Supp (1) SCC 71]. It was urged that **Milak** was considering the question as to whether groundnut which had undergone a roasting and salting process would lose its identity as groundnut. It was submitted that the Supreme Court had held that it was possible to envisage two different commercial commodities falling under the same entry of Section 14. In such a situation the Supreme Court held that there was no reason why the entry should be restricted to only one of them.

8. He submitted that the subsequent decision rendered by three Judges of the Supreme Court in **Gopuram** did not notice **Milak** and even otherwise was not dealing with the issue of a commodity in its roasted or finished form and was therefore clearly distinguishable.

9. The essence of the submission being that in case of a state of doubt with respect to the taxability of an item, the circular issued by the Commissioner was liable to prevail and benefits accorded to the assessee. He has in support of his submissions above, relied upon the following judgments:

1. **Collector of Central Excise Patna Vs. Usha Martin Industries** [(1997) 7 SCC 47]

2. **Paper Products Ltd Vs. Commissioner of Central Excise** [(1999) 7 SCC 84]

3. **State of Karnataka and another Sri Lakshmi Coconut Industries** [(1997) 11 SCC 621]

4. **M/s. KBB Nuts Pvt Ltd Vs. Commissioner of Value Added Tax**. [ST. Appl.5/2014 dated 28 March 2014 [Delhi High Court]

10. Sri B.K. Pandey per contra, made the following submissions:

A. The 2004 circular of the Commissioner had in express term annulled the 1979 circular. This recital in the 2004 circular would have to be construed as if the 1979 circular never existed or held the field.

B. Even prior to the issuance of the 2004 circular, a doubt had been expressed with respect to the taxability of roasted groundnut and the Additional Commissioner (Law), Trade Tax, U.P had expressed the opinion that roasted groundnut would not stand covered under the entry of groundnut as provisioned for in clause (vi) (i) of Section 14 of the 1956 Act.

C. No question of retrospectivity applies inasmuch as the judgment of the Supreme Court in **Gopuram** is liable to be treated as declaratory. He submits that not only was **Gopuram** rendered by a larger Bench of the Supreme Court than which decided **Milak**, the law as enunciated therein would always deemed to have operated.

D. This Court should not and cannot grant primacy to the 1979 circular over and above what the Supreme Court held in **Gopuram**.

11. Sri Pandey in support of his submissions above, relied upon the judgment of the Supreme Court in **Commissioner of Central Excise, Bolpur Vs. M/s. Ratan Melting & Wire Industries**[2008 NTN (Vol.38) - 206]

12. It is these rival submissions, which now fall for consideration.

13. Clause (vi) of Section 14 of the 1956 Act refers to various categories of oil seeds. The description of the commodity and various commodities which are then classified as falling within the same genre are prefaced by the words “*that is to say*”. It is trite to note that in **Gopuram**, three learned Judges of the Supreme Court have noticed and held that the usage of the phrase ‘*that is to say*’ indicates the intent of the legislature to make clear or fix the meaning of what is sought to be explained or defined. Their Lordships held that the phrase ‘*that is to say*’ indicates an exhaustive enumeration and therefore consequently the benefit of Section 14 must be limited to the goods expressly mentioned therein.

14. Now it needs to be borne in mind that no judgment of this Court or for that matter the Supreme Court directly deals/dealt with the issue of whether roasted groundnut would be liable to be treated as falling within the ambit of the entry ‘groundnut’ as used in clause (vi) (i) of section 14. **Milak**, it becomes relevant to note, was a judgment rendered with reference to the Customs Tariff Act, 1975 and was not really dealing with section 14 of the 1956 Act. While the interpretation accorded to groundnut in the said judgment may be said to veer around or tend to support the submission of the revisionist, the Court would be justified in treading with caution before applying a judgment which has come to be rendered with reference to the provisions of another statute. This more so when the Court finds that the Customs Tariff Act 1975 did not employ the words “that is to say”. Similarly **Gopuram** while dealing with the provisions of the 1956 Act, was construing “gram” and whether parched or fried gram would stand covered. Of course **Gopuram** does stress upon and underline the significance of the phrase “that is to say” in section 14 and holds that no expansive meaning can be accorded to commodities which stand mentioned therein. Therefore it would be safe to say that there is no authoritative pronouncement on the issue as to whether roasted groundnut would stand covered under clause (vi) (i) of section 14. The 1979 circular in unequivocal terms held out that roasted groundnuts would be liable to be considered as falling within the ambit of clause (vi) (i). The 2004 circular represented an authoritative yet paradigm shift from what was permitted to hold the field for decades namely, the 1979 circular. The 2004 circular, it may be noted, did not rest itself upon a declaration of the law that roasted groundnut would not be covered. It was based upon the opinion of the Law Department

of the State which in turn rested upon the interpretation to section 14 as accorded to it by the Supreme Court in *Gopuram*. This Court, it must be noted, is not called upon to test the correctness of the opinion expressed therein nor must it be understood to have ruled upon its validity. All that the Court is called upon to consider and answer essentially is whether the 2004 circular would have the effect of effacing the benefits derived by the revisionist from and under the 1979 circular.

15. Now the effect of departmental circulars issued under taxing statutes is a subject that is no longer *res integra*.

16. In *Usha Martin* the law on the subject was enunciated in the following terms:

“6. There is no doubt that as per the above notification if any amount of duty has been paid on the raw material, the output product would escape from excise duty. The doubt arose was regarding the expression in the notification i.e. "on which the appropriate amount of duty of excise has already been paid" as to whether it is capable of two interpretations, one as claimed by the assessee and the other as put forth by the revenue".

19. No doubt the court has to interpret statutory provisions and notifications thereunder as they are with emphasis to the intention of the legislature. But when the Board made all others to understand a notification in a particular manner and when the latter have acted accordingly, is it open to the Revenue to turn against such persons on a premise contrary to such instructions?

21. Through a catena of decisions this Court has pronounced that Revenue cannot be permitted to take a stand contrary to the instructions issued by the Board. It is a different matter that an assessee can contest the validity or legality of a departmental instruction. But that right cannot be conceded to the department, more so when others have acted according to such instructions, [vide Collector of Central Excise. *Bombay vs. Collector of Central Excise* [1996(88) ELT 638], *Ranadey Micronutrients vs. collector of Central Excise* [1996(87) ELT 19], *Poulose and Mathen vs. collector of central Excise* [1997(90) ELT 264], *British Machinery Supplies Co. vs. Union of India* [1996(86) ELT 449]. Of course the appellate authority is also not bound by the interpretation given by the Board but the assessing officer cannot take a view contrary to the Board's interpretation.

22. We may observe particularly that a special aspect highlighted by the Bench in *Poulose and Mathen vs. Collector of Central Excise* [1997(90) ELT 264] is apposite for fastening the revenue with binding force as regards the instructions issued, while constructing a notification which was not free from doubt, Learned judges in that decision have observed thus: "One aspect deserves to be noticed in this context. The earlier tariff advice no. 83/81 on the basis of which trade notice No. 222/81 was issued by the Collector of Central Excise and Customs is binding on the department. It should be given effect to . There is no material on record to show that this has been rescinded or departed from, and even so, to what extent. Even assuming that the later tariff advice No.6/85 has taken a different view about which there is no positive material the facts point out that

the concerned department itself was having considerable doubts about the matter. The position was not free from doubt. It was far from clear. In such a case, where two opinions are possible, the assessee should be given the benefit of doubt and that opinion which is in its favour should be given effect to. In the light of the above, it is unnecessary to adjudicate the other points involved in the appeal on the merits." (emphasis supplied)

17. Declaring the law in similar terms in **Paper Products** the Supreme Court held:

"4. The question for our consideration in these appeals is: what is the true nature and effect of the Circulars issued by the Board in exercise of its power under Section 37B of the Central Excise Act, 1944? This question is no more res integra in view of the various judgments of this Court. This Court in a catena of decisions has held that the Circulars issued under Section 37B of the said Act are binding on the Department and the Department cannot be permitted to take a stand contrary to the instructions issued by the Board. These judgments have also held that the position may be different with regard to an assessee who can contest the validity or legality of such instructions but so far as the Department is concerned, such right is not available. [See Collector of Central Excise, Patna v. Usha Martin Industries (1997 7 SCC 47)]. In the case of Ranadey Micronutrients v. Collector of Central Excise (1996 (87) ELT 19), this Court held that the whole objective of such Circulars is to adopt a uniform practice and to inform the trade as to how a particular product will be treated for the purposes of excise duty. The Court also held that it does not lie in the mouth of the Revenue to repudiate a Circular issued by the Board on the basis that it is inconsistent with a statutory provision. (emphasis supplied). Consistency and discipline are, according to this Court, of far greater importance than the winning or losing of court proceedings. In the case of Collector of Central Excise, Bombay v. Jayant Dalal Pvt. Ltd. (1997 10 SCC 402), this Court has held that it is not open to the Revenue to advance an argument or even file an appeal against the correctness of the binding nature of the Circulars issued by the Board. Similar is the view taken by this Court in the case of Collector of Central Excise, Bombay v. Kores [India] Ltd. (1997 10 SCC 338).

6. As stated above, it is an admitted fact that by virtue of Circular No.4/85 dated 23.7.1986 as clarified by Circular dated 7.8.1987, all the three products of the appellant are to be treated as the products of the printing industry and not that of the packaging industry. A change in the said view of the Board occurred for the first time by virtue of its Circular No.6/89 dated 16.1.1989. Further, the Board itself by its subsequent Circular No.29/89 dated 5.5.1989 has made it abundantly clear that the change notified in Circular No.6/89 will be prospective from the date of issuance of Circular No.6/89, that is, from 16.1.1989. Therefore, it is clear that till the issuance of Circular No.6/89 which is dated 16.1.1989 the products of the appellant, by virtue of the two Circulars dated 23.7.1986 and 7.8.1987, have to be classified under Chapter 49 of the Act as being products of the printing industry eligible for exemption of duty under Notification Nos.122/75 and 234/82 as applicable at the relevant time. The impugned show cause notices and consequent demand being ab initio bad inasmuch as the same was contrary to the existing Circulars of the Board, the same cannot be sustained." (emphasis supplied)

18. A Constitution Bench in *Ratan Melting* summarized the law in the following words

“2. It was noted by the threeJudge Bench that the effect of the aforesaid observations was noted in several decisions. [In Kalyani Packaging Industry v. Union of India and Anr.](#) (2004 (6) SCC 719), it was noted as follows:

"We have noticed that para 9 (para 11 in SCC) of Dhiren Chemical case (2004 (6) SCC 722) is being misunderstood. It, therefore, becomes necessary to clarify para 9 (para 11 in SCC) of Dhiren Chemical case (2004 (6) SCC 722). One of us (Variava, J.) was a party to the judgment of Dhiren Chemical case and knows what was the intention in incorporating para 9 (para 11 in SCC). It must be remembered that law laid down by this Court is law of the land. The law so laid down is binding on all courts/tribunals and bodies. It is clear that circulars of the Board cannot prevail over the law laid down by this Court. However, it was pointed out that during hearing of Dhiren Chemical case because of the circulars of the Board in many cases the Department had granted benefits of exemption notifications. It was submitted that on the interpretation now given by this Court in Dhiren Chemical case the Revenue was likely to reopen cases. Thus para 9 (para 11 in SCC) was incorporated to ensure that in cases where benefits of exemption notification had already been granted, the Revenue would remain bound. The purpose was to see that such cases were not reopened. However, this did not mean that even in cases where the Revenue/Department had already contended that the benefit of an exemption notification was not available, and the matter was sub judice before a court or a tribunal, the court or tribunal would also give effect to circulars of the Board in preference to a decision of the Constitution Bench of this Court. Where as a result of dispute the matter is sub judice, a court/tribunal is, after Dhiren Chemical case, bound to interpret as set out in that judgment. To hold otherwise and to interpret in the manner suggested would mean that courts/tribunals have to ignore a judgment of this Court and follow circulars of the Board. That was not what was meant by para 9 of Dhiren Chemical case."

“5. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.”

19. What is discernible from the law as declared by the Supreme Court is that circulars issued by departmental authorities in exercise of statutory powers is clearly binding on them though not on courts or tribunals. They have been rightly described as representing the views and understanding of the department of the statutory provisions. They continue to hold the field till the view expressed and embodied therein is overruled or eclipsed by an authoritative pronouncement of the High Court or the Supreme Court. Once a precedent comes to be handed down and entered

which enunciates the law on the point at variance with what the circular purported to hold, the circular must necessarily give way. At such a juncture a party cannot contend that the circular would continue to operate even though it may run contrary to a binding verdict or declaration of law by a High Court or the Supreme Court. The primary purpose as noted by the Supreme Court in holding the department to the views taken and expressed in such circulars is to ensure a uniform practice and to enable the trade to arrange its business accordingly.

20. If the above principles as enunciated by the Supreme Court are borne in mind it is clear and apparent that the revisionist was justified in proceeding to arrange its affairs in accordance with the 1979 circular. The 1979 circular was issued by the Commissioner of Trade Tax U.P. who was duly empowered in terms of rule 4 of the U.P. Trade Tax Rules, 1948. This circular was clearly binding upon the other subordinate authorities working under and administering the 1948 Act. In any view of the matter the revisionist could not have been held liable to pay additional tax and denied the benefits flowing from section 14. Its actions were based entirely upon the 1979 circular which continued to hold the field till 24 May 2004 when the second circular came to be issued. All transactions prior to 24 May 2004 were therefore liable to be treated in accordance with the provisions of the 1979 circular.

21. That then takes us to the issue of whether the 2004 circular had the effect of impacting transactions which had already been subjected to tax prior thereto. To this the answer must obviously be in the negative.

22. As noted above, the 1979 circular continued to hold the field for decades. The 2004 circular represented a considered and definitive shift in the stand and understanding of the department on the subject. It represented a paradigm change of position and thought. The said circular was neither explanatory in character nor was it an instrument to clear conflicting views and opinions. The letter dated 3 March 2001 addressed by the Assistant Commissioner (Law), Trade Tax, U.P. it becomes worthy of note, was merely a communication of the Assistant Commissioner (Law). It was not a circular issued by the Commissioner of Trade Tax in exercise of statutory powers. It did not have the effect of overriding or rescinding the 1979 circular. The 2004 circular can be rightly described as an outcome of a revisit and a reconsideration of the vexed issue of taxability of roasted groundnut and whether it was liable to be treated as an unclassified item. However the moment one arrives at the conclusion that the 2004 circular was merely an outcome of an exercise of “revisit” and “reconsideration” and not an expression of opinion based upon an authoritative pronouncement of law by a competent court, it must be treated as having prospective operation.

23. While arriving at the above conclusions, the Court has also weighed in consideration the flux in the legal position and the fact that the issue of taxability of roasted groundnut as an unclassified item was/is an issue not free from debate and question. In such a situation as the Supreme Court held in **Usha Martin** benefit of doubt must be given to the assessee and that opinion which is in its favor must be given effect to.

24. One last submission of Sri B.K. Pandey which needs to be noticed and considered is his contention that the 2004 circular declared the 1979 circular as void and a nullity and therefore the views expressed therein would be deemed to have never operated. With respect, this Court is unable to countenance the said submission. The Commissioner Trade Tax U.P. it needs to be noted is not a court. The power to declare the law is vested in and with a court. The power to issue a declaration of nullity does not inhere in the Commissioner. The submission itself is based upon principles, applicable to the issue of decrees and declarations by courts. The 2004 circular therefore did not have the effect of effacing the 1979 circular with retrospective effect.

25. In light of the above, this Court holds that question no. 2 must be answered in favor of the revisionist and it be held that prior to the promulgation of the 2004 circular the 1979 circular held the field and all transactions in roasted groundnuts as entered into by the assessee be subjected to tax in accordance therewith.

(2016) 8 ILRA 419
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2016

BEFORE

THE HON'BLE PANKAJ MITHAL, J.

SCC Revision No.- 279 Of 2016

M/S Bon Ton Plastics Pvt. Ltd. Delhi ...Revisionist
Versus
Sri Ramesh Chawla & Anr. ...Opposite Parties

Counsel for the Revisionist:
Vijay Praksah

Counsel for the Opposite Parties:
Ranjit Saxena

Revision — Section 25 Provincial Small Causes Court Act, 1887 — SCC Suit — Eviction — Arrears of rent — Written statement — Order 8 Rule 1 C.P.C. — Filing of written statement — Thirty days — Ninety days — Extension of time — Directory in nature — Exceptional and rare cases — Discretion of Court — Application rejected — Revision dismissed.

The order dated 31.5.2016 passed by the Additional District Judge in exercise of power as Judge, Small Cause Court, rejecting the application of the defendant-revisionist (paper No.33-Ga) for taking on record its written statement is subject of this revision u/s 25 of the Provincial Small Causes Court Act, 1887.(Para 2)

It appears that the plaintiff-respondents filed SCC Suit No.75 of 2013 for eviction of the defendant-revisionist on the ground of arrears of rent after determining its tenancy. The defendant-revisionist in the said suit had put in its appearance on 20.11.2013. The defendant-revisionist on 24.7.2015 filed an application under Order 7 Rule 11 C.P.C. for rejection of the plaint. The said application was rejected vide order dated 18.1.2016.(Para 3)

Held:(Para:-20,21,25,26)

1.Accordingly, in my opinion the provisions of Order 8 Rule 1 are directory in nature and the extended time limit of 90 days provided therein for filing written statement can further be extended at the discretion of the Court for reasons to be recorded in exceptional and rare cases but not in a routine manner.

2.In view of the above, the court below has the discretion to extend or not to extend the time for filing written statement beyond 90 days provided sufficient cause is shown justifying extension of time

3.In view of the aforesaid facts and circumstances, if the Court of first instance has exercised its discretionary power and has rejected the application paper No.33-Ga of the defendant-revisionist by refusing to accept the written statement filed by the defendant-revisionist, the said discretion is not liable to be disturbed in exercise of revisional jurisdiction.

4.Accordingly, I find no merit in this revision and the same is **dismissed** with costs upon the parties

Case Law discussed:

- 1.Kailash Vs. Nanhku and others, (2005) 4 SCC 480 — para 14
- 2.Dr. J.J. Merchant and others Vs. Shrinath Chaturvedi, (2002) 6 SCC 635 — paras 15, 16
- 3.New India Assurance Co. Ltd. Vs. Hilli Multipurpose Cold Storage Pvt. Ltd., AIR 2016 SC 86 — paras 16, 17, 19
- 4.Salem Advocates Bar Association, Tamil Nadu Vs. Union of India, AIR 2005 SC 3353 — paras 18, 19

(Delivered by Hon'ble Pankaj Mithal, J.)

1. Heard Sri Vijay Prakash, learned counsel for the defendant-revisionist and Sri Ranjit Saxena, learned counsel appearing for the plaintiff-respondents.

2. The order dated 31.5.2016 passed by the Additional District Judge in exercise of power as Judge, Small Cause Court, rejecting the application of the defendant-revisionist (paper No.33-Ga) for taking on record its written statement is subject of this revision u/s 25 of the Provincial Small Causes Court Act, 1887.

3. It appears that the plaintiff-respondents filed SCC Suit No.75 of 2013 for eviction of the defendant-revisionist on the ground of arrears of rent after determining its tenancy. The defendant-revisionist in the said suit had put in its appearance on 20.11.2013. The defendant-revisionist on 24.7.2015 filed an application under Order 7 Rule 11 C.P.C. for rejection of the plaint. The said application was rejected vide order dated 18.1.2016.

4. The defendant revisionist after rejection of the above application filed an application on 17.2.2016 to allow time to challenge the above order before the High Court. The application was allowed and the order was challenged in SCC Revision No.75 of 2016 which is pending.

5. Thereafter the defendant-revisionist on 24.2.2016 filed an application seeking time to file written statement and the Court permitted time for filing written statement in accordance with the provisions of C.P.C. subject to payment of costs of Rs.1000/-.

6. The defendant-revisionist thereafter on 4.3.2016 submitted application paper No.33-Ga enclosing written statement seeking permission to file it.

7. The aforesaid application has been rejected by the impugned order as Order 8 Rule 1 C.P.C. permits only 30 days time for filing written statement from the date of appearance which can be extended by the Court to a maximum of 90 days.

8. Admittedly, the defendant-revisionist had not filed the written statement within the above period of 30 days or the extended period of 90 days but much later for which the Court found no justification.

9. The submission of Sri Vijay Prakash, learned counsel for the defendant-revisionist is that the provisions of Order 8 Rule 1 C.P.C. are not mandatory but directory in nature. The time

provided therein for filing written statement can be extended even beyond 90 days for sufficient reasons. Since the defendant-revisionist bonafidely, on legal advise was pursuing its application under Order 7 Rule 11 C.P.C. the time spent thereon was liable to be excluded under Section 14 of the Limitation Act. The Court below therefore, ought to have accepted the written statement by extending time beyond 90 days of its appearance in the case.

10. Sri Ranjit Saxena on the other hand, contends that the object of the defendant-revisionist was to delay the disposal of the suit by filing unnecessary applications. No valid reason existed for extending the time for filing written statement beyond the period of 90 days stipulated under Order 8 Rule 1 C.P.C.

11. Order 8 Rule 1 C.P.C. makes provisions for the filing of written statement, set-off and counter claim. Rule 1 of Order 8 C.P.C. as amended, provides that the defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence. The proviso to it lays down that where the written statement is not filed within a period of thirty days, he shall be allowed to file it for reasons to be recorded and on payment of such costs as the court deems fit but not beyond 90 days from the date of service of summons.

12. In other words, the aforesaid provision mandates for filing of written statement within 30 days of service of summons upon the defendant which period can be extended for reasons to be recorded to a maximum period of 90 days from the date of service of summons.

13. The use of the word 'shall' therein prima facie makes the provision mandatory in the nature but as sometimes the use of the word 'shall' is taken to mean 'may' a controversy arose about the nature of the said provision.

14. The above provision came up for consideration before the three Judges Bench in the case of **Kailash Vs. Nanhku and others (2005) 4 SCC 480** and their Lordships of the Supreme Court ruled that the aforesaid provision is not mandatory but directory in nature and that the Court may extend the time for filing of written statement even though the time referred in the aforesaid provision of 30 days and 90 days have expired.

15. On the other hand, a co-ordinate Bench of three Judges in **Dr. J.J. Merchant and others Vs. Shrinath Chaturvedi (2002) 6 SCC 635** while dealing with the similar and identical provision of Section 13(2)(a) of the Consumer Protection Act, 1986 which lays down time period of 30 days + 15 days = 45 days for filing defence in consumer complaint cases on consideration of the case of **Kailash (supra)** held that in no case the period of 45 days can be extended for filing defence in the complaint case.

16. It is in view of the above two decisions that when a similar matter relating to time limit for filing of defence version came up for consideration in **New India Assurance Co. Ltd. Vs. Hilli Multipurpose Cold Storage Pvt. Ltd. AIR 2016 SC 86**, the Apex Court finally approved the view taken in **Dr. J.J. Merchant (supra)** and observed that the Co-ordinate Bench in **Kailash (supra)**

was bound by the view taken in **Dr. J.J. Merchant (supra)** and ought to have followed it with respect.

17. The three Judges Bench in **New India Assurance Co. Ltd. (supra)** despite agreeing with the view taken in **Dr. J.J. Merchant (supra)** and ignoring that of **Kailash (supra)** fell short of either over-ruling or holding that the view expressed in **Kailash (supra)** is per incurium or is not in accordance with law. Thus, the view taken in **Kailash (supra)** as regards the nature of the provision of Order 8 Rule 1 C.P.C. and extension of time beyond 90 days in filing the written statement was not over-ruled.

18. In **New India Assurance Co. Ltd. (supra)** the Supreme Court in observing as aforesaid had not taken note of another three Judges decision in the case of **Salem Advocates Bar Association, Tamil Nadu Vs. Union of India 2005 AIR 2005 SC 3353**. In the aforesaid case the Bench dealt with the provisions of Order 8 Rule 1 C.P.C. in extenso and held that as the aforesaid provision or as a matter of fact the entire C.P.C. is procedural in nature, the provision of Order 8 Rule 1 despite use of word 'shall' cannot be held to be mandatory in nature and is rather directory in nature. The aforesaid provision do not place any restriction from granting additional time after the expiry of 90 days stipulated therein for the purposes of filing written statement. Thus, the time for filing written statement can be extended even beyond the time limit of 90 days fixed therein in exceptional and hard cases but not as a matter of routine and the said discretion cannot be utilized by the Court frequently and in a routine way so as to nullify the existence of Rule 1 of Order 8 C.P.C.

19. A complete reading of the entire case law on the subject and considering the provisions of Order 8 Rule 1 C.P.C., it is clear that the view expressed in **New India Assurance Co. Ltd. (supra)** and **Dr. J.J. Merchant (supra)** are confined to cases arising out and under the provisions of Consumer Protection Act, 1986 and the dictum of law laid down therein cannot be applied to proceedings governed by the procedure laid down under C.P.C. The suits governed by the procedure established by the C.P.C. have to abide by the ratio decidendi of **Salem Advocates Bar Association (supra)** and that of **Kailash (supra)** in so far as they directly express the view in relation to Order 8 Rule 1 C.P.C.

20. Accordingly, in my opinion the provisions of Order 8 Rule 1 are directory in nature and the extended time limit of 90 days provided therein for filing written statement can further be extended at the discretion of the Court for reasons to be recorded in exceptional and rare cases but not in a routine manner.

21. In view of the above, the court below has the discretion to extend or not to extend the time for filing written statement beyond 90 days provided sufficient cause is shown justifying extension of time.

22. There is no dispute that the defendant-revisionist had put in appearance in the suit on 2.11.2013. They filed written statement vide application paper No.33-Ga dated 4.3.2016 i.e. after about two and half years of appearance which is obviously after service of summons.

23. The defendant-revisionist had filed application under Order 7 Rule 11 C.P.C. on 24.7.2015 and the same was rejected on 18.1.2016. The explanation that the defendant-revisionist could not file the written statement on account of pendency of the above application is completely irrelevant and not material. The period of 30 days for filing written statement as well as the extended period of 90 days had expired much before the application under Order 7 Rule 11 was filed. There is no explanation or material on record to justify the non-filing of the written statement by the defendant-revisionist within the above period. Therefore, the defendant-revisionist even if entitle to exclusion of time spent in pursuing the application under Order 7 Rule 11 C.P.C. has miserably failed to submit any explanation or justification for not filing the written statement within 90 days of its appearance which had expired before the filing of application under Order 7 Rule 11 C.P.C.

24. Moreover, the filing of the aforesaid application under Order 7 Rule 11 C.P.C. in no way had stopped the defendant-revisionist from filing the written statement. The said application was rejected on 18.1.2016 but the written statement was presented in the Court on 4.3.2016 and in the meantime the defendant-revisionist had moved two applications seeking time to move to the High Court and for filing written statement. The manner and conduct in which the defendant-revisionist handled the suit and took time for filing of written statement speaks for itself that the intention was to prolong the matter rather to contest it on merit and git it concluded. These facts do not justify to make out an exceptional and rare case fit for extending time for filing written statement beyond the period of 90 days.

25. In view of the aforesaid facts and circumstances, if the Court of first instance has exercised its discretionary power and has rejected the application paper No.33-Ga of the defendant-revisionist by refusing to accept the written statement filed by the defendant-revisionist, the said discretion is not liable to be disturbed in exercise of revisional jurisdiction.

26. Accordingly, I find no merit in this revision and the same is dismissed with costs upon the parties.

(2016) 8 ILRA 424
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.08.2016

BEFORE

THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Service Single No.- 1619 Of 2012

Brij Kishore

...Petitioner

Versus

State Of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Jitendra Singh

Counsel for the Respondents:

C.S.C, B.P. Singh, N.C Mehrotra, Seema Singh

Writ petition — Article 226 Constitution — Date of birth — Service record — School leaving certificate — Medical examination report — U.P. Recruitment to Services (Determination of Date of Birth) Rules, 1974 — Rule 2 — Complaint by brother — Retirement from service — Recovery of salary — Breach of natural justice — Document not supplied — No departmental enquiry — Impugned order quashed — No recovery

The brief reference to the factual aspect would suffice. The petitioner was initially engaged on the post of Waterman on 08.02.1980 on casual basis. He was regularized on the said post on 01.01.1988. A show cause notice was issued to the petitioner on 23.11.2011 on the basis of a complaint made by his brother dated 01.06.2010 wherein it was alleged that the petitioner's date of birth in the school leaving certificate was recorded as 02.01.1945. It was alleged that he was a student of Primary School, Nawabganj Sandi, Hardoi and according to the records of the said institution, his date of birth was 02.01.1945. Copy of the show cause notice is on record as Annexure-7 to the writ petition. (Para 2)

The petitioner has submitted his reply to the said show cause notice on 26.11.2011 denying all the allegations made therein. It has been contended on his behalf that the petitioner at the time of his appointment, was sent for medical examination and on the basis of the age mentioned in the medical examination report, his date of birth was recorded in his service record as 02.01.1954. He has stated that his brother due to enmity, has got manufactured some documents to cause harassment to the petitioner. (Para 3)

After considering the reply submitted by the petitioner, the fourth respondent has passed the impugned order and the petitioner has been retired. In the impugned order the fourth respondent has recorded that correct date of birth of the petitioner is 02.01.1945, thus, petitioner ought to have been retired on attaining the age of superannuation on 03.01.2005. Accordingly, a direction was issued to treat the petitioner as retired on 31.12.2011 and for recovery of his salary from 01.02.2005 to 31.12.2011. In the impugned order it is also recorded that on a complaint dated 01.06.2010, it came to the knowledge that the petitioner's correct date of birth is 02.01.1945 and on the basis of the fabricated medical report, the petitioner has got recorded his date of birth as 02.01.1954 in his service record. Some legal opinion has also been sought before passing the impugned order. (Para 4)

Held: (Paras 23-27)

1.It is noteworthy that, the petitioner in his reply to the show cause notice has categorically denied the fact that he has received any education in the said institution and the documents relied by the respondents are fabricated and manufactured documents, in my view, a regular departmental proceedings ought to have been initiated against the petitioner giving him full opportunity to rebut the allegation made against him. No such enquiry has been conducted against the petitioner even the document which has been relied in the impugned order, has not been furnished to the petitioner. Thus, whatever enquiry has been conducted by the respondents, is in the breach of the natural justice.

2.It is a trite that if a document is relied by the employer for taking action against the employee, the said document must be supplied to the employee. The said requirement is based on the fair play and natural justice. No such procedure has been adopted by the respondents. In my view, the action of the respondents has to be tested on the touchstone of justice, equity and fair play. Accordingly, the impugned order stands vitiated on the ground of the breach of the principle of natural justice.

3.The petitioner is a Class IV employee. From the counter affidavit, it is evident that no allegation against the petitioner in respect of his work and conduct has been made. Only on the basis of a complaint of his brother, the enquiry has been initiated after such a long period. A person who has been working satisfactory for 30 years, cannot be disturbed at the verge of his retirement. As noted above, no enquiry against him has been conducted in accordance with law. In his service record, his date of birth is 02.01.1954. During the pendency of the writ petition, he stood retired.

4.After a careful consideration of the matter, for the reasons stated above, I find that the impugned order dated 31.12.2011 is not sustainable. It needs to be quashed. Accordingly, it is quashed. No recovery shall be made pursuant to the impugned order.

5.The writ petition is **allowed**.

Case Law discussed:

- 1.State of Uttaranchal and others Vs. Pitamber Dutt Semwal, (2002) 1 UPLBEC 441 SC — para 15
- 2.State of U.P. and others Vs. Gulaichi (Smt), (2003) 6 SCC 483 — para 16
- 3.U.P. Madhyamik Shiksha Parishad and others Vs. Raj Kumar Agnihotri, (2005) 11 SCC 465 — para 17

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J.)

1. The petitioner has preferred this writ petition under Article 226 of the Constitution for quashing the order dated 31.12.2011 passed by fifth respondent retiring the petitioner from service and for the recovery of the excess amount paid to him.

2. The brief reference to the factual aspect would suffice. The petitioner was initially engaged on the post of Waterman on 08.02.1980 on casual basis. He was regularized on the said post on 01.01.1988. A show cause notice was issued to the petitioner on 23.11.2011 on the basis of a complaint made by his brother dated 01.06.2010 wherein it was alleged that the petitioner's date of birth in the school leaving certificate was recorded as 02.01.1945. It was alleged that he was a student of Primary School, Nawabganj Sandi, Hardoi and according to the records of the said institution, his date of birth was 02.01.1945. Copy of the show cause notice is on record as Annexure-7 to the writ petition.

3. The petitioner has submitted his reply to the said show cause notice on 26.11.2011 denying all the allegations made therein. It has been contended on his behalf that the petitioner at the time of his appointment, was sent for medical examination and on the basis of the age mentioned in the medical examination report, his date of birth was recorded in his service record as 02.01.1954. He has stated that his brother due to enmity, has got manufactured some documents to cause harassment to the petitioner.

4. After considering the reply submitted by the petitioner, the fourth respondent has passed the impugned order and the petitioner has been retired. In the impugned order the fourth respondent has recorded that correct date of birth of the petitioner is 02.01.1945, thus, petitioner ought to have been retired on attaining the age of superannuation on 03.01.2005. Accordingly, a direction was issued to treat the petitioner as retired on 31.12.2011 and for recovery of his salary from 01.02.2005 to 31.12.2011. In the impugned order it is also recorded that on a complaint dated 01.06.2010, it came to the knowledge that the petitioner's correct date of birth is 02.01.1945 and on the basis of the fabricated medical report, the petitioner has got recorded his date of birth as 02.01.1954 in his service record. Some legal opinion has also been sought before passing the impugned order.

5. A counter affidavit has been filed. The stand taken in the counter affidavit is that a complaint was received against the petitioner wherein it is mentioned that the petitioner got his primary education from Primary School, Nawabganj Sandi, Hardoi and according to the school register, his date of birth is 02.01.1945. A communication dated 18.10.2010 sent by the Head Master of the institution has also been brought on record wherein it is mentioned that according to the said record, the petitioner's date of birth is 02.01.1945.

6. An impleadment application has been filed on behalf of Virendra Kumar, his brother, in the writ petition but no one is present on his behalf to press the impleadment application. An objection to the impleadment application has been filed by the petitioner. In the said objection, it is stated that a large number of criminal cases are pending between the brothers, hence due to the malafide reasons, he had moved the complaint against the petitioner, which ought not to have been entertained.

7. Heard learned counsel for the petitioner, Sri Jitendra Singh learned Standing Counsel and Sri N.C. Mehrotra for respondent nos. 2 to 5.

8. It is contended on behalf of the petitioner that he was appointed in the year 1980 and was regularized in the year 1988 and after such a long period, a complaint has been made against the petitioner in 2011 and without holding any enquiry, the petitioner's services has been terminated. It is further urged that the petitioner was appointed after the medical examination, on the basis of medical report his age was recorded in service book. Next it was submitted that U.P. Recruitment to Services (Determination of Date of Birth) Rules, 1974 (In short 'Rules 1974') provide that if a person has not passed High School then the age recorded in the service record is final. He has further submitted that neither the communication of the Head Master of the institution was supplied

to him nor any other document was furnished to him. Thus, the entire proceedings is in the breach of natural justice.

9. Lastly, it is urged that the petitioner has worked till 2011, thus the direction for recovery of the salary from 2005 to 2011 is arbitrary as during the said period, the petitioner has actually worked, hence no recovery can be made for the said period.

10. Sri N.C. Mehrotra, learned counsel for the respondent nos. 2 to 5 submits that the petitioner has committed fraud and he has obtained his appointment on the basis of the fabricated medical report.

11. I have considered the rival submissions and perused the record.

12. The petitioner was initially appointed in the year 1980 on casual basis and in the year 1988 he was regularized and after about 30 years a complaint was made against him by his real brother that his date of birth is wrongly recorded and his correct date of birth is 02.01.1945. In support of the said allegation, it appears that he has produced some duplicate copy of the school leaving certificate which indicate that his date of birth is recorded 02.01.1945 in schools record. On the basis of the communication of the Head Master and the said document, a show cause notice was issued to the petitioner stating that the Head Master of the institution has certified that his date of birth is 02.01.1945. The petitioner in his reply to the said show cause notice has categorically denied the said fact. From the show cause notice, it is clear that the document relied by the respondents i.e. the communication of the Head Master and his duplicate school leaving certificate was not furnished to the petitioner.

13. The State Government has framed U.P. Recruitment to Services (Determination of Date of Birth) Rules, 1974 to determine the date of birth of the Government servants. The rule-2 of Rules, 1974 provides the determination of correct date of birth. Rule-2 of Rules, 1974 reads as under:-

"2. Determination of correct date of birth or age- The date of birth of a Government servant as recorded in the certificate of his having passed the high School or equivalent examination at the time of his entry into the Government service or where a Government servant has not passed any such examination as aforesaid or has passed such examination after joining the service, the date of birth or the age recorded in his service book at the time of his entry into the Government service shall be deemed to be his correct date of birth or age, as the case may be for all purposes in relation to his service, including eligibility for promotion, superannuation, premature retirement or retirement benefits, and no application or representation shall be entertained for correction of such date or age in any circumstances whatsoever."

14. From the reading of the rule-2 it is evident that if a person is High School at the time of his entry into Government service, the date of birth recorded in the High School certificate shall be deemed to be his correct date of birth and in case the Government servant is not High School then the date of birth or the age recorded in service book at the time of his entry, shall be deemed to be his correct date of birth or age.

15. The rule 2 of Rules 1974 came to be considered by the Supreme Court in the case of **State of Uttranchal and others v. Pitamber Dutt Semwal, (2002) 1 UPLBEC 441 SC**. The Court has held as under:

"6. These rules, the validity of which have not been challenged, clearly stipulate that no application or representation shall be entertained for correcting any date or age record and the entry made in the service book shall be deemed to be the correct date of birth. Be that as it may, even de hors the said rule, we are of the opinion that the plea of the respondent that the date of birth was wrongly recorded was highly belated. He joined service in 1964, the service book was prepared in 1965 and according to the appellant, he has signed the said service book at least on three occasions. In any case, the plea of the wrong recording of the age in the service book has been taken, nearly thirty years after the service book was prepared. In our opinion, the Division Bench was in error in ignoring the provisions of the said Rule 2 and even otherwise, in the facts of this case, there was no occasion for the High Court to have interfered with the decision of the appellant."

16. The said rule was again considered in the case of **State of U.P. and others v. Gulaichi (Smt), (2003) 6 SCC 483** wherein the Court has held as under:

"12. - - - Additionally, the first appellate court and the High Court seem to have lost sight of the fact that the person who endorsed changes was not authorized to do so. The original service-book was produced before us by the learned counsel for the appellants. Though the learned counsel for the respondent submitted that we should not look into it, for the purpose of arriving at the truth, we overruled the objection and looked at the original document, which undisputedly was exhibited during trial. The entry i.e. 31-07-1929 appears to have been made simultaneously by one and the same person at the time when other entries were made in FR Form 13. The respondent has herself signed the page at Serial No.8, whereas the entry relating to the date of birth is at Serial No.5."

17. In **U.P. Madhyamik Shiksha Parishad and others v. Raj Kumar Agnihotri, (2005) 11 SCC 465**, the Supreme Court had occasioned to consider the rule 2 of the Rules 1974 and has held that the age recorded in the service at the time of entry shall be deemed to be correct date of birth for all purposes and no application or representation shall be entertained for correction of such date. The Court held as under:

"18. In the instant case, the U.P. Recruitment to Service (Determination of date of birth) Rules came into force w.e.f. 28.05.1974. Rule 2 of the Rules was amended by the first amendment Rules, 1980 of 07.06.1980. The existing rule and the substituted rule are extracted hereinbelow:

COLUMN 1	COLUMN 2
(Existing rule)	(Rule as hereby substituted)
2. The date of birth of Government servant as recorded in the certificate of	2. The date of birth of a Government servant as recorded in the certificate of

his having passed the High School or equivalent examination, or where a Government servant has not passed any such examination as aforesaid, the date of birth or the age recorded in his service book at the time of his entry into Government service, shall be deemed to be his correct date of birth or age, as the case may be, for all purposes in relation to his service including, eligibility for promotion, superannuation, premature retirement or retirement benefits, and no application or representation shall be entertained for correction of such date or age in any circumstances whatsoever.	his having passed the High School or equivalent examination at the time of his entry into the Government service or where a Government servant has not passed any such examination as aforesaid or has passed such examination after joining the service, the date of birth or the age recorded in his service book at the time of his entry into the Government service shall be deemed to be his correct date of birth or age, as the case may be, for all purposes in relation to his service, including eligibility for promotion, superannuation, premature retirement or retirement benefits and no application or representation shall be entertained for correction of such date or age in any circumstances whatsoever.
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As per the existing rule, the date of birth or the age recorded in his service book at the time of entry into the Government service shall be deemed to be the correct date of birth or age, as the case may be, for all purposes and no application or representation shall be entertained for correction of such date or age in any circumstances whatsoever.

18. What emerges from the above mentioned cases is that Rule 2 of Rules 1974 does not provide any change and no representation can be entertained for the change of date of birth for whatsoever reason by the employee.

19. It is a common ground that the petitioner is not High School and his date of birth recorded in the service record is 02.01.1954. He did not produce any school leaving certificate at the time of his appointment that was the reason for recording his date of birth on the basis of Medical report. It is noteworthy that the petitioner has averred in the writ petition that at time of his appointment, he was sent for a medical examination and the said report dated 03.03.1987 is issued under the seal and signature of Chief Medical Officer, Hardoi, it is on the record as Annexure-3 to the writ petition. It is recorded therein that at time of the medical examination, his age was about 34 years. The said certificate was issued in the year 1987. The averment made in the writ petition and about this document has been replied in the counter affidavit in paragraph no. 17. The paragraph no. 17 of the counter affidavit reads as under:-

"17. That the contents of paragraph no. 5 of the writ petition are false and are denied. The alleged certificate has no relevance. The document itself shows that the date of birth of the petitioner is 02.01.1945 and not 02.01.1954."

20. A careful perusal of the medical report dated 03.03.1987 indicates that the averment made in the counter affidavit that in the said certificate it is mentioned that the petitioner's date of birth is 02.01.1945, is palpably false. There is no such recital in the said certificate. Moreover in the counter affidavit the genuineness of the medical certificate has not been doubted.

21. In addition to above, the respondents have entertained the complaint after 30 years of service. In the objection to the impleadment application, the petitioner has given the details of the criminal cases between the brothers. This facts also indicate that for the malafide intention, the brother of the petitioner had made the complaint.

22. It is noteworthy that, the petitioner in his reply to the show cause notice has categorically denied the fact that he has received any education in the said institution and the documents relied by the respondents are fabricated and manufactured documents, in my view, a regular departmental proceedings ought to have been initiated against the petitioner giving him full opportunity to rebut the allegation made against him. No such enquiry has been conducted against the petitioner even the document which has been relied in the impugned order, has not been furnished to the petitioner. Thus, whatever enquiry has been conducted by the respondents, is in the breach of the natural justice.

23. It is a trite that if a document is relied by the employer for taking action against the employee, the said document must be supplied to the employee. The said requirement is based on the fair play and natural justice. No such procedure has been adopted by the respondents. In my view, the action of the respondents has to be tested on the touchstone of justice, equity and fair play. Accordingly, the impugned order stands vitiated on the ground of the breach of the principle of natural justice.

24. The petitioner is a Class IV employee. From the counter affidavit, it is evident that no allegation against the petitioner in respect of his work and conduct has been made. Only on the basis of a complaint of his brother, the enquiry has been initiated after such a long period. A person who has been working satisfactory for 30 years, cannot be disturbed at the verge of his retirement. As noted above, no enquiry against him has been conducted in accordance with law. In his service record, his date of birth is 02.01.1954. During the pendency of the writ petition, he stood retired.

25. After a careful consideration of the matter, for the reasons stated above, I find that the impugned order dated 31.12.2011 is not sustainable. It needs to be quashed. Accordingly, it is quashed. No recovery shall be made pursuant to the impugned order.

26. The writ petition is allowed.

(2016) 8 ILRA 431
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.08.2016

BEFORE

THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE DR. VIJAY LAXMI, J.

Special Appeal No.- 265 Of 2014
&
Connected With Other Cases

The Khemraj Smarak Rashtriya Vidyapeeth Sangh Faizabad & Anr. ...Appellants
Versus
State Of U.P.Throu.Prin.Secy.Finance Lko.& Ors.46(Revp)12(Ms ...Respondents

Counsel for the Appellants:

Shailendra Kumar Singh, Sabhapati Shukla

Counsel for the Respondents:

C.S.C., Pt.S.Chandra, Sushil Kumar Singh

Special Appeal—Societies Registration Act, 1860 — Section 25(2) — Deputy Registrar — Committee of Management — Society — amendment in byelaws — Memorandum of Association — membership of the society — elections — Committee of Management declared defunct — direction for holding fresh elections — writ petition — modification application — review application — principles of natural justice — framing of issues — jurisdiction of Deputy Registrar — validity of elections — order dated 15.04.2011 — learned Single Judge — Special Appeals — order set aside — order of Deputy Registrar quashed — fresh decision after opportunity of hearing

These three appeals relate to the elections of the Committee of Management and affairs of a society registered under the Societies Registration Act, 1860 namely, the Khemraj Smarak Rashtriya Vidyapeeth Sangh, Khemapur Faizabad, district Ambedkar Nagar, the focus whereof is the challenge raised to the order of the Deputy Registrar, Firms, Societies and Chits, Faizabad dated 15.04.2011 whereby the contention raised on behalf of the appellants had been accepted and the Deputy Registrar had after declaring the tenure of the Committee of Management of the society to have come to an end, further issued directions for holding of fresh elections in exercise of powers under Section 25 (2) of the 1860 Act.(Para 1)

It may be put on record that all elections after 29.11.1967 were declared invalid on the ground that the membership of the society was highly disputed as it was based on amendment in the byelaws and Memorandum of Association that was illegal, and any consequential action or elections being claimed were all invalid.(Para 2)

The aforesaid order had been passed against the respondent petitioners No.9 and 10 holding that all the activities that were carried out under the amended byelaws of 24.11.1980 and the amendment in the Memorandum of Association dated 12.06.2001, were invalid as the amendment itself was impermissible and, therefore, the elections should now be held on the strength of the membership that existed as on 29.11.1967.

Accordingly, a direction was issued by the Deputy Registrar to submit a list of members of the general body for holding elections.(Para 3)

The aforesaid society has established an Intermediate College namely, Kehmraj Smarak Rashtriya Vidyapith Sangh, Khemapur, Faizabad, district Ambedkar Nagar, which is duly recognized under the provisions of the U.P. Intermediate Education Act, 1921 and is governed by the provisions of a scheme of administration approved by the competent authority under the provisions of the said Act.(Para 4)

Held:(Paras 51-58)

1.The learned Single Judge, therefore, committed a manifest error in dismissing the writ petition. The order of the Deputy Registrar dated 15.04.2011 being invalid for the aforesaid reasons, therefore, had to be set aside and the writ petition deserves to be allowed. Instead, the learned Single Judge entered into the exercise of changing of the dates and passed orders on the review application and on a modification application in a manner which is unsupported in law about which we have already indicated hereinabove. The Deputy Registrar had acted in a way that did not conform to the correct procedure under the provisions of the Societies Registration Act, 1860. He has also not taken notice of the fact as to whether he did have the authority to enter into an infructuous dispute of the Committee of Management the tenure whereof had long come to an end. All these issues, therefore, require being addressed to that was not done by the Deputy Registrar. The writ petition therefore, deserves to be allowed for which we have also to set aside the impugned judgment herein.

2.Accordingly, the judgment dated 09.01.2012 arising out of Writ Petition No.2816 (M/S) of 2011 is hereby set aside. The order of the Deputy Registrar dated 15.04.2011 is quashed. The Deputy Registrar shall proceed to pass a fresh order in the light of the observations made hereinabove after giving an opportunity of hearing to the parties and after noticing their contentions and framing issues arising out of the dispute raised before him.

3.We now advert to Special Appeal No.81 of 2015. The learned Single Judge while dismissing Writ Petition No.1804 (M/S) of 2012 has simply expressed his inability to interfere in the matter on account of the passing of the orders dated 09.01.2012, 17.01.2012, 20.09.2013 and 08.05.2014 in Writ Petition No.2816 (M/S) of 2011. We have by this judgment today set aside the judgment dated 09.01.2012 and have also declared the orders dated 17.01.2012, 20.09.2013, 04.12.2012 to be a nullity and have quashed the order dated 08.05.2014.

4.Writ Petition No.1804 (M/S) of 2012 has been filed basically challenging the consequential decision of the Deputy Registrar finalizing the list of the members and then holding of the elections of the society pursuant to the judgment of the learned Single Judge in Writ Petition No.2816 (M/S) of 2011. Since the judgment in relation thereto, as noted above has been set aside and the order of the Deputy Registrar dated 15.04.2011 has been quashed, then all consequential actions also fall through and, therefore, this appeal also deserves to be allowed and the challenge raised in the writ petition also deserves to be accepted.

5.We accordingly allow this appeal setting aside the judgment dated 24.02.2015. We also set aside all the actions taken pursuant to the order of the Deputy Registrar dated 15.04.2011 as the order dated 15.04.2011 itself has been quashed by us today. Consequential finalization of membership, and holding of elections vide orders dated 17.03.2012 and 26.04.2012 are also set aside.

6.The Deputy Registrar shall accordingly, in case he finds that the tenure of the committee has come to an end, proceed to finalize the membership in accordance with law and then proceed to hold elections if necessary.

7.Consequently, all the three appeals are **allowed** subject to the directions hereinabove.

8. The Deputy Registrar shall decide the matter expeditiously preferably, within a period of three months from the date of presentation of a certified copy of this order before him.

Case Law discussed:-

1. Kalabharti Advertising Vs. Hemant Vimalnath Narichania and others, (2010) 9 SCC 437 — para 37
2. Committee of Management, Vidyawati Higher Secondary School, Azamgarh and another Vs. Assistant Registrar, Firms Societies and Chits, Azamgarh and others, 2005 (2) ESC (All) 847 — para 37
3. Shiksha Samiti Degree College, Garua Maksudpur and others Vs. Registrar, Firms, Societies and Chits, U.P. Lucknow, AIR 1990 Allahabad 110 — para 38
4. Sri Krishna Educational Society, Deoria and another Vs. State of U.P. and others, (1995) 2 UPLBEC 732 — para 38
5. Committee of Management, Hari Shyam Khadi Gram Udyog Sewa Sabha, Allahabad and others Vs. State of U.P. and others, 2006 (3) ESC 1570 (All) — para 38
6. Improvement Trust, Ludhiyana Vs. Ujagar Singh and others, 2010 (28) LCD 1531 — para 26
7. Executive Officer, Antiyur Town Panchayat Vs. G. Arumugam (D) by Lrs., 2015 (33) LCD 602 — para 26

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.
&
Hon'ble Dr. Vijay Laxmi, J.)

1. These three appeals relate to the elections of the Committee of Management and affairs of a society registered under the Societies Registration Act, 1860 namely, the Khemraj Smarak Rashtriya Vidyapeeth Sangh, Khemapur Faizabad, district Ambedkar Nagar, the focus whereof is the challenge raised to the order of the Deputy Registrar, Firms, Societies and Chits, Faizabad dated 15.04.2011 whereby the contention raised on behalf of the appellants had been accepted and the Deputy Registrar had after declaring the tenure of the Committee of Management of the society to have come to an end, further issued directions for holding of fresh elections in exercise of powers under Section 25 (2) of the 1860 Act.

2. It may be put on record that all elections after 29.11.1967 were declared invalid on the ground that the membership of the society was highly disputed as it was based on amendment in the byelaws and Memorandum of Association that was illegal, and any consequential action or elections being claimed were all invalid.

3. The aforesaid order had been passed against the respondent petitioners No.9 and 10 holding that all the activities that were carried out under the amended byelaws of 24.11.1980 and the amendment in the Memorandum of Association dated 12.06.2001, were invalid as the amendment itself was impermissible and, therefore, the elections should now be held on the strength of the membership that existed as on 29.11.1967. Accordingly, a direction was issued by the Deputy Registrar to submit a list of members of the general body for holding elections.

4. The aforesaid society has established an Intermediate College namely, Khemraj Smarak Rashtriya Vidyapeeth Sangh, Khemapur, Faizabad, district Ambedkar Nagar, which is duly recognized under the provisions of the U.P. Intermediate Education Act, 1921 and is governed by

the provisions of a scheme of administration approved by the competent authority under the provisions of the said Act.

5. The appellants allege that the Principal of the institution Mr. Babban Singh had an evil eye over the institution as well as the society and he gradually tried to take over the affairs of the society as well as the institution as would be evident from the facts narrated and brought on record. On account of such nefarious activities and complaints being lodged, the Management of the college was superseded by the State Government invoking the provisions of Section 16-D of the 1921 Act, vide order dated 22.02.2011. One Sri Ashok Kumar Singh filed Writ Petition No.1288 (M/S) of 2011, assailing the said order of supersession on several grounds including the mala fides alleged against a local MLA Sri Bhagelu Ram who had influenced the Secretary, Secondary Education Sri Jitendra Kumar to pass the said order. The writ petition was entertained and the following order was passed on 10.03.2011:-

"Through the instant writ petition under Article 226 of the Constitution of India, the petitioner has assailed the order dated 22.2.2011 passed by the opposite party No.1-Secretary, Secondary Education, Uttar Pradesh and issued by the opposite party No.2-the Special Secretary, Sanskrit Shiksha Anubhag, Lucknow, Uttar Pradesh, whereby the Principal of Government Inter College, Akbarpur has been appointed as Authorized Controller of the Committee of Management of the petitioner's institution in exercise of the powers under Section 16-D of the U.P. Intermediate Education Act, 1921.

The main grounds on which the impugned order has been challenged are that the Principal, who has been appointed as an Authorized Controller is a tainted person and closely associated to the M.L.A. of the ruling party, namely, Sri Bhagelu Ram. It has been alleged that at the behest of the said MLA, who is taking keen interest in the affairs, the State Government supersede and terminate the Committee of Management of the petitioner's institution illegally and arbitrarily and without application of mind.

In order to verify the averments made in the writ petition, this Court, vide order dated 4.3.2011, the Principal Secretary, Secondary Education, Lucknow, was directed to appear in person along with the relevant record to assist the Court.

In compliance thereof, Sri Jitendra Kumar, Secretary, Secondary Education, Lucknow, U.P., is present in person along with the entire records.

Sri Jitendra Kumar, Secretary, Secondary Education, Lucknow, U.P., on the basis of the records, submits that on the basis of the recommendation of the Director in exercise of power under Section 16 (D) (4) of the U.P. Intermediate Education Act, 1921 with regards to irregularities, which have been committed by the Committee of Management of the petitioner's institution, Authorized Controller has been appointed.

The petitioner in para 18 of the writ petition has specifically stated that action with regards to appointment of authorized controller in the petitioner's institution has only been initiated on the influence of the opposite party No.9-Sri Pawan Kumar, who is the Regional Co-ordinator and also local Member of Legislative Assembly of Uttar Pradesh of the ruling party.

On perusal of the records, which have been produced by Sri Jitendra Kumar, Secretary, it reflects that the irregularities, which has been pointed out by the Director in his recommendation for appointment of Authorized Controller was for the year 2003-2004 and thereafter, no specific irregularities has been either pointed out by the Secretary nor are reflected from perusal of the records. The Member of Legislative Assembly, namely, Sri Bhagelu Ram, wrote a letter, which has been received in the office of Chief Minister on 2.2.2011 and Sri Net Ram, Chief Secretary, Government of U.P., directed the Secretary, Secondary Education, Lucknow, to do necessary action, on 1.2.2011. Immediately thereafter, on 22.2.2011, Authorized Controller in the petitioner's institution has been appointed.

Considering the entire facts and circumstances of the case and also on perusal of the records, I am of the view that the officers of the State Government are acting under the influence of the elected Member of Legislative Assembly without applying their own independent minds in the instant case. Fairness and transparency is the essence of the State Act. The Government Officers are bound to pass order after applying their independent mind and strictly in accordance with law. The order cannot be the result of political influence.

For the reasons aforesaid, the Chief Secretary, State of U.P., shall call an explanation from Sri Jitendra Kumar, Secretary, Secondary Education, Government of U.P., within three days from today as to under what circumstances and how he proceeded to in utter breach of the provisions of law, specifically, under Section 16 (D) (5) of the U.P. Intermediate Education Act, 1921 insofar as without issuing any notice, he appointed authorized controller under the influence of the political leader.

List the matter on 16.3.2011, on which date, Sri Jitendra Kumar, Secretary, Secondary Education, U.P., who is present in person, shall also appear in person.

The Chief Secretary, State of U.P., shall also ensure that an officer not below the rank of Joint Secretary, in his office, is present in the Court along with the show cause notice given to Sri Jitendra Kumar and the explanation so tendered by Sri Jitendra Kumar, Secretary, Government of U.P., on the date fixed.

The Bench Secretary shall seal the records, which have been produced by Sri Jitendra Kumar, Secretary, Government of U.P., and transmit the same to the Registrar of this Court. The Registrar shall keep the record in sealed envelop in a safe custody and ensure that the records in sealed cover are made available on the date fixed before this Court.

In the event, Sri Jitendra Kumar, Secretary, Secondary Education, Government of U.P., wants to inspect the records for tendering his explanation, he shall move an appropriate application before the Registrar of this Court. In case such an application is received, the Registrar shall open the seal cover and allow Sri Jitendra Kumar to inspect the file in his presence and shall also allow him to note down the points. This can be done in any working day. Immediately thereafter, the Registrar shall seal the records in his presence.

Order Date :- 10.3.2011

Ajit/-

Let a copy of this order be sent to the Chief Secretary, Government of U.P., Lucknow through FAX today."

6. The appellants, who are also contesting the continuance of Sri Babbann Singh and the contesting respondent No.9 and 10 in the society, are stated to have adopted the same method and through the influence of the then Secretary, Secondary Education Sri Jitendra Kumar to rake up the matter of the society by filing two applications: one dated 09.12.2009 said to have been moved by the respondent No.8 Dinesh Pratap Singh son of Hira Singh and the second application dated 08.02.2010 by the same person. The aforesaid facts are available from the narration made in the order of the Deputy Registrar dated 15.04.2011. The said order also narrates the availability of a complaint dated 03.12.1985 said to have been moved by Sri Hira Singh and five others, referring to an earlier complaint dated 06.11.1985. These complaints had been controverted by the then office bearers of the society. The respondent No.9 and 10 contend that this was again a mala fide exercise to somehow or the other disturb the functioning of the society at the instance of the same MLA and the same Secretary, Secondary Education under whose influence, the Deputy Registrar under the garb of looking to all the complaints, including the amendments in the byelaws and Memorandum of Association of the society, proceeded to annul all the elections of the society and its activities after 20.11.1967. This order came to be challenged by the contesting respondent No.9 and 10 in Writ Petition No.2816 (M/S) of 2011.

7. Thus, the order of supersession of the management of the College that was assailed in Writ Petition No.1288 (M/S) of 2011 and the above mentioned order of the Deputy Registrar dated 15.04.2011 in relation to the management and affairs of the appellant society challenged in Writ Petition No.2816 (M/S) of 2011, came to be heard together by a learned Single Judge of this Court who delivered two separate judgments in both the writ petitions. The judgment of the case of supersession of the management of the College in **Writ Petition No.1288 (M/S) of 2011, dated 09.01.2012** is extracted hereinabove:-

"Heard learned Counsel for the parties.

The instant writ petition has been filed assailing the appointment of Authorized Controller superseding the duly elected Committee of Management inter alia on the ground that the

order appointing Authorized Controller has been passed by the State Government at the instance of one Member of Legislative Assembly, namely, Baghelu Ram.

While entertaining the writ petition, vide order dated 4.3.2011, this Court directed the Principal Secretary (Madhyamik) to appear in person alongwith the relevant records on 10.3.2011. In compliance of the order dated 4.3.2011, the Principal Secretary (Madhyamik) appeared and produced the relevant record.

On perusal of the records, it was found that the material procedural irregularities were committed while appointing the Authorized Controller. Therefore, the records were directed to be sealed. Today, when the case was taken up, records were opened and on perusal, it further reflects that it is only on the basis of letter written by the MLA, action has been initiated by the State Government appointing the Authorized Controller. Neither any report was called for from the concerned educational authorities nor from the petitioner. Law is well settled that any action which entails civil consequences must be in consonance with the principles of natural justice. At this juncture, it would be useful to refer the law enunciated by the Apex Court.

In D.K. Yadav Vs. J.M.A. Industries; (1993) 3 SCC 259 the Apex Court while laying emphasis on affording opportunity by the authority which has the power to take punitive or damaging action held that orders affecting the civil rights or resulting civil consequences would have to answer the requirement of Article 14. The Hon'ble Apex Court concluded as under: -

"The procedure prescribed for depriving a person of livelihood would be liable to be tested on the anvil of Article 14. The procedure prescribed by a statute or statutory rule or rules or orders affecting the civil rights or result in civil consequences would have to answer the requirement of Article 14. Article 14 has a pervasive procedural potency and versatile quality, equalitarian in its soul and principles of natural justice are part of Article 14 and the procedure prescribed by law must be just, fair and reasonable, and not arbitrary, fanciful or oppressive.

In National Building Construction Corporation v. S. Raghunathan; (1998) 7 SCC 66, the Apex Court in unequivocal words that a person is entitled to judicial review, if he is able to show that the decision of the public authority affected him of some benefit or advantage which in the past he had been permitted to enjoy and which he legitimately expected to be permitted to continue to enjoy either until he is informed the reasons for withdrawal and the opportunity to comment on such reasons.

As the order appointing Authorized Controller has been passed in violation of provisions of Section 16 (D) (5) of the U.P. Intermediate Education Act, 1921, it is liable to be quashed. Furthermore, the Standing Counsel has failed to point out that any notice or opportunity of hearing was provided before passing the impugned order. Thus, it is clear that the order was passed in utter disregard of the principles of natural justice.

Accordingly, the writ petition is allowed and the impugned order dated 22.2.2011 is hereby quashed. The record, which is produced and kept in this Court, shall be returned to the Standing Counsel or the official concerned."

The writ petition was allowed and the appointment of the Authorized Controller in the institution was quashed.

The dispute now presently in question began with the dismissal of Writ Petition No.2816 (M/S) of 2011 that had raised the challenge to the order of the Deputy Registrar dated 15.04.2011. The judgment dismissing the said **Writ Petition No.2816 (M/S) of 2011, dated 09.01.2012**, is extracted hereinunder:-

"Heard Pt. S. Chandra, learned Counsel for the petitioner, Mr. Anil Tiwari, Senior Advocate assisted by Mr. Shailendra Kumar Singh, learned counsel appearing for the opposite parties and Mr. M. B. Singh, learned counsel for the opposite party nos.2 and 3.

During pendency of writ petition No.1288 (MS) of 2011, the Deputy Registrar, Firms, Societies and Chits has issued a notice to all the concerned parties requiring to convene a meeting of General Body. When a compliant has been filed on 19.12.2009 by Sri Dinesh Pratap Singh, it was investigated and it was found that last election of the Committee of Management was held on 1.4.2008 and thereafter, no election took place and as such, in exercise of powers conferred under Section 25 (2) of Societies Registration Act, elections were notified. Being aggrieved by the said action, the instant writ petition has been filed.

After hearing learned Counsel for the parties, **I am of the opinion that no election took place after 1.4.2008** and the **term** of Committee of Management **has also been expired** and as such, I do not find any illegality or infirmity in the impugned orders. No interference is required under Article 226 of the Constitution of India.

Accordingly, the writ petition is dismissed. The **Deputy Registrar is directed to hold elections within a maximum period of one month** from the date of receipt of a certified copy of this order."

8. While dismissing the writ petition, the learned Single Judge in the second last paragraph concluded that since no election had taken place after 01.04.2008 and the tenure of the committee has already expired, the writ petition was dismissed as no interference was called for with a direction that the Deputy Registrar shall proceed to hold election within time period given therein.

9. It is this date of 01.04.2008 which raised the controversy afresh. The contesting respondent No.9 and 10 who are the petitioners in the writ petition, however, felt satisfied with the said date and at that point of time, they did not raise any objection to the aforesaid fact having been recorded by the learned Single Judge which was in complete variance with the last date of the tenure of the Committee of management of the society i.e., 29.11.1967 mentioned by the Deputy

Registrar in the order impugned dated 15.04.2011. The Deputy Registrar had concluded that the tenure of the society as was then under the byelaws was two years, and the Committee of Management had been constituted in November, 1965 whereafter no valid elections have been held as such the committee had become defunct after 1967.

10. The learned Single Judge dismissed the writ petition but recorded the date as 01.04.2008. The appellants contend that the Deputy Registrar had rightly found that no elections were held after 1967 and the aforesaid date 01.04.2008 was got confused with the elections of the Committee of Management of the Intermediate College. According to the appellants since the mentioning of the said date was absolutely incorrect, a modification application was filed by the appellants herein, who were the respondents in the writ petition, on 16.01.2012 and the said modification application was taken up on **17.01.2012** by the learned Single Judge and the following order was passed on 17.01.2012:-

"Heard Mr. Shailendra Kumar Singh, learned Counsel for the applicant.

Learned Counsel for the applicant submits that in the judgment and order dated 9.1.2012, date of last election of the Committee of Management was held on 1.4.2008. In this context, learned Counsel for the applicant has drawn the attention of this Court towards the impugned order dated 15.4.2011 wherein it has been mentioned that on 29.11.1967, Committee of Management has expired.

Accordingly, **the judgment and order dated 9.1.2012 is modified to the extent that the undisputed elections for the office bearers of the Committee of Management was held and the Committee of Management has expired on 29.11.1967.**

The application is disposed of in above terms."

11. The learned Single Judge accepted the modification holding that the date of the expiry of the tenure of the last valid elections of the society was 29.11.1967 which was the date mentioned by the Deputy Registrar in the impugned order dated 15.04.2011.

12. The petitioners therein who are the respondent No.9 and 10 in the present appeal, filed a Review Application No.46 of 2012 along with a recall application for recall of the order dated 17.01.2012 contending that the said order dated 17.01.2012 was without jurisdiction as it amounted to review of the entire judgment changing the date without even serving a copy of the application on the counsel for the petitioners. The modification was, therefore, carried out in violation of principles of natural justice.

13. This application remained pending and in between in view of the modified order dated 17.01.2012, the Deputy Registrar, who was to proceed with the elections in terms of his order dated 15.04.2011, finalized the list of the members of the general body on 17.03.2012. This action of the Deputy Registrar became subject matter of challenge in Writ Petition No.1804 (M/S) of 2012. The

elections were also held on 26.04.2012 pursuant to the said electoral list finalized by the Deputy Registrar and the said elections were also challenged by way of an amendment in the same writ petition.

14. During the pendency of the said writ petition, certain developments more took place in respect of the modification order and the review application filed by the respondent No.9 and 10 in Writ Petition No.2816 (M/S) of 2011. The Review Application No.46 of 2012 referred to hereinabove, was taken up by the learned Single Judge on **14.12.2012** and an order was passed recording that the review petition "was" allowed with certain modification for "the reasons to be recorded later on". The order passed on the review application is extracted hereinunder:-

"This review petition was allowed with certain modification for the reasons to be recorded later on. During the course of dictation of judgment, the record reveals that certain new developments had taken place, which were not brought to the notice of the Court during hearing. Therefore, it is necessary to get clarification from the parties' counsel.

Accordingly, list this case as and when I sit singly.

Registry shall issue counsel notice in this regard."

This order in several ways contradicts itself with regard to which we will delve later on, as it is this order which further complicated the issues giving rise to this appeal and the connected appeals. As directed by the learned Single Judge in the aforesaid order to list the matter after issuing notice with a view to seek clarification from the learned counsel, the same was taken up on 20.09.2013 and the following order was passed:-

"Vide judgment and order dated 17.1.2012 passed in C.M.Application No. 5633 of 2012 in re: Writ petition No. 2816 of 2011, this Court has passed the following order :

"Heard Mr. Shailendra Kumar Singh, learned Counsel for the applicant.

Learned Counsel for the applicant submits that in the judgment and order dated 9.1.2012, date of last election of the Committee of Management was held on 1.4.2008. In this context, learned Counsel for the applicant has drawn the attention of this Court towards the impugned order dated 15.4.2011 wherein it has been mentioned that on 29.11.1967, Committee of Management has expired.

Accordingly, the judgment and order dated 9.1.2012 is modified to the extent that the undisputed elections for the office bearers of the Committee of Management was held and the Committee of Management has expired on 29.11.1967.

The application is disposed of in above terms."

Not being satisfied with the above judgment and order dated 17.1.2012, instant review petition has been preferred inter alia on the ground that the Deputy Registrar, Firms, Societies and Chits, Faizabad, by the impugned order dated 15.4.2011, illegally cancelled the election of the petitioners' society since 29.11.1967 though the record pertaining to election since the year 1967 (29.11.1967) is available in the office of Deputy Registrar.

During the course of arguments, learned Counsel for the review petitioners submits that the judgment and order dated 17.1.2012 be reviewed only to the extent that undisputed elections for the office bearers of Committee of Management was debarred on 29.11.1967.

It is not in dispute that Committee of Management was debarred on 29.11.1967.

Considering the peculiar facts and circumstances of the case, review petition is **allowed in part and the above order dated 17.1.2012** is recalled and following order is being passed :

"The judgment and order dated 9.1.2012 is modified to the extent that undisputed elections for the office bearers of Committee of Management was debarred on 29.11.1967." "

15. A perusal of the aforesaid order would indicate that the Court reiterated that the undisputed elections that were held, had come to an end on 29.11.1967 by using the word, "debarred".

16. The aforesaid order, however, purports to allow the review petition in part but at the same time, the matter **was again taken up on 08.05.2014 and a fresh order was passed** holding that since the petitioners in the writ petition have brought on record the details of certain elections last of which were held on 01.04.2008, then the date of expiry of last elections from 29.11.1967 was again changed to 01.04.2008 as existed in the original order dated 09.01.2012.

17. It is against this order that the present Special Appeal No.265 of 2014 has been filed.

18. It appears that after filing of this appeal and the grounds taken herein, the respondent No.9 and 10 were advised to question the correctness of the original judgment dated 09.01.2012 whereby the writ petition had been dismissed and also prayed for quashing of the order of the Deputy Registrar dated 15.04.2011 by filing Special Appeal No.84 of 2015.

19. There is yet another development which deserves to be put on record namely, that the list that was finalized by the Deputy Registrar on 17.03.2012 and the elections which were held pursuant thereto on 26.04.2012, as per the modified order of the High Court dated 17.01.2012, was subject matter of challenge in Writ Petition No.1804 (M/S) of 2012 as noted above. The said writ petition was dismissed by a detailed judgment on 24.02.2015 by a learned Single Judge on the

ground that it would not be possible to question the correctness of the elections already held pursuant to the order dated 15.04.2011 of the Deputy Registrar and the intervening judgment of the High Court dated 17.01.2012 as well as the subsequent orders dated 14.12.2012, 20.09.2013 and 08.05.2014 that are subject matter of Special Appeal No.265 of 2014 namely, the present appeal. Learned Single Judge thus, found that the said proceedings could not be adjudicated independently as everything was dependent now on the outcome of the Special Appeal No.265 of 2014 that was considering all the orders passed by the learned Single Judge in Writ Petition No.2816 (M/S) of 2011 referred to hereinabove.

20. The respondent No.9 and 10 aggrieved by the judgment dated 24.02.2015 of the learned Single Judge, have filed Special Appeal No.81 of 2015.

21. Thus, the subsequent two appeals namely, Special Appeal No.84 of 2015 and Special Appeal No.81 of 2015 were clubbed together and heard by a Division Bench that came to connect the present appeal along with the same and passed the following order dated 20.03.2015:-

"An application seeking impleadment has been moved today supported by affidavit of Sri Narendra Pratap Singh, copy thereof has been supplied to the learned counsel for the appellants as also to the learned standing counsel appearing for the respondent No.1.

The matter is essentially of election/management dispute of a society registered as The Khemraj Smarak Rashtriya Vidyapith Sangh Khemapur, Faizabad and this special appeal is by the same named appellant who had filed Writ Petition No.1804 (M/S) of 2012 wherein, the learned Single Judge of this Court has declined to exercise writ jurisdiction essentially for the reason of the pendency of Special Appeal No.265 of 2014, said to be having a direct bearing on the issues sought to be raised in Writ Petition No.1804 (M/S) of 2012.

It is also noticed that the contesting parties seek to take varying stands as regards purport, implication as also validity of the order dated 09.01.2012 as passed by the learned Single Judge of this Court in Writ Petition No.2816 (M/S) of 2011, which has been subjected to review and then, recall applications and is said to be now forming the subject matter of Special Appeal No.265 of 2014.

The present appellants have chosen to put a direct challenge to the aforesaid order dated 09.01.2012 also by way of another Special appeal No.84 of 2015, which is obviously time barred by about three years. Therein, an application seeking condonation of delay has been filed as also an application for impleadment has been moved after duly serving copies thereof to the learned counsel of other sides.

In the totality of the circumstances, it appears appropriate as also expedient that these two fresh matters, being Special Appeal No.81 of 2015 and 84 of 2015 as also pending appeal bearing Special Appeal No.265 of 2014 and applications moved therein, be heard together.

Therefore, this special appeal is ordered to be listed for admission along with Special Appeal No.84 of 2015 and Special Appeal No.265 of 2014 on 30.03.2015 as fresh."

22. Pt. S. Chandra, learned counsel for the appellants has urged that firstly, the delay in Special Appeal Defective No.84 of 2015 be condoned keeping in view the fact that a bona fide litigation was continuing and pending before the learned Single Judge in Writ Petition No.2816 (M/S) of 2011 while several orders passed are under consideration in connected Special Appeal No.265 of 2014. The contention is that in the aforesaid background coupled with the observations made in the judgment dated 24.02.2015 by a learned Single Judge and the observations made in the order dated 24.03.2015 in Special Appeal No.265 of 2014, delay deserves to be condoned.

23. Sri Anil Tewari, learned Senior Counsel for the contesting respondents and the learned standing counsel have, however, opposed the delay but they could not contradict the peculiar situation of the case on account of the orders passed from time to time in Writ Petition No.2816 (M/S) of 2011 where both the parties were advancing arguments and still continue to contest the dispute in Special Appeal No.265 of 2014. It was on account of the intervening orders passed in Writ Petition No.2816 (M/S) of 2011 that Special Appeal No.84 of 2015 had to be filed challenging the order dated 09.01.2012. We find that the challenge raised to the judgment dated 09.01.2012 was, therefore, essential but had not been raised earlier on account of the orders passed in the same writ petition on the review application. This ultimately has been made subject matter of Special Appeal No.265 of 2014 and the outcome thereof, will have a direct bearing on Special Appeal Defective No.84 of 2015. In the above background, we find that the delay in Special Appeal Defective No.84 of 2015 deserves to be condoned as the cause shown is sufficient and the entire dispute deserves to be addressed simultaneously.

24. Pt. S. Chandra advancing his arguments has rightly relied on the observations made in the ratio of two Supreme Court decisions reported in **[2010 (28) LCD 1531]: Improvement Trust, Ludhiyana. Vs. Ujagar Singh & others**, and **[2015 (33) LCD 602]: Executive Officer, Antiyur Town Panchayat. Vs. G. Arumugam (D) by Lrs.**

25. We accordingly, condone the delay and treat Special Appeal Defective No.84 of 2015 to be within time for being heard along with Special Appeal No.265 of 2014 and Special Appeal No.81 of 2015.

26. Pt. S. Chandra then advancing his arguments on merits submits that the learned Single Judge has rightly restored the correct position while passing the order dated 08.05.2014 in review petition arising out of Writ Petition No.2816 (M/S) of 2011. As such, there was no cause with the appellants of Special Appeal No.265 of 2014 to file the said appeal. It is urged that all the intervening orders passed by the learned Single Judge in the said writ petition, were therefore, of no consequence and this Court may not interfere with the order of the learned Single Judge dated 08.05.2014. He submits that the learned Single Judge rightly appreciated the holding of the last elections on 01.04.2008, and if fresh elections of the society are to be held then the same deserves to be held from amongst such members of the general body who were existing on the said date i.e.,

01.04.2008. He therefore, submits that putting the clock back to 1967 and reducing the membership as existing on that date was a totally illegal exercise undertaken by the Deputy Registrar who has decided a dispute that had already become infructuous. He further submits that the elections and its status in 1967 could not have been subject matter of consideration by the Deputy Registrar while passing the order dated 15.04.2011 inasmuch as, the provisions of sub-section (2) of Section 25 were incorporated in the statute namely, the 1860 Act with effect from 06.10.1975. In this view of the matter any elections held prior to that could not have been made subject matter of adjudication by the Deputy Registrar who otherwise also cannot decide any doubt or dispute of such elections. The Deputy Registrar committed a manifest error by travelling into the election of 1967 even prior to the availability of the powers under Section 25 (2) which obviously was available only after 1975. Thus, any election or its correctness in 1967 could not have been made a matter of inquiry or subject matter of adjudication by the Deputy Registrar. His next contention is that all future elections would not be invalid even if the earlier elections had not been held in time inasmuch as, the society continued to function and the Deputy Registrar or any other authority had not passed any order about the previous elections the term thereof, was only two years. It is only after the amendment in the byelaws that the tenure of the Committee came to be fixed as five years. Thus, the Deputy Registrar according to Pt. S. Chandra, committed a manifest error by delving into the validity of future elections on the strength of the past elections being not within time.

27. The next contention raised by him is that the Deputy Registrar while passing the order dated 15.04.2011 could not have decided the issue of the membership of the general body on the strength of the observations made with regard to the amendment in the byelaws and the Memorandum of Association. The power of the Registrar to cancel an amendment or its registration is subject to an appeal before the Commissioner under Section 12 (D) of the 1860 Act but such annulment could not have been made by the Deputy Registrar in respect of the amendments that had already allowed and given effect to inasmuch as the Deputy Registrar has no power to review the earlier approval of the amendment of the byelaws. If any person is aggrieved, he could have taken steps further but the Deputy Registrar had no authority to annul or review the amendment which were already carried out and were in force.

28. He then submits that the matter was contested before the Deputy Registrar by Sri Dinesh Pratap Singh who was the son of Hira Singh, the erstwhile Manager of the institution. Dinesh Pratap Singh had, therefore, no locus to move the applications dated 09.12.2009 and 08.02.2010 for reopening the status of the elections held in the past after the amendment had been carried out. He further submits that Hira Singh himself had moved a complaint in 1985 that is stated to have been lying in the file. The said complaint also and the complaint dated 03.12.1985 could not have been taken up for any adjudication in 2011 after 16 years. All these applications were made the basis for creating the dispute which had been mala fide prompted by the local MLA Sri Bhagelu Ram who wanted to usurp the institution with the help of the then Secretary, Secondary Education Sri Jitendra Kumar.

29. Pt. S. Chandra then urged that the Deputy Registrar did not even frame the issue of the validity of the elections and the three issues which were framed for being contested as are narrated

in the order dated 15.04.2011 are not with regard to the validity of elections. He further submits that the validity of elections could not have been questioned by him as the Deputy Registrar has no authority to assume that the Committee of Management had become defunct on account of not holding of elections. Even otherwise if it was a matter of validity of elections, then the issue could have been framed and then sent to Prescribed Authority for decision in order to ascertain about the status of any elections that were being claimed by the respondent No.9 and 10. He, therefore, submits that for all the aforesaid reasons, Special Appeal No.265 of 2014 should be dismissed and Special Appeal No.81 of 2015 and Special Appeal Defective No.84 of 2015 both should be allowed and the order of the Deputy Registrar dated 15.04.2011 should be quashed. The elections of the society can be held only through the valid members of the general body which cannot be extended to the year 1967 as has been done by the Deputy Registrar or what had been done earlier by the learned single Judge as per the facts narrated above. The elections even if not held within time, can now be held only under the existing list of members of general body and not on the strength of the electoral college of 1967.

30. Sri Anil Tewari, learned Senior Counsel for the appellant in Special Appeal No.265 of 2014 has extensively taken the Court through the order dated 15.04.2011 passed by the Deputy Registrar to contend that the Deputy Registrar found serious irregularities and that no evidence of any elections having been held being available in his records, he had no option but to declare the committee to have become defunct since 1967 and the only option left under the provisions of the 1860 Act was to hold fresh elections. He further submits that since the date 01.04.2008 as mentioned by the learned Single Judge was not obviously in relation to the elections of the society, the same had been rightly corrected by the learned Single Judge dating it back to 1967 on the modification record. It is only the members who were existing then who were entitled to participate. Sri Babban Singh the Principal of the College in order to usurp the society and perpetuate his existence carried out the amendments reposing sole arbitrary powers in himself about membership including the power to receive the contribution for membership that was to be accepted by him only. The provisions of his becoming a life member of the society and inducting his son and wife as office bearers as a consequence of the illegal amendments can be of no avail and therefore, the Deputy Registrar was justified in exercising his power for annulling the said amendment. He, therefore, submits that if the respondent No.9 and 10 of Special Appeal No.265 of 2014 are aggrieved by any such orders on the amendment, they had a right of appeal under Section 12 (D) of the Societies Registration Act, 1860 which has not been availed of. The order of the Deputy Registrar therefore, cannot be questioned in view of what has been stated above.

31. Sri Anil Tewari, then submits that if the transactions were fraudulent and against all the norms prescribed in the byelaws as well as the provisions of 1860 Act, the Deputy Registrar was justified in coming to the conclusion of treating the committee to have become defunct and holding of fresh elections.

32. He further submits that even if the learned Single Judge had been passing orders in between, the ultimate order dated 08.05.2014 restores back the judgment dated 09.01.2012 which is an incorrect order and against record and, therefore, Special Appeal No.265 of 2014 deserves to be

allowed. Once the special appeal is allowed, then the earlier order dated 10.09.2013 would stand and the elections held pursuant to the judgment dated 17.01.2012, would be valid. He has ultimately submitted that even if the intervening orders passed by the learned Single Judge dated 04.12.2012 and 10.09.2013 are kept aside, then too also, no interference is called for as elections have been held.

33. Learned standing counsel has also urged that since the elections have already been held pursuant to the directions of the High Court and the order of the Deputy Registrar dated 15.04.2011 has been given effect to, there is no reason to interfere in the appeals at this stage. The submission of the learned standing counsel, therefore, is that if anybody wants to dispute the status of the management or the membership of the general body, then the aggrieved person can approach the appropriate forum for redressal of the grievances by filing a civil suit.

34. We have heard Sri Anil Tewari, learned Senior Counsel for the appellants in Special Appeal No.265 of 2014 and Pt. S. Chandra for the respondent No.9 and 10 in the said special appeal. Pt. S. Chandra has advanced submissions on behalf of the appellants in Special Appeal No.81 of 2015 and Special Appeal Defective No.84 of 2015 where the respondents are represented by Sri Anil Tewari, Senior Advocate for the private parties and the learned standing counsel for the State and have been heard on the merits of the appeals.

35. Pt. S. Chandra has relied on the judgment of the Apex Court in the case of **Kalabharti Advertising. Vs. Hemant VimalNath NariChania and others.: (2010) 9 SCC 437** to contend that the Deputy Registrar had no power to review the orders allowing the amendment in the byelaws and Memorandum of Association being an administrative exercise of power. On the issue of entering into the question of future elections in the absence of any orders passed by the Deputy Registrar, Pt. S. Chandra relied on the judgment in the case of **Committee of Management, Vidyawati Higher Secondary School, Azamgarh and another. Vs. Assistant Registrar, Firms Societies and Chits, Azamgarh and others.: [2005 (2) ESC (All) 847]** to substantiate his argument that the validity of the earlier elections could not have been gone into.

36. Sri Anil Tewari learned Senior Counsel for the appellants in Special Appeal No.265 of 2014 has relied on the Division bench judgment in the case of **Shiksha Samiti Degree College, Garua Maksudpur and others. Vs. Registrar, Firms, Societies and Chits, U.P. Lucknow. : AIR 1990 Allahabad 110** and the judgment in the case of **Sri Krishna Educational Society, Deoria and another. Vs. State of U.P. And others.: [(1995) 2 UPLBEC 732]** to urge that the Registrar has powers to cancel the amendment in the registered byelaws and, therefore, the conclusion drawn on the strength thereof that no valid elections had been held, cannot be said to suffer from any infirmity. He further submits that once such a decision has been taken by the Deputy Registrar on 15.04.2011, then the respondents had a remedy of filing an appeal against the order dated 15.04.2011 or a civil suit as has been rightly held in the case of **Committee of Management, Hari Shyam Khadi Gram Udyog Sewa Sabha, Allahabad and others. Vs. State of U.P. And others.: [2006 (3) ESC 1570 (All)]**.

37. In order to resolve the controversy, we have to first advert to the orders passed by the learned Single Judge in Writ Petition No.2816 (M/S) of 2011 including the order dated 08.05.2014 that is impugned in Special Appeal No.265 of 2014. This is necessary as the decision in this appeal will have a direct impact on the other two appeals.

38. Writ Petition No.2816 (M/S) of 2011 had been filed challenging the order of the Deputy Registrar dated 15.04.2011. The writ petition was dismissed on 09.01.2012 recording that no election of the Society Management took place after 01.04.2008. This position has again been reiterated in the impugned order dated 08.05.2014 giving rise to Special Appeal No.265 of 2014. What we find is that there is a serious dispute about the recording of the correct date of last elections in the said order between the parties. The appellants of Special Appeal No.265 of 2014 contend that no elections were held after 1967 and the committee had become defunct whereas, the learned Single Judge held that no election took place after 01.04.2008 and as such, the term of Committee of management has expired. For this, the learned Single Judge in the impugned order dated 08.05.2014 refers to certain documents relating to the elections upto 2008 alleged to have been set up by the respondent No.9 and 10 of Special Appeal No.265 of 2014. The appellants dispute the said elections contending that they are the dates of elections of managements of the Intermediate College and not of the society if at all they have been held. The appellants specifically contend that no elections of the society were held after 1967. The Deputy Registrar while passing the order dated 15.04.2011 framed only three issues for deciding the matter namely, the status of the amendment in the original byelaws of 1965, whether the Principal of the institution established by the society can also be the founder member of the parent society and thirdly, the status of members and membership is according to the original byelaws as against the amended byelaws of the society. However, while proceeding to consider this aspect of membership and the issue of amendment, the Deputy Registrar proceeded to hold that any elections or proceedings conducted on the strength of the such amendment and membership were invalid and, therefore, all elections after 29.11.1967 were invalid. Consequently, in the absence of any valid elections after 1967 the committee has become defunct and, therefore, it was necessary to invoke the provisions of sub-section 92) of Section 25 of the Societies Registration Act, 1860.

39. The learned Single Judge completely omitted to consider the aforesaid three issues and on the strength of the conclusion of the Deputy Registrar about the defunct status of the Committee of management, proceeded to uphold the order of the Deputy Registrar and issued directions for holding fresh elections but while doing so, the learned Single Judge mentioned the date 1st of April, 2008. This date nowhere is in the entire order of the Deputy Registrar pertaining to the election of the society while treating it to be defunct whereas, the contesting respondents 9 and 10 are alleging that they held elections periodically on 30.11.1969, 30.11.1971, 30.11.1973, 30.11.1975, 30.11.1977, 30.11.1979, 30.11.1983, 04.04.1988, 3.04.1993, 01.03.2003 and 01.04.2008. Sri Anil Tewari for the appellants urges that all these dates are fake and there is no document or any proceeding worth the name to support the holding of any such elections. According to him, the Deputy Registrar has categorically recorded that such documents are not available on his file. On a perusal of the order dated 15.04.2011 we find that before the Deputy Registrar, the one election of the Committee had been intimated through a registered letter dated

11.12.1985. At another place, it has been mentioned that while granting renewal on 06.11.1982 with effect from 10.10.1981, the list of office bearers and the elections proceedings dated 29.11.1981 has been submitted along with the election papers whereafter the renewal was granted. Thus, there is a reference of the stand taken by the respondent No.9 and 10 about the submission of documents relating to some elections held in between. However, neither the Deputy Registrar nor the learned Single Judge have examined this issue to find out about the status of such elections and therefore, we find that there was no basis for the learned single Judge to have arrived at the conclusion that no elections were held after 01.04.2008 or that they have been held periodically prior to that date. The order of the Deputy Registrar of no elections having been held after 1967 is, therefore, clearly at variance with the conclusion drawn by the learned Single Judge that no elections were held after 01.04.2008 for which we do not find any basis having been discussed or determined either by the Deputy Registrar or by the learned Single Judge. The Deputy Registrar had not even framed the issue to that effect which was necessary inasmuch as, unless that is done, no conclusion can be drawn about the defunct status of the Committee of Management so as to invoke the powers under Section 25 (2) of the Societies Registration Act, 1860.

40. In order to achieve their ends, the appellants initially filed a modification application and the date was changed by the learned Single Judge referring the tenure of the committee to have come to an end in 1967 vide order dated 17.01.2012. In our opinion, neither a modification application was maintainable as it was not a mere correction of date but it clearly amounted to decide the date whereafter no elections were held. Once the learned Single Judge mentioned the date 01.04.2008, then to convert it to 1967, clearly amounted to review of the decision dated 09.01.2012 on a modification application. The order was passed ex parte to the respondent No.9 and 10 therefore, was not in conformity with law.

41. Surprisingly enough, on coming to know of the said order having been passed, the respondent No.9 and 10 filed Review Application NO.46 of 2012 even though they had not challenged the initial dismissal of the writ petition, vide judgment dated 09.01.2012 which they have now done through Special Appeal Defective No.84 of 2015. Their review application is alleged to have been allowed with certain modifications for reasons to be recorded later on as is evident from the order dated 14.12.2012. We are unable to comprehend this order inasmuch as, no previous order had admittedly been passed allowing the Review Application No.46 of 2012. To us, it appears that the very same order intended to allow the review petition for reasons to be recorded later on but at the same time, the Court simultaneously called upon the learned counsel for seeking clarification from them. To our mind, such an order cannot be said to be in conformity with law inasmuch as, a review cannot be allowed for reasons to be recorded later on, on the one hand and on the other, simultaneously calling upon the parties counsel to seek clarification. The order is incomprehensible and lawfully impermissible and to our mind, the said order dated 14.12.2012 is also not in conformity with law.

42. The third order of the learned Single Judge in the same review application dated 20.09.2013 is equally bewildering inasmuch as, it records that the counsel for the review petitioners have sought review only to the extent of any undisputed elections having been held after 1967. The

Court recorded two contrary findings holding that there is no dispute about the tenure of the committee. Elections of the committee were not held after 1967 and the committee was debarred. This is contrary to record as the parties were clearly disputing the date on which the Committee is stated to have become defunct. This part of the order, therefore, has been incorrectly recorded by the learned Single Judge. The learned Single Judge apparently allowed the review application and recalled the order dated 17.01.2012 and substituted it by a fresh clarification of the judgment dated 09.01.2012. In our opinion, this course was completely impermissible by altering the judgment one after the other in the manner aforesaid.

43. The last order dated 08.05.2014 is again an order taking a complete U turn and restoring the status of the elections of the society as per the judgment dated 09.01.2012 and recording that no elections were held after 01.04.2008. No reasoning has been given by the Hon'ble Single Judge in having passed these contrary orders one after the other after the final judgment dated 09.01.2012 in a review application which appears to have been dealt with at different stages by the orders referred to hereinabove.

44. The orders passed right from 09.01.2012 to 08.05.2014 are all incongruous, incoherent and incompatible in law. Deliverance of justice should foster stability and not uncertainty. The random choice of a date to treat the tenure of the Committee to have come to an end is almost abrupt and out of the hat without recording any satisfaction as to why the choice of the date is logically correct. The allegations of one side were accepted as correct and at the same time reversed suddenly in favour of the other side. The word "debarred" has been used to describe the defunct status of the Committee without advert to the facts of renewal of the Society and the list of office bearers submitted from time to time. The end of the tenure has to be gathered on the assessment of the allegations on record and the evidence in support thereof. The learned Single Judge does not appear to have delved into such an exercise and consequently no effective adjudication has been attempted.

45. Consequently, the order dated 08.05.2014 impugned in this appeal and all the previous orders after 09.01.2012 are nowhere in conformity with law and are hereby declared to be a nullity.

46. The appeal is allowed. The order dated 08.05.2014 impugned herein is set aside and the previous orders after 09.01.2012 are held to be a nullity that can be termed as a judicial straightening of the proceedings.

47. We now advert to Special Appeal Defective No.84 of 2015 which questions the correctness of the original judgment of the learned Single Judge dated 09.01.2012 in Writ Petition No.2816(M/S)of 2011. The judgment which gives rise to this appeal is in a petition filed by the appellant challenging the order of the Deputy Registrar dated 15.04.2011. As noticed above, we find that the order dated 15.04.2011 cannot be sustained for the reason that it did not frame any issue pertaining to the holding of periodical elections so as to arrive at the conclusion that the committee had become defunct. Secondly, the validity of the elections if held, the term whereof expired long ago could not have been gone into by the Deputy Registrar as otherwise it was within

the jurisdiction of the prescribed authority in view of Section 25 of the Societies Registration Act 1860. Thirdly, the elections or its status prior to 06.10.1975 could not have been gone into as the provisions of Section 25 came into effect only after 1975 and, therefore, the proceedings of 1967 could not have been made subject matter of decision by the Deputy Registrar.

48. Sri Anil Tewari has, however, contended that the Deputy Registrar was within his jurisdiction and it had the authority to decide the issue of validity of the amendments and its consequences to that extent. Sri Tewari may be right but while entering into the question of amendment having been carried out, the Deputy Registrar has not adverted to the issue as to whether he did have the power to review earlier orders passed by his predecessors allowing the amendment. Secondly, there is no finding as to whether the said amendment was obtained by fraud or misrepresentation so as to invoke the power of review. If the amendments were invalid or renewal granted, then a person had a right to question the same by raising an appropriate challenge. In the instant case, there were applications pending filed by Sri Hira Singh and others since 1985 but it is not understood as to why they kept quiet for sixteen years and it was ultimately Dinesh Pratap Singh son of the erstwhile Manager Sri Hira Singh who moved the two applications in 2009 and 2010. The question of locus of Dinesh Pratap Singh was also, therefore, required to be examined as to whether he had any authority to move such applications on the basis whereof the decision has been taken by the Deputy Registrar on 15.04.2011. Apart from this, if the Deputy Registrar was of the opinion that there were no documents pertaining to the holding of any such elections after 1967, he should have framed such an issue calling upon the parties to submit their documents to establish as to whether valid periodical elections have been held or not and duly intimated to the authorities. This approach was not adopted by the Deputy Registrar and, therefore, we find that the order dated 15.04.2011 cannot be sustained. The learned Single Judge, therefore, committed a manifest error in dismissing the writ petition. The order of the Deputy Registrar dated 15.04.2011 being invalid for the aforesaid reasons, therefore, had to be set aside and the writ petition deserves to be allowed. Instead, the learned Single Judge entered into the exercise of changing of the dates and passed orders on the review application and on a modification application in a manner which is unsupported in law about which we have already indicated hereinabove. The Deputy Registrar had acted in a way that did not conform to the correct procedure under the provisions of the Societies Registration Act, 1860. He has also not taken notice of the fact as to whether he did have the authority to enter into an infructuous dispute of the Committee of Management the tenure whereof had long come to an end. All these issues, therefore, require being addressed to that was not done by the Deputy Registrar. The writ petition therefore, deserves to be allowed for which we have also to set aside the impugned judgment herein.

49. Accordingly, the judgment dated 09.01.2012 arising out of Writ Petition No.2816 (M/S) of 2011 is hereby set aside. The order of the Deputy Registrar dated 15.04.2011 is quashed. The Deputy Registrar shall proceed to pass a fresh order in the light of the observations made hereinabove after giving an opportunity of hearing to the parties and after noticing their contentions and framing issues arising out of the dispute raised before him.

50. We now advert to Special Appeal No.81 of 2015. The learned Single Judge while dismissing Writ Petition No.1804 (M/S) of 2012 has simply expressed his inability to interfere in the matter on account of the passing of the orders dated 09.01.2012, 17.01.2012, 20.09.2013 and 08.05.2014 in Writ Petition No.2816 (M/S) of 2011. We have by this judgment today set aside the judgment dated 09.01.2012 and have also declared the orders dated 17.01.2012, 20.09.2013, 04.12.2012 to be a nullity and have quashed the order dated 08.05.2014.

51. Writ Petition No.1804 (M/S) of 2012 has been filed basically challenging the consequential decision of the Deputy Registrar finalizing the list of the members and then holding of the elections of the society pursuant to the judgment of the learned Single Judge in Writ Petition No.2816 (M/S) of 2011. Since the judgment in relation thereto, as noted above has been set aside and the order of the Deputy Registrar dated 15.04.2011 has been quashed, then all consequential actions also fall through and, therefore, this appeal also deserves to be allowed and the challenge raised in the writ petition also deserves to be accepted.

52. We accordingly allow this appeal setting aside the judgment dated 24.02.2015. We also set aside all the actions taken pursuant to the order of the Deputy Registrar dated 15.04.2011 as the order dated 15.04.2011 itself has been quashed by us today. Consequential finalization of membership, and holding of elections vide orders dated 17.03.2012 and 26.04.2012 are also set aside.

53. The Deputy Registrar shall accordingly, in case he finds that the tenure of the committee has come to an end, proceed to finalize the membership in accordance with law and then proceed to hold elections if necessary.

54. Consequently, all the three appeals are allowed subject to the directions hereinabove.

55. The Deputy Registrar shall decide the matter expeditiously preferably, within a period of three months from the date of presentation of a certified copy of this order before him.

(2016) 8 ILRA 452
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.08.2016

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Sales/Trade Tax Revision No.- 883 Of 2006
 &
 Connected With Other Cases

Bharat Sanchar Nigam Ltd. Thru' Asst. G.M. (Admin.) ...Applicant
Versus
The Commissioner Of Trade Tax U.P. Lucknow ...Opposite Party

Counsel for the Applicant:

Piyush Agrawal, Amit Jaitley ,Bharat Ji Agarwal

Counsel for the Opposite Party:

S.C.

U.P. Trade Tax Act, 1948 — Section 8-D — works contract — tax deduction from amount payable to works contractor — failure to deduct tax — penalty under Section 8-D(6) — laying underground cable — digging trenches — construction activities — transfer of property in goods — Article 366 (29A) Constitution of India — dominant intention test — composite contract — levy of penalty — revision dismissed

Briefly stated, the revisionist has been held liable to pay a penalty in terms of Section 8D(6) of the 1948 Act as consequence of its failure to deduct tax in respect of a works contract awarded by it. For the purposes of laying cables, the revisionist is stated to have awarded contracts to various parties. One such contract and the terms upon which the same was to be executed stands enshrined in an agreement dated 24 January 2002. The relevant terms of the said contract are as under:

"Whereas it has been decided to award the work of laying underground cable falling in the jurisdiction of Telecom District Bareilly to M/s A.A. Cables Layers Ltd., 25A, Model Town Bareilly. M/s A.A. Cable Layers Ltd., 25A, Model Town Bareilly.....

The contractor will coordinate between the BSNL and agencies like PWD/ Municipality/BDA/UPSEB etc. for road cutting. Until road cutting permission is obtained, contractor will not get cable issued for laying.

The cable and other stores will be supplied by the BSNL. The contractor will execute the work strictly according to the work order and diagram supplied by the BSNL as per BSNL specifications and standards under the supervision of BSNL officers.

The BSNL will not take any responsibility for providing any facility to the labours employed by the contractor. The BSNL will supply underground cable, joining kits, DP boxes, cabinets and other store items required for the job. The contractor will be responsible for their safety and in case of loss to BSNL property, the contractor will have to pay for the losses or the same will be adjusted towards his bills or security money etc.

6. digging or trenching should be made at a standard depth of one meter or 1.65 meter (as the case may be.).....

10. The cable is to be laid as soon as trenches are ready and should not be left till the whole length is dug up.....

13. The contractor has to abide by the terms & conditions of trenching/cable laying/joining and termination of laid cables fixed by GMTD, BR. 90% payment of the value of the work done will be made against bills in support of actual physical work completed and put to use certified by unit officer..... GMTD, BR however, shall reserve the right to pay the balance 10% amount of a particular work, after the completion of work, if he is satisfied with the performance of the contractor.”(Para 2)

Held: (Paras 15-18)

1. Having thus found that the contract in question was a works contract, the Court then proceeds to consider the impact of the provisions of Section 8D. Section 8D (1) imposes an unequivocal obligation upon a person making payment to a contractor engaged in a works contract to deduct tax. The tax which is liable to be deducted is with reference to the liability discharged on account of valuable consideration paid for the transfer of property in goods in pursuance of a works contract. The civil work element undertaken by the contractor would necessarily entail a transfer of property in goods involved in the execution of a works contract. Subsection (6) then provides for the imposition of penalty if a person fails to make deductions before making payment to the contractor. Subsection (6) does not defer the imposition of penalty nor does it make the payment of penalty dependent upon the intent of the person responsible. The payment of penalty is also not contingent upon it being found that there was a design to evade payment of tax or any unlawful intent not to deduct tax. Subsection (6) therefore, stands attracted immediately upon a failure on the part of the person responsible to deduct tax from payments made to a contractor. In the present case, there has admittedly been a failure on the part of the revisionist to deduct tax. Consequently, the provisions of subsection (6) stood attracted and the levy of penalty, therefore, followed and was in fact a necessary corollary.

2. Learned Senior Counsel referring to the provisions of Section 3F of the 1948 Act has then submitted that the penalty could not have been imposed on the entire amount of payment made under the contract. It was his submission that the penalty was liable to be restricted to the tax liability, which in turn was to be computed in accordance with the provisions of Section 3F (2) (b). Subsection (2) of Section 3F makes a provision for the identification of items which are liable to be included or excluded while computing the net turnover which is liable to be taxed in respect of a works contract. This Court however, finds that neither before the authorities below nor even before this Court has the revisionist furnished any details in respect of the taxable turnover liable to be computed in accordance with the provisions of Section 3F (2)(b). In absence of the said material and as a consequence of the failure of the revisionist to provide such details, the learned Standing Counsel has rightly contended that the respondents committed no illegality in levying penalty upon the revisionist.

3. More importantly, the provisions of Section 3F deal with the computation and determination of net turnover of the works contractor. The identification of the valuable consideration paid in respect of a transfer of property in goods in the execution of a works contract is an exercise which was liable to be undertaken during the course of assessment of the works contractor. At this stage and in the absence of any material before this Court, no exercise of bifurcation can possibly be undertaken. It becomes relevant to note that despite pointed queries in this respect the details of assessments undertaken in respect of the works contractor were neither produced, referred or adverted to. This Court, therefore, finds no material or ground to interfere with the imposition of penalty or to upset the decisions rendered by the authorities below.

4. Accordingly and for the reasons aforementioned, this and connected revisions shall stand **dismissed**.

Case Law discussed:

1. Kone Elevator India Private Limited Vs. State of Tamil Nadu, (2014) 7 SCC 1 — para 13
2. Larsen and Toubro Ltd. Vs. State of Karnataka — para 13

3.Hindustan Shipyard Ltd. Vs. State of Andhra Pradesh — para 13

4.State of Madras Vs. Gannon Dunkerley & Co. Ltd. (Gannon Dunkerley-I) — para 13

(Delivered by Hon'ble Yashwant Varma, J.)

1. This batch of revisions, which raise identical issues have with the consent of parties been taken up for disposal together. The issue itself relates to the validity of the action taken against the revisionist on an alleged breach of the provisions of Section 8D of the U.P. Trade Tax Act, 19481.

2. Briefly stated, the revisionist has been held liable to pay a penalty in terms of Section 8-D(6) of the 1948 Act as consequence of its failure to deduct tax in respect of a works contract awarded by it. For the purposes of laying cables, the revisionist is stated to have awarded contracts to various parties. One such contract and the terms upon which the same was to be executed stands enshrined in an agreement dated 24 January 2002. The relevant terms of the said contract are as under:

"Whereas it has been decided to award the work of laying underground cable falling in the jurisdiction of Telecom District Bareilly to M/s A.A. Cables Layers Ltd., 25-A, Model Town Bareilly. M/s A.A. Cable Layers Ltd., 25-A, Model Town Bareilly.....

3. The contractor will co-ordinate between the BSNL and agencies like PWD/ Municipality/BDA/UPSEB etc. for road cutting. Until road cutting permission is obtained, contractor will not get cable issued for laying.

4. The cable and other stores will be supplied by the BSNL. The contractor will execute the work strictly according to the work order and diagram supplied by the BSNL as per BSNL specifications and standards under the supervision of BSNL officers.

5. The BSNL will not take any responsibility for providing any facility to the labours employed by the contractor. The BSNL will supply underground cable, joining kits, DP boxes, cabinets and other store items required for the job. The contractor will be responsible for their safety and in case of loss to BSNL property, the contractor will have to pay for the losses or the same will be adjusted towards his bills or security money etc.

6. digging or trenching should be made at a standard depth of one meter or 1.65 meter (as the case may be.).....

10. The cable is to be laid as soon as trenches are ready and should not be left till the whole length is dug up.....

13. The contractor has to abide by the terms & conditions of trenching/cable laying/joining and termination of laid cables fixed by GMTD, BR. 90% payment of the value of the work done will be made against bills in support of actual physical work completed and put to use

certified by unit officer..... GMTD, BR however, shall reserve the right to pay the balance 10% amount amount of a particular work, after the completion of work, if he is satisfied with the performance of the contractor."

3. By a notice which stands appended as Annexure-2 to the revision, the assessee was called upon to show cause why penalty be not imposed upon it in terms of sub section (6) consequent to a failure on its part to deduct tax from payments made to the contractor in the course of execution of a works contract. The revisionist furnished a reply whereafter an order was passed on 23 September 2003 holding it liable to pay a sum of Rs. 12,79,033/- as penalty in terms of Section 8-D(6). The order notes that in the execution of the works contract, the contractor while laying cables also utilized stone, bajri and other like items, the property in which goods, is stated to have been transferred to the revisionist in the execution of the works contract. It was therefore, held that the revisionist had failed to deduct tax and was consequently liable to suffer a levy of penalty. The issue was taken by the revisionist in appeal wherein it was asserted that all materials including underground cables, joining kits, DP boxes, cabinets etc. were provided by the revisionist itself to the contractors. It was contended that the contract in essence was not a works contract and did not involve any building, construction or manufacturing process. It was submitted that the contract in essence was one which related to job work and therefore, the provisions of Section 8-D had no application. These contentions did not find favour with the first appellate authority, which accordingly proceeded to dismiss the appeal on 16 December 2003. The matter was taken to the Tribunal, which by its judgment and order dated 4 May 2006, has proceeded to affirm the view taken by the assessing authority and the first appellate authority. It is in the above backdrop that the instant revisions have come to be preferred before this Court.

4. Sri Bharatji Agrawal, learned Senior Counsel appearing in support of these revisions has contended that the contract awarded was for job work and would not fall within the meaning of a works contract as defined by the 1948 Act. He has further submitted that even if it were assumed that the property in goods utilized for execution of any civil work stood transferred in terms of the contract, the levy of penalty with reference to the entire payment made under the contract would be wholly unjustified. He submits that the levy of penalty was liable to be restricted only to the value of the goods, which in the opinion of the department, stood transferred in the execution of the works contract. Sri Agrawal further contends that no exercise of bifurcation was undertaken by the department nor was any enquiry instituted in order to ascertain the value of the goods, the property in which may be stated to have been transferred in the course of execution of the contract. Referring to the provisions of Section 3-F (2)(b) he submits that the stone, bricks and other material utilized for completion of the civil work elements of the contract were not liable to be included while determining the net turnover relating to the works contract. For the aforesaid reasons, it was his submission that the levy of penalty was unjustified.

5. Sri B.K. Pandey, the learned Standing Counsel while refuting the above submissions has drawn the attention of the Court to the fact that neither before the assessing authority nor before the first appellate authority were any details furnished by the revisionist to indicate the bifurcation of items utilized in the civil work undertaken by the contractors. He further submits that the issue of

bifurcation of items itself would be an issue which was liable to be inquired into during the assessment of the contractor. He submits that in the absence of any details in respect of assessment proceedings taken out in respect of the contractor, the contentions advanced on behalf of the revisionist are not liable to be countenanced. He lastly submits that the provisions of Section 8-D place an unambiguous obligation upon a dealer while making payment to a contractor for discharge of any liability under a works contract to make a statutory deduction at the rate of 4% with reference to the tax payable under the Act on account of such works contract. He submits that sub-section (6) comes into play immediately upon a failure on the part of the dealer to make such a deduction. In view of the above, Sri Pandey submits that no interference is warranted in the orders passed by the authorities.

6. It is these rival submissions that fall for consideration. However, before ruling upon the rival contentions, it would be apposite to refer to some of the relevant statutory provisions. Section 2(m) of the 1948 Act defines a 'works contract' in the following terms:

"2(m) 'Works contract' includes any agreement for carrying out, for cash, deferred payment or other valuable consideration, the building construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property;"

7. A dealer is made liable to pay tax on the net turnover on a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract in terms of section 3-F. While determining the net turnover in terms of sub section (2), various deductions are allowed to be made from the total amount received or receivable under the works contract. Sub section (2) insofar as is relevant for our purposes reads as under:

"(2) For the purposes of determining the net turnover referred to in sub-section (1), the following amounts shall be deducted from the total amount received or receivable by a dealer in respect of a--

(a) xxxxxxxxxxxxxx

(b) transfer referred to in clause (b) of sub-section (1),--

(i) the amount representing the sales value of the goods covered by Sections 3, 4 and 5 of the Central Sales Tax Act, 1956;

(ii) the amount representing the value of the goods exempted under Section 4;

(iii) the amount representing the value of the goods, on the sale or purchase whereof tax has been levied or is leviable under this Act at some earlier stage;

(iv) the amount representing the value of the goods manufactured in a new unit exempted under Section 4-A or Section 4-AAA;

(v) the amount representing the value of the goods supplied to the contractor by the contractee;

Provided that the ownership of such goods remains with the contractee under the terms of the contract;

(vi) the amount representing the labour charges for the execution of the works contract;

(vii) all amounts paid to the sub-contractor as the consideration for execution of the works contract, whether wholly or in part:

Provided that no deduction under this sub-clause shall be allowed unless the dealer claiming deduction produces proof that the sub-contractor is a registered dealer liable to tax under this Act and that such amount is included in the return of turnover filed by such sub-contractor under the provisions of this Act;

(viii) the amount representing the charges for planning, designing and architect's fees;

(ix) the amount representing the charges for obtaining on hire or otherwise machinery and tools used for execution of the works contract;

(x) the amount representing the cost of consumables used in the execution of the works contract, the property in which is not transferred in the execution of the works contract;

(xi) the amount representing the cost of establishment and other similar expenses of the contractor to the extent it is relatable to supply of labour and services;

(xii) the amount representing the profit earned by the contractor to the extent it is relatable to the supply of labour and services."

8. The obligation to deduct tax from the amount payable to a work contractor stands enshrined in Section 8-D. Sub sections (1) and (6) which are relevant for our purpose are extracted hereinbelow:

"Section 8-D - Tax deduction from the amount payable to Works Contractor.

- (1) Notwithstanding anything contained in sub-section (2) of Section 8-A, every person responsible for making payment to any dealer (hereinafter in this section referred to as the contractor) for discharge of any liability on account of valuable consideration payable for the

transfer of property in goods (whether as goods or in any other form) in pursuance, of a works contract, not being a building contract of such class or value as may be notified by the State Government in public interest in this behalf, shall, at the time of making such payment to the contractor, either in cash or in any other manner, deduct an amount equal to four per centum of such sum towards part or, as the case may be, full satisfaction of the tax payable under this Act on account of such works contract:

Provided that the Assessing Authority may, if satisfied, that it is expedient in the public interest so to do and for reasons to be recorded in writing order that in any case or class of cases no such deduction shall be made or, as the case may be, such deduction shall be made at lesser rate:

Provided further that where any deduction has been made by a contractor from the payments made to his sub-contractor in accordance with sub-section (2), the amount of such payments shall be deducted from the amount on which deduction is to be made under this sub-section:

Provided also that where the goods referred in this sub-section are covered by Sections 3, 4 or 5 of the Central Sales Tax Act, 1956, no amount shall be deducted under this sub-section in respect of such goods.

(6) If any such person, as is referred to in sub-section (1) or subsection (2), fails to make the deduction or, after deducting, fails to deposit the amount so deducted, as required by sub-section (3), the Assessing Authority may, after giving to such person an opportunity of being heard, by order in writing, direct that such person shall pay, by way of penalty, a sum not exceeding twice the amount deductible under this section but not so deducted and, if deducted, not so deposited into the Government Treasury."

9. Dealing with the submission that the contract in question would not fall within the meaning of a 'works contract' as defined under the 1948 Act, it would first be apposite to refer to the terms of the agreement. The essential obligation placed upon the contractor under the contract was of laying underground cables. Although the underground cables, joining kits and other apparatus were to be supplied by the revisionist, the contractor was also obliged to undertake the activity of road cutting, digging of trenches and preparing the ground for laying of cables. The contractor was further obliged to clear surplus earth and road spills and restore the metalled roads to their original condition. The trenches themselves were to be prepared in accordance with the specifications laid down in the agreement. It is in the backdrop of the above obligations that the contention of Sri Agrawal is liable to be tested. As noted above, the essence of the submission of Sri Agarwal was that the contract in question was essentially one of providing labour and service and not a works contract. It becomes relevant to note that the respondents have while passing the orders impugned herein noted that the contractor engaged by the revisionist utilized stone ballast, bajri and other articles in order to construct platforms as also to strengthen the trenches created. It is on this strength that they came to conclude that the contract in question was a works contract.

Now the 1948 Act gives an expansive meaning to the phrase 'works contract' to include any agreement which may involves: -

- (a) building;
- (b) constructions;
- (c) manufacture;
- (d) processing;
- (e) fabrication;
- (f) erection;
- (g) installation;
- (h) fitting out;
- (i) improvement;
- (j) modification;
- (k) repair;
- (l) commissioning of any movable or immovable property.

10. Bearing in mind the ordinary meaning assigned to the words installation, fitting out, fabrication and commissioning, it cannot be said that the contractor did not engage in any of the above-mentioned endeavors. The contract as noted above in essence required the contractor to install, lay out and commission the underground cable. The work also required him to bear all costs and expenses relating to the digging of trenches, construction of pillars in and upon which the underground cable was to rest. The payment terms as agreed to between the parties was linked to the work done. In fact clause 13 in specific terms provided that 90% of the payment would be released against bills in support of actual physical work completed. Regard may also be had to the approved rates for laying of cables which formed part of this agreement and classified the rates at which the contractor would obtain payment for the following activities: -

- (a) digging and reinstating trenches;
- (b) supply of bricks;
- (c) horizontal boring of road crossing;

- (d) laying and fixing of GI pipes;
- (e) construction of cement-concrete foundation; and
- (g) making of joint pits.

11. The tacit admission of the revisionist in respect of the above activities being undertaken and performed by the contractor is further evident from what was submitted before the appellate authority as part of its grounds of appeal. In fact and as would be evident from a reading of the submission made it is evident that the transfer of property in goods in the course of execution of the works contract was admitted. The said ground in appeal was in the following words: -

"Because in view of the facts mentioned above it is clear that the transfer of property in goods is strictly confined to the cost of bricks and its placement. These important aspects have not been taken into consideration by the learned Assessing Authority and the assessment order has been passed in a cursory manner without application of mind."

12. The above provisions of the agreement, the stand of the revisionist, have been referred to in some detail in order to highlight that the contract, its essential obligations and characteristics were not restricted to mere job work. The payment terms were in no manner connected to the cost that may have been incurred by the contractor for the purpose of engaging men and labour. The contract was a composite contract, which entailed the laying of cables after undertaking civil works which have been detailed above. The contract cannot be read as one which was confined to the provision of labour. On an overall conspectus of the facts it is clear that the contract in question was not merely one for supply of labour and service as is sought to be contended and portrayed but clearly fell in the species of a works contract as defined by Section 2(m) of the 1948 Act.

13. The submission of the learned Senior Counsel in this regard is not liable to be accepted for another fundamental reason. By virtue of the provisions of Article 366 (29A) of the Constitution and the corresponding amendments made in the 1948 Act, a works contract, which was earlier treated as an indivisible contract, has by way of a legal fiction been divided into two parts- one for the sale of goods and the other for supply of labour and services. Consequent to the insertion of Article 366 (29A) in the Constitution and the expansion of the meaning of the phrase '*tax on the sale or purchase of goods*', the issue of whether the contract involved a "*dominant intention*" to transfer property in goods is no longer material. In fact the Supreme Court has consistently held that the dominant intention theory or test is not liable to be employed in the case of contracts which stand covered and fall within the scope and ambit of Article 366 (29A). To put this issue beyond the pale of controversy, one may usefully refer to what a Constitution Bench of the Supreme Court held in **Kone Elevator India Private Limited Vs. State of Tamil Nadu**: -

"37. Having dealt with the aforesaid authorities, as advised at present, we shall refer to certain authorities as to how the term "works contract" has been understood in the

contextual perspective post the constitutional amendment. In *Hindustan Shipyard Ltd.* (supra), the Court observed that the distinction between a contract of sale and a works contract is not free from difficulty and has been the subject-matter of several judicial decisions. It is further observed that neither any straitjacket formula can be made available nor can such quick-witted tests devised as would be infallible, for it is all a question of determining the intention of the parties by culling out the same on an overall reading of the several terms and conditions of a contract. Thereafter, the two-Judge Bench set out three categories of contracts and explained the contours, namely, (i) the contract may be for work to be done for remuneration and for supply of materials used in the execution of the work for a price; (ii) it may be a contract for work in which the use of the materials is accessory or incidental to the execution of the work; and (iii) it may be a contract for supply of goods where some work is required to be done as incidental to the sale. Thereafter, it opined that the first contract is a composite contract consisting of two contracts, one of which is for the sale of goods and the other is for work and labour; the second is clearly a contract for work and labour not involving sale of goods; and the third is a contract for sale where the goods are sold as chattels and the work done is merely incidental to the sale.

43. The essential characteristics have been elucidated by a three-Judge Bench in *Larsen and Toubro* (supra) thus:

" 56.As the very title of Article 366 shows, it is the definition clause. It starts by saying that in the Constitution unless the context otherwise requires the expressions defined in that article shall have the meanings respectively assigned to them in the article. The definition of expression "tax on sale or purchase of the goods" is contained in Clause (29-A). If the first part of Clause (29-A) is read with Sub-clause (b) along with latter part of this clause, it reads like this: "tax on the sale or purchase of the goods" includes a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made. The definition of "goods" in Clause (12) is inclusive. It includes all materials, commodities and articles. The expression "goods" has a broader meaning than merchandise. Chattels or movables are goods within the meaning of Clause (12). Sub-clause (b) refers to transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. The expression "in some other form" in the bracket is of utmost significance as by this expression the ordinary understanding of the term "goods" has been enlarged by bringing within its fold goods in a form other than goods. Goods in some other form would thus mean goods which have ceased to be chattels or movables or merchandise and become attached or embedded to earth. In other words, goods which have by incorporation become part of immovable property are deemed as goods. The definition of "tax on the sale or purchase of goods" includes a tax on the transfer of property in the goods as goods or which have lost its form as goods and have acquired some other form involved in the execution of a works contract."

44. On the basis of the aforesaid elucidation, it has been deduced that a transfer of property in goods under Clause (29A)(b) of Article 366 is deemed to be a sale of goods involved in

the execution of a works contract by the person making the transfer and the purchase of those goods by the person to whom such transfer is made. One thing is significant to note that in **Larsen and Toubro** (supra), it has been stated that after the constitutional amendment, the narrow meaning given to the term "works contract" in **Gannon Dunkerley-I** (supra) no longer survives at present. It has been observed in the said case that: (Larsen and Toubro Ltd. Case, SCC p. 750, para 72)

"72. ... even if in a contract, besides the obligations of supply of goods and materials and performance of labour and services, some additional obligations are imposed, such contract does not cease to be works contract, for the additional obligations in the contract would not alter the nature of the contract so long as the contract provides for a contract for works and satisfies the primary description of works contract."

14. It has been further held that: (Larsen and Toubro Ltd. Case, SCC p. 750, para 72)

"72. ...once the characteristics or elements of works contract are satisfied in a contract, then irrespective of additional obligations, such contract would be covered by the term "works contract" because nothing in Article 366(29-A)(b) limits the term "works contract" to contract for labour and service only."

45. In the said case, another significant aspect has been considered. That relates to the "dominant nature test". We think it apt to reproduce what has been stated in **Larsen and Toubro** (supra):

"60. Whether the contract involved a dominant intention to transfer the property in goods, in our view, is not at all material. It is not necessary to ascertain what is the dominant intention of the contract. Even if the dominant intention of the contract is not to transfer the property in goods and rather it is the rendering of service or the ultimate transaction is transfer of immovable property, then also it is open to the States to levy sales tax on the materials used in such contract if it otherwise has elements of works contract..."

46. At this juncture, it is condign to state that four concepts have clearly emerged. They are:

(i) the works contract is an indivisible contract but, by legal fiction, is divided into two parts, one for sale of goods, and the other for supply of labour and services;

(ii) the concept of "dominant nature test" or, for that matter, the "degree of intention test" or "overwhelming component test" for treating a contract as a works contract is not applicable;

(iii) the term "works contract" as used in Clause (29A) of Article 366 of the Constitution takes in its sweep all genre of works contract and is not to be narrowly construed to cover one species of contract to provide for labour and service alone; and

(iv) once the characteristics of works contract are met with in a contract entered into between the parties, any additional obligation incorporated in the contract would not change the nature of the contract." (emphasis supplied)

15. Bearing in mind the principles elucidated by the Constitution Bench, it is clear that the submission of the learned Senior Counsel cannot be accepted. In fact the acceptance of the submissions advanced would lead to the introduction and application of the dominant intention theory to a works contract which stands forbidden in light of the provisions of Article 366 (29A).

16. Having thus found that the contract in question was a works contract, the Court then proceeds to consider the impact of the provisions of Section 8D. Section 8-D (1) imposes an unequivocal obligation upon a person making payment to a contractor engaged in a works contract to deduct tax. The tax which is liable to be deducted is with reference to the liability discharged on account of valuable consideration paid for the transfer of property in goods in pursuance of a works contract. The civil work element undertaken by the contractor would necessarily entail a transfer of property in goods involved in the execution of a works contract. Sub-section (6) then provides for the imposition of penalty if a person fails to make deductions before making payment to the contractor. Sub-section (6) does not defer the imposition of penalty nor does it make the payment of penalty dependent upon the intent of the person responsible. The payment of penalty is also not contingent upon it being found that there was a design to evade payment of tax or any unlawful intent not to deduct tax. Sub-section (6) therefore, stands attracted immediately upon a failure on the part of the person responsible to deduct tax from payments made to a contractor. In the present case, there has admittedly been a failure on the part of the revisionist to deduct tax. Consequently, the provisions of sub-section (6) stood attracted and the levy of penalty, therefore, followed and was in fact a necessary corollary.

17. Learned Senior Counsel referring to the provisions of Section 3-F of the 1948 Act has then submitted that the penalty could not have been imposed on the entire amount of payment made under the contract. It was his submission that the penalty was liable to be restricted to the tax liability, which in turn was to be computed in accordance with the provisions of Section 3-F (2)(b). Sub-section (2) of Section 3F makes a provision for the identification of items which are liable to be included or excluded while computing the net turnover which is liable to be taxed in respect of a works contract. This Court however, finds that neither before the authorities below nor even before this Court has the revisionist furnished any details in respect of the taxable turnover liable to be computed in accordance with the provisions of Section 3-F (2)(b). In absence of the said material and as a consequence of the failure of the revisionist to provide such details, the learned Standing Counsel has rightly contended that the respondents committed no illegality in levying penalty upon the revisionist.

18. More importantly, the provisions of Section 3F deal with the computation and determination of net turnover of the works contractor. The identification of the valuable consideration paid in respect of a transfer of property in goods in the execution of a works contract is an exercise which was liable to be undertaken during the course of assessment of the works

contractor. At this stage and in the absence of any material before this Court, no exercise of bifurcation can possibly be undertaken. It becomes relevant to note that despite pointed queries in this respect the details of assessments undertaken in respect of the works contractor were neither produced, referred or adverted to. This Court, therefore, finds no material or ground to interfere with the imposition of penalty or to upset the decisions rendered by the authorities below.

19. Accordingly and for the reasons aforementioned, this and connected revisions shall stand **dismissed**.

circumstances and in order to hoodwink the Bank, a frivolous lease deed was executed surreptitiously by respondent no. 2 in favour of the petitioner.

3.Reference may also be had to a recent judgment of Division Bench of Allahabad High Court rendered in Surendra Kumar Maheshwari v. State of U.P. and others; 2006(2) ADJ 182 wherein the Court while dealing with the similar situation has held that the grant of relief in writ jurisdiction is discretionary and a Court can decline the relief where the person seeks to secure a dishonest advantage or perpetuate unjust gain.

4.In the present case, lease deed has been executed after the receipt of notice under Section 13(2) of the SARFAESI Act and thus it cannot be said that the lease is valid or that the possession of the petitioner is a lawful possession.

5.In view of the aforesaid facts and circumstances, this Court finds that the petitioner is not entitled to grant of any indulgence of this Court in exercise of its equitable jurisdiction under Article 226 of the Constitution.

6.The writ petition fails and is accordingly **dismissed**.

Case Law discussed:

- 1.Harshad Govardhan Sondagar v. International Assets Reconstruction Company Limited and others, (2014) 6 SCC 1 — para 4
- 2.Hari Chand Aggarwal v. Batala Engineering Co. Ltd., Civil Appeal No. 681 of 1966 — para 5
- 3.Virendra Kumar Agarwal v. M. L. Kulshreshtha and others, Civil Misc. Writ No.3721 of 1973— para 5
- 4.M/s T. R. Jewellery and another v. M/s State Bank of India and another, AIR 2016 Hyderabad 125 — para 7
- 5.Transcore v. Union of India (UOI) and another — para 7
- 6.Union Bank of India v. State of Maharashtra — para 7
- 7.International Asset Reconstruction Company Private Limited v. Union of India — para 7
- 8.Mansa Synthetic Pvt. Ltd. and others v. Union of India and another — para 7
- 9.Irshad Husain v. District Magistrate Moradabad and others, 2009 (3) ADJ 81 — para 8
- 10.Sk. Akbr Ali v. State of West Bengal and others, AIR 2012 Calcutta 90 — para 9
- 11.Andhra Pradesh State Financial Corporation v. M/s GAR Re-Rolling Mills and another, AIR 1994 SC 2151 — para 18
- 12.M.P. Mittal v. State of Haryana and others, AIR 1984 SC 1888 — para 19
- 13.State of Maharashtra v. Prabhu, (1994) 2 SCC 481 — para 20
- 14.Chandra Singh v. State of Rajasthan and another, AIR 2003 SC 2889 — para 21
- 15.ONGC Ltd. v. Sendhabhai Vastram Patel and others, (2005) 6 SCC 454 — para 22
- 16.S.D.S. Shipping (P) Ltd. v. Jay Container Services Co. (P) Ltd., (2003) 9 SCC 439 — para 22
- 17.Surendra Kumar Maheshwari v. State of U.P. and others, 2006 (2) ADJ 182 — para 24

(Delivered by Hon'ble Tarun Agarwala, J.

&

Hon'ble Vipin Sinha, J)

1. Heard Sri Ashok Khare, the learned Senior Advocate assisted by Sri Prateek Chandra, the learned counsel for the petitioner and Sri Satish Chaturvedi, the learned counsel appearing for the respondent bank.

2. The present writ petition has been filed by the petitioner with the claim that the petitioner is neither a borrower nor a guarantor and in fact is a lessee in pursuance of a valid lease

deed executed by the borrower - respondent no.2. The relief sought by the petitioner in the present writ petition is to the effect that the impugned order dated 1.1.2016 be quashed as it has been passed by the Additional District Magistrate purportedly in exercise of power under Section 14 of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'SARFAESI Act'). The petitioner has also made the following prayer in the writ petition:

"II. Issue a writ, order or direction in the nature of Mandamus directing the Respondent No.1 to refrain from interfering with the possession of the property of the petitioner;

III. Issue a writ, order or direction in the nature of Certiorari or any other order or direction declaring the e-auction notice issued by the Respondent No.1 that was published in the newspaper on 16.1.2016 as null and void and restraining the Respondent No.1 from proceeding with the auction sale or taking any action.

IV. ...

V. ..."

3. Sri Ashok Khare, the learned Senior Counsel appearing for the petitioner has raised three basic contention while attacking the impugned order dated 1.1.2016 (Annexure No.1 to the writ petition); (a) that the order passed under Section 14 of the Act could not have been passed by the Additional District Magistrate as he is not the competent authority as the same being Collector / District Magistrate and in this regard reliance has been placed upon Section 14 of the Act, relevant portion of which reads as under:

"14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset.--

(1) Where the possession of any secured assets is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured assets, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him--

(a) take possession of such asset and documents relating thereto; and

(b) forward such asset and documents to the secured creditor:

Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor, declaring that--

(i) the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;

(ii) the borrower has created security interest over ig various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;

(iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;

(iv) the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;

(v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non-performing asset;

(vi) affirming that the period of sixty days notice as required by the provisions of sub-section (2) of section 13, demanding payment of the defaulted financial assistance has been served on the borrower;

(vii) the objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;

(viii) the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer is, therefore, entitled to take possession of the secured assets under the provisions of sub-section (4) of section 13 read with section 14 of the principal Act;

(ix) that the provisions of this Act and the rules made thereunder had been complied with:

Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets:

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.

(1-A) The District Magistrate or the Chief Metropolitan Magistrate may authorise any officer subordinate to him,--

(i) to take possession of such assets and documents relating thereto; and

(ii) to forward such assets and documents to the secured creditor.

(2) For the purpose of securing compliance with the provisions of sub- section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate any officer authorised by the Chief Metropolitan Magistrate or District Magistrate done in pursuance of this section shall be called in question in any court or before any authority.""

(b) that the Additional District Magistrate has not at all referred to the contention / objection raised by the petitioner in its objection filed in response to the application of the Bank under Section 14 of the SARFAESI Act;

and (c) that the petitioner is a lessee under a validly executed lease deed.

4. Thus, the petitioner cannot be evicted except in accordance with law from the premises in dispute. The learned senior counsel has relied upon a judgment of the Supreme Court rendered in **Harshad Govardhan Sondagar v. International Assets Reconstruction Company Limited and others; 2014 (6) SCC 1** to contend that it was incumbent upon the authority prescribed under Section 14 of the SARFAESI Act to adjudicate upon the status of the petitioner as a lessee under a validly executed lease deed. The relevant extracts are quoted herein below:

"As per the mandate of Section 107 TPA if the lessee of the mortgagor claims that it is entitled to possession of a secured asset for any term exceeding one year from the date of the lease made in his favour by the lessor. Where he does not produce proof of execution of a registered instrument in his favour and instead relied on an unregistered instrument or oral agreement accompanied by delivery of possession, the CMM or the DM, as the case may be will have to come to the conclusion that he is not entitled to the possession of the secured asset for more than a year from the date of the instrument or from the date of delivery of possession in his favour by the landlord.

... If the lessee surrenders possession, the lease, even if valid, gets determined in accordance with clause (f) of Section 111 of the Transfer of Property Act, but if he resists the attempt of the secured creditor to take possession, the authorised officer cannot evict the lessee by force but has to file an application before the Chief Metropolitan Magistrate or the District Magistrate under Section 14 of the SARFAESI Act and state in the affidavit accompanying the application, the name and address of the person claiming to be the lessee. When such an application is filed, the Chief Metropolitan Magistrate or the District Magistrate will have to give a notice and give an opportunity of hearing to the person claiming to be the lessee as well as to the secured creditor consistent with the principles of natural justice and then take a decision.

We may now consider the contention of the respondents that some of the appellants have not produced any document to prove that they are bona fide lessees of the secured assets. We find that in the cases before us, the appellants have relied on the written instruments or rent receipts issued by the landlord to the tenant. Section 107 of the Transfer of Property Act provides that a lease of immoveable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made "only by a registered instrument" and all other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. Hence, if any of the appellants claim that they are entitled to possession of a secured asset for any term exceeding one year from the date of the lease made in his favour, he has to produce proof of execution of a registered instrument in his favour by the lessor. Where he does not produce proof of execution of a registered instrument in his favour and instead relies on an unregistered instrument or oral agreement accompanied by delivery of possession, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, will have to come to the conclusion that he is not entitled to the possession of the secured asset for more than an year from the date of the instrument or from the date of delivery of possession in his favour by the landlord. "

5. The learned Senior Counsel further relied upon a judgment of the Apex Court rendered in the case of **Hari Chand Aggarwal v. Batala Engineering Co. Ltd.** (Civil Appeal No. 681 of 1966 decided on 24.9.1968) and also upon a judgment of Allahabad High Court rendered in **Virendra Kumar Agarwal v. M. L. Kulshreshtha and others** (Civil Misc. Writ No. 3721 of 1973 decided on 19.7.1973) in support of his contention that the Additional District Magistrate could not have exercised the power of District Magistrate in exercise of power under Section 14 of the SARFAESI Act. However, as far as the case of **Hari Chand (Supra)** is concerned, the same is with regard to the power under the Code of Criminal Procedure. In the said case it has been observed that the District Magistrate and the Additional District Magistrate are two different and distinct authorities and even though the latter may be empowered under Sub-section (2) to exercise all or any of the powers of a District Magistrate but by no stretch of reasoning can an Additional District Magistrate be called the District Magistrate which are the words employed in Sub-section (1) of Section 10. As far as second case **Virendra Kumar (Supra)** is concerned, the same is with regard to the power of the Central Government to delegate the power to the District Magistrate and, thus, it is contended that District Magistrate could not have sub delegated the power. A perusal of the said two judgment shows that the facts and circumstances of the aforesaid cases do not apply to the facts and circumstances of the present case.

6. It has been a considered legal position that the power exercised under Section 14 of the SARFAESI Act by the Collector/District Magistrate is only an administrative power and thus authorizing any authority to exercise these powers does not amount to the delegation of the power and, in view of the Full Bench judgment of the Supreme Court and the Division Bench judgment of Allahabad High Court, referred to above, this Court finds no illegality in the order that has been passed under Section 14 of the SARFAESI Act by the Additional District Magistrate.

7. Sri Satish Chaturvedi, the learned counsel for the respondent bank has placed strong reliance upon a Full Bench judgment of Hyderabad High Court rendered in **M/s T. R. Jewellery and another v. M/s State Bank of India and another; AIR 2016 HYDERABAD 125** to contend in support of his contention that the term District Magistrate will include the Additional District Magistrate or Additional Collector. The relevant extract of the said judgment is quoted herein below:

"27. Relying upon the word order used in the proviso to Section 14, it has been urged, that the Chief Metropolitan Magistrate is exercising judicial function while assisting the secured creditor and the same cannot be entrusted to Chief Judicial Magistrate in non-metropolitan area when the Legislature never contemplated the same. It has been further urged that if really the intention of the Legislature was to give such power to Chief Judicial Magistrate, it would have referred to it atleast in the amendment brought to Section 14 in the year 2013. It is true that Section 14 of the Act refers only to Chief Metropolitan Magistrate and District Magistrate. But, if really the proceedings before the Chief Metropolitan Magistrate are judicial in nature, the Legislature would not have allowed the District Magistrate or the Chief Metropolitan Magistrate to authorize any Officer subordinate to them to take possession of such assets and documents relating there to and forward such assets and documents to the secured creditor. At this stage, an argument was sought to be advanced, stating that delegation as referred to in Section 14(1A) is only with regard to execution of the order by an Officer subordinate to Chief Metropolitan Magistrate or District Magistrate and not passing of the order. The same cannot be accepted. It is to be noted that Section 14(1)(a)(b) which deal with assistance by Chief Metropolitan Magistrate and District Magistrate also refers to taking possession of such assets and documents and forwarding them to the secured creditor.

28. Dealing with the word possession in Sections 13, 17 and the Rules made under SARFAESI Act, the Apex Court in Transcore v. Union of India (UOI) and another, held as under :

68. The word possession is a relative concept. It is not an absolute concept. The dichotomy between symbolic and physical possession does not find place in the Act. As stated above, there is a conceptual distinction between securities by which the creditor obtains ownership of or interest in the property concerned (mortgages) and securities where the creditor obtains neither an interest in nor possession of the property but the property is appropriated to the satisfaction of the debt (charges). Basically, the NPA Act deals with the former type of securities under which the secured creditor, namely, the bank/FI obtains interest in the property concerned. It is for this reason that the NPA Act ousts the intervention of the courts/tribunals.

29. In Union Bank of India v. The State of Maharashtra through the Office of the Government Pleader, Public Works Department and others , the Bombay High Court held that Section 14 of the SARFAESI Act is procedural in nature and that the procedure stipulated therein enables the secured creditor to take the assistance of Chief Metropolitan Magistrate or District Magistrate in taking possession of the secured assets. It was also held that Section 14 only empowers the authorities to assist the secured creditor in taking possession of the secured assets as

per the procedure contemplated under Section 14, but does not clothe the District Magistrate with the power to adjudicate in respect of any dispute pertaining to any secured asset. Further, it has been held that proviso to Section 14 of the Act does not vest District Magistrate with the jurisdiction to adjudicate and decide any dispute regarding the secured assets. Similar view was taken by a Division Bench of Bombay High Court in International Asset Reconstruction Company Private Limited through its Authorized Representative of the Constituted Attorney Shri Tushar B. Patel v. Union of India (UOI), through the District Magistrate and others. In Mansa Synthetic Pvt. Ltd. and others v. Union of India and another, a Division Bench of the Gujarat High Court held that the District Magistrate or Chief Metropolitan Magistrate is bound to assist secured creditor in taking possession of secured asset and is not empowered to decide question of legality or propriety of any action taken by the secured creditor under Section 14 of the Act."

8. He further placed reliance upon Division Bench judgment of this Court rendered in **Irshad Husain v. District Magistrate Moradabad and others; 2009 (3) ADJ 81** wherein the Division Bench has taken a specific view and has held herein as under:

"According to us, when the above Act is subjective in nature, the Act below is the procedural in nature. Upon going through Section 14-A of the U.P. Land Revenue Act, 1901 we find that the Additional Collector has the similar power as of Collector, thereby the Collector includes the Additional Collector. Section 14-A of such Act is also quoted hereunder:

"14-A. Appointment, powers and duties of Additional Collectors.--(1) The State Government may appoint an Additional Collector in a district or in two or more districts combined.

(2) An Additional Collector shall hold his office during the pleasure of State Government.

(3) An Additional Collector shall exercise such powers and discharge such duties of a Collector in such cases or classes of cases as the Collector concerned may direct.

(4) This Act and every other law for the time being applicable to a Collector shall apply to every Additional Collector, when exercising any powers or discharging any duties under sub-section (3), as if he were the Collector of the district."

9. Reference may also be made to a judgment of the Calcutta High Court rendered in **Sk. Akbr Ali v. State of West Bengal and others; AIR 2012 CALCUTTA 90**, wherein it has been categorically held that there is no dispute that an Additional District Magistrate even if the State Government duly confers on him all or any of the powers of the District Magistrate does not become a District Magistrate. He still remains an Additional District Magistrate holding a position below the District Magistrate. This, however, does not lead to the conclusion that if a power of the District Magistrate on being duly conferred on him is exercised by an Additional District Magistrate, it will not be a valid exercise of power. Once the power is duly conferred on an Additional District Magistrate, such Additional District Magistrate is competent to decide an

application under Section 14 of the SARFAESI Act. It is not necessary that the power has to be exercised by the District Magistrate.

10. Learned counsel for the respondent bank has also placed reliance upon Section 14(1-A) of the SARFAESI Act.

11. It has further been contended by the learned counsel for respondent bank that as far as question of lease deed is concerned, it may be appreciated that the Bank had issued a notice under Section 13(2) of the SARFAESI Act on 17.5.2014 for recovery of the amount due against the borrower, namely, respondent no.2 - M/s Zync Global Pvt. Ltd. which was to the tune of Rs.67,00,26,840/- including the accrued interest up to 1.10.2013 and that as per the notice/application under Section 14 of the SARFAESI Act apart from the liability of the State Bank of India running to Rs.67,00,26,840/- there is further liability of Punjab National Bank running to Rs.75,48,38,788.78/-. The contention of the respondent bank is that respondent no.2 knowing fully well that there is huge liability against him, in order to derail the entire recovery proceeding had executed an unregistered lease deed in favour of the petitioner on 9.9.2014 for a period of three years. The further contention of the respondent bank is that it is an admitted position on record that the lease deed was executed after the notice under Section 13(2) of the SARFAESI Act has been given.

12. Further reliance has been placed by the counsel for respondent bank upon a specific clause contained in the notice issued under Section 13(2) of the SARFAESI Act, which reads as under:

"You are also put on notice that in terms of sub-section 13 of section 13 you shall not transfer by sale, lease or otherwise the said secured assets detailed in Schedule "C" of this notice without obtaining written consent of the Bank."

13. The learned counsel for the respondent bank has also drawn attention of the Court to section 13(13) of the SARFAESI Act, which reads as under:

"13. Enforcement of security interest. - (1) ...

(2) ...

(3) ...

(4) ...

(5) ...

(6) ...

(7) ...

(8) ...

(9) ...

(10) ...

(11) ...

(12) ...

(13) *No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor."*

14. Relying upon the aforesaid contentions, learned counsel for the respondent bank submitted that the petitioner cannot be granted any indulgence whatsoever in exercise of equitable jurisdiction of this Court under Article 226 of the Constitution.

15. It is apparent from the record that respondent no.2, who happens to be the borrower has very complacently executed a lease deed after the receipt of the notice under Section 13(2) of the SARFAESI Act with the sole intention of playing fraud with the Bank. His dishonest intention is writ large on the face of the record. Respondent no. 2 after setting up the petitioner in the forefront has very calmly chosen to stay away from the litigation and is cooling his heels sitting at home. It is apparent from the fact that the benefit of the lease deed cannot be extended to the petitioner in view of the fact that firstly it is an unregistered document and secondly it was executed after the service of notice under Section 13 (2) of the SARFAESI Act and this Court feels that no person can be permitted to reap the harvest of his own wrongdoing. Further, the petitioner admits that the lease is an unregistered document.

16. It has also been submitted that upon default in payment of financial assistance, the account of borrower has been notified as 'non-performing asset' by State Bank of India on 28.1.2014 and by Punjab National Bank on 31.12.2013 and thus it is apparent that respondent no.2 was well aware that the account has been notified as 'non-performing asset'. There is apparently a huge liability against respondent no.2 and it was under these circumstances and in order to hoodwink the Bank, a frivolous lease deed was executed surreptitiously by respondent no. 2 in favour of the petitioner.

17. Sri Chaturvedi has placed reliance upon the reply filed by the Bank to the application of objector i.e. the petitioner wherein the objection taken by the petitioner has been duly considered and replied to, a copy of the said reply has been annexed as annexure CA-3 to the counter affidavit.

The said reply has been considered by the Additional District Magistrate while passing the order under Section 14 of the SARFAESI Act.

18. Keeping in view the conduct of the borrower a reference may be made to the judgment of the Apex Court rendered in **Andhra Pradesh State Financial Corporation v. M/s GAR Re-Rolling Mills and another; AIR 1994 SC 2151**, where the Supreme Court observed:-

"A court of equity, when exercising its equitable jurisdiction under Article 226 of the Constitution must so act as to prevent perpetration of a legal fraud and the courts are obliged to do justice by promotion of good faith, as far as it lies within their power. Equity is always known to defend the law from clefty evasions and new subtilities invented to evade law."

19. In the case of **M.P. Mittal Vs. State of Haryana & Ors. AIR 1984 SC, 1888**, the Hon'ble Supreme Court held as follows:-

"The appeal arises out of a writ petition, and it is well settled that when a petitioner invokes the jurisdiction of the High Court under Article 226 of the Constitution, it is open to the High Court to consider whether, in the exercise of its undoubted discretionary jurisdiction, it should decline relief to such petitioner if the grant of relief would defeat the interests of justice. The Court always has power to refuse relief where the petitioner seeks to invoke its writ jurisdiction in order to secure a dishonest advantage or perpetuate an unjust gain. This is a case where the High Court was fully justified in refusing relief."

20. The Hon'ble Supreme Court in State of **Maharashtra Vs. Prabhu (1994) 2 SCC 481** considered the equity jurisdiction of the High Court under Article 226 of the Constitution and pointed out as follows:-

"Even assuming that the construction placed by the High Court and vehemently defended by the learned counsel for respondent is correct should the High Court have interfered with the order of Government in exercise of its equity jurisdiction..... Where the Government or any authority passes an order which is contrary to rules or law it becomes amenable to correction by the courts in exercise of writ jurisdiction. But one of the principles inherent in it is that the exercise of power should be for the sake of justice. One of the yardstick for it is if the quashing of the order results in greater harm to the society then the court may restrain from exercising the power.....Therefore, even if the order of the Government was vitiated either because it omitted to issue a proper show-cause notice or it could not have proceeded against the respondent for his past activities the High Court should have refused to interfere in exercise of its equity jurisdiction as the facts of the case did not warrant interference..... It is the responsibility of the High Court as custodian of the Constitution to maintain the social balance by interfering where necessary for sake of justice and refusing to interfere where it is against the social interest and public good."

21. The same position was reiterated by the Hon'ble Supreme Court in the case of **Chandra Singh Vs. State of Rajasthan & Anr. AIR 2003 SC 2889** in which it was observed as follows:-

"Issuance of a writ of Certiorari is a discretionary remedy (Champalal Binani v. CIT, West Bengal, AIR 1970 SC 645). The High Court and consequently this Court while exercising its extra ordinary jurisdiction under Articles 226 or 32 of the Constitution of India may not strike down an illegal order although it would be lawful to do so. In a given case, the High Court or this Court may refuse to extend the benefit of a discretionary relief to the applicant."

22. In **ONGC Ltd. Vs. Sendhabhai Vastram Patel & Ors., reported in (2005) 6 SCC 454**, the Supreme Court held as follows:-

"It is now well settled that the High Court and the Supreme Court while exercising their equity jurisdiction under Articles 226 and 32 of the Constitution as also Article 136 thereof may not exercise the same in appropriate cases. While exercising such jurisdiction, the superior courts in India may not strike down even a wrong order only because it would be lawful to do so. A discretionary relief may be refused to be extended to the appellant in a given case although the Court may find the same to be justified in law. [See S.D.S. Shipping (P) Ltd. V. Jay Container Services Co. (P) Ltd. (2003) 9 SCC 439]."

23. Respondent no. 2 who owes approximately a sum of Rs. Rs.67,00,26,840/- to SBI and a sum of Rs. 75,48,38,788.78/- to PNB and with the sole intention of playing fraud with the Bank has executed a lease deed surreptitiously and that too after the receipt of the notice and in complete violation of Section 13(13) of the SARFAESI Act as well as the condition mentioned in the notice under Section 13(2) of the SARFAESI Act itself.

24. Reference may also be had to a recent judgment of Division Bench of Allahabad High Court rendered in **Surendra Kumar Maheshwari v. State of U.P. and others; 2006(2) ADJ 182** wherein the Court while dealing with the similar situation has held that the grant of relief in writ jurisdiction is discretionary and a Court can decline the relief where the person seeks to secure a dishonest advantage or perpetuate unjust gain.

25. In the present case, lease deed has been executed after the receipt of notice under Section 13(2) of the SARFAESI Act and thus it cannot be said that the lease is valid or that the possession of the petitioner is a lawful possession.

26. In view of the aforesaid facts and circumstances, this Court finds that the petitioner is not entitled to grant of any indulgence of this Court in exercise of its equitable jurisdiction under Article 226 of the Constitution.

27. The writ petition fails and is accordingly dismissed.

(2016) 8 ILRA 477
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE KAUSHAL JAYENDRA THAKER, J.

Writ A No.- 14108 Of 2004

Ram Niyadi Rai

...Petitioner

Versus

State Of U.P. & Anr.

...Respondents

Counsel for the Petitioner:

G.K. Singh, V.K. Singh

Counsel for the Respondents:

C.S.C., M.A.Qadeer

Civil Services Regulations — Article 351-A — disciplinary enquiry after retirement — reduction of pension — forfeiture of gratuity — departmental enquiry — oral enquiry — opportunity to cross-examine witnesses — principles of natural justice — quasi-judicial proceeding — major punishment — enquiry not conducted in accordance with procedure — punishment order set aside.

The writ petition is directed against the order dated 19.02.2004 passed by respondent-1 imposing punishment of reduction of pension by fifty per cent and forfeiture of entire gratuity.(Para 2)

Petitioner was working as Accounts Officer in the Office of Basic Shiksha Adhikari and retired on 31.01.1998. Before his retirement, a charge-sheet was issued to him on 17.01.1997 which was replied by him and thereafter Enquiry Officer submitted enquiry report which has culminated in the impugned order of punishment.(Para 3)

Counsel for petitioner submitted that enquiry has been continued after retirement of petitioner under Article 351-A of Civil Services Regulations (hereinafter referred to as "CSR"), which provides that procedure for enquiry would be same as is applicable in the case of major penalty but in the present case, no date, time or place for oral enquiry was ever fixed and after receiving reply from petitioner, Enquiry Officer submitted enquiry report and thereafter punishment order has been passed. In this regard, specific averment has been made in para 20 of writ petition.(Para 4)

In the present case, charge-sheet was issued to petitioner which is undated but it is said in para 13 of writ petition that the same was served on 17.01.1997. This is admitted in para 7 of counter affidavit. Petitioner submitted reply on 28.01.1997 as said in para 15 of writ petition and that is also not denied in para 9 of counter affidavit. A letter sent by Enquiry Officer dated 07.08.1997 required petitioner to make available copies of certain letters which was also replied by petitioner on 07.08.1997. Thereafter case of petitioner is that no date, place or time was fixed for oral enquiry and no oral enquiry was conducted at all. Enquiry Officer submitted report, copy whereof has been filed as Annexure-8 to writ petition, but it is also undated. In the

counter affidavit also no date of enquiry has been discussed. Petitioner retired on 31.01.1998 after attaining age of superannuation. Show cause notice along copy of enquiry report was forwarded to petitioner on 17.03.1998.(Para 7)

Held (Paras:- 20-24)

1.Impugned order of punishment also shows that till the retirement, enquiry had not completed and if that be so there was no reason as to why an oral enquiry was not conducted by Enquiry Officer. No reason has been given therefor and counter affidavit is completely silent on this aspect.

2.There is another aspect of the matter. If the enquiry is conducted under Article 351 of CSR, punishment permissible therein can only be inflicted if retired employee is found guilty of grave misconduct or to have caused pecuniary loss to Government by misconduct or negligence during service. Impugned order shows that attached Primary School, Daulatpur of Sant Ramraj Goswami Junior High School, Daulatpur was not grant-in-aid and, therefore, Teachers and non-teaching Staff was unauthorizedly and illegally paid salary from State exchequer from January' 1991 to July' 1991 and loss suffered by State is attributable to petitioner. This is obviously a serious matter and therefore also departmental enquiry strictly in accordance with procedure prescribed ought to have been conducted, but the same has not been conducted. Meaning thereby petitioner has not been given adequate opportunity of defence and enquiry has not been conducted in accordance with Article 351A of the CSR read with U.P. Government Servants (Discipline and Appeal) Rules, 1999 (hereinafter referred to as "Rules, 1999) which provides procedure to hold enquiry.

3.When confronted, learned Standing Counsel could not dispute the above proposition of law and also could not controvert that in the case in hand, no oral enquiry has been conducted at all.

4.In these facts and circumstances, the impugned order is patently illegal and in utter violation of principles of nature justice and also the procedure prescribed in the Rules.

5.In the result, the writ petition is **allowed**. Impugned order dated 19.02.2004 is hereby **set aside**. Petitioner shall be entitled to all consequential benefits..

Case Law discussed:

- 1.Gopi Chand Bishnoi v. State of U.P. and another, 2007 (4) AWC 3591 — para 8
- 2.Meenglas Tea Estate v. The Workmen, AIR 1963 SC 1719 — para 10
- 3.State of U.P. v. C. S. Sharma, AIR 1968 SC 158 — para 11
- 4.Punjab National Bank v. A.I.P.N.B.E. Federation, AIR 1960 SC 160 — para 12
5. A.C.C. Ltd. v. Their Workmen, (1963) II LLJ 396 — para 12
- 6.Tata Oil Mills Co. Ltd. v. Their Workmen, (1963) II LLJ 78 (SC) — para 12
- 7.S.C. Girotra v. United Commercial Bank, 1995 Supp (3) SCC 212 — para 13
- 8.Subhas Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541 — para 14
9. Subhas Chandra Sharma v. U.P. Co-operative Spinning Mills and others, 2001 (2) UPLBEC 1475 — para 15
- 10.State of Uttar Pradesh v. Saroj Kumar Sinha, (2010) 2 SCC 772 — para 16
- 11.Roop Singh Negi v. Punjab National Bank, (2009) 2 SCC 570 — para 17
- 12.Rajesh Prasad Mishra v. Commissioner, Jhansi Division, Jhansi and others, 2010 (1) UPLBEC 216 — para 18
- 13.State of U.P. and another v. T.P. Lal Srivastava, 1997 (1) LLJ 831 — para 18
- 14.Subhash Chandra Gupta v. State of U.P., 2012 (1) UPLBEC 166 — para 19
- 15.Salahuddin Ansari v. State of U.P. and others, 2008 (3) ESC 1667 — para 19
- 16.Laturi Singh v. U.P. Public Service Tribunal and others, Writ Petition No.12939of 2001 — para 19

(Delivered by Hon'ble Sudhir Agarwal, J.

&
Hon'ble Kaushal Jayendra Thaker, J.)

1. Heard Sri G.K. Singh, learned counsel for petitioner and Sri M.A. Qadeer, learned Senior Advocate appearing for respondent no. 1.

2. The writ petition is directed against the order dated 19.02.2004 passed by respondent-1 imposing punishment of reduction of pension by fifty per cent and forfeiture of entire gratuity.

3. Petitioner was working as Accounts Officer in the Office of Basic Shiksha Adhikari and retired on 31.01.1998. Before his retirement, a charge-sheet was issued to him on 17.01.1997 which was replied by him and thereafter Enquiry Officer submitted enquiry report which has culminated in the impugned order of punishment.

4. Counsel for petitioner submitted that enquiry has been continued after retirement of petitioner under Article 351-A of Civil Services Regulations (hereinafter referred to as "CSR"), which provides that procedure for enquiry would be same as is applicable in the case of major penalty but in the present case, no date, time or place for oral enquiry was ever fixed and after receiving reply from petitioner, Enquiry Officer submitted enquiry report and thereafter punishment order has been passed. In this regard, specific averment has been made in para 20 of writ petition.

5. State has replied para 20 of writ petition in para 12 of counter affidavit by denying the same and stating that full opportunity was given. When called upon, learned Standing Counsel could not tell as to in what manner opportunity was given.

6. In fact, various averments contained in counter affidavit and in particular para-10 shows that petitioner's reply is said to have been fully examined by Enquiry Officer and thereafter enquiry report was submitted which shows that no oral enquiry, whatsoever, has been conducted.

7. In the present case, charge-sheet was issued to petitioner which is undated but it is said in para 13 of writ petition that the same was served on 17.01.1997. This is admitted in para 7 of counter affidavit. Petitioner submitted reply on 28.01.1997 as said in para 15 of writ petition and that is also not denied in para 9 of counter affidavit. A letter sent by Enquiry Officer dated 07.08.1997 required petitioner to make available copies of certain letters which was also replied by petitioner on 07.08.1997. Thereafter case of petitioner is that no date, place or time was fixed for oral enquiry and no oral enquiry was conducted at all. Enquiry Officer submitted report, copy whereof has been filed as Annexure-8 to writ petition, but it is also undated. In the counter affidavit also no date of enquiry has been discussed. Petitioner retired on 31.01.1998 after attaining age of superannuation. Show cause notice along copy of enquiry report was forwarded to petitioner on 17.03.1998.

8. As per provisions of Article 351A of CSR, if a disciplinary enquiry has been instituted before retirement of Government Servant, the same shall continue in accordance with procedure applicable to proceedings on which an order of dismissal from service can be made. This is evident

from Regulation 351A CSR read in entirety along with proviso (a)(iii). This is what has been said by this Court also in **Gopi Chand Bishnoi Vs. State of U.P. and another 2007 (4) AWC 3591**. In the present case, it is evident that enquiry has not been conducted in such as manner.

9. It has been held repeatedly that an enquiry which may lead to punishment of dismissal would include necessarily an oral enquiry and it is mandatory.

10. In **Meenglas Tea Estate v. The workmen., AIR 1963 SC 1719**, Supreme Court observed "It is an elementary principle that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way to cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him. This is the barest requirement of an enquiry of this character and this requirement must be substantially fulfilled before the result of the enquiry can be accepted.

11. In **State of U.P. v. C. S. Sharma, AIR 1968 SC 158**, Court held that omission to give opportunity to the officer to produce his witnesses and lead evidence in his defence vitiates the proceedings. Court also held that in the enquiry, witnesses have to be examined in support of the allegations, and opportunity has to be given to the delinquent to cross-examine these witnesses and to lead evidence in his defence.

12. In **Punjab National Bank v. A.I.P.N.B.E. Federation, AIR 1960 SC 160, (vide para 66)**, Court held that in such enquiries evidence must be recorded in the presence of charge-sheeted employee and he must be given an opportunity to rebut the said evidence. Same view was taken in **A.C.C. Ltd. v. Their Workmen, (1963) II LLJ. 396**, and in **Tata Oil Mills Co. Ltd. v. Their Workmen, (1963) II LLJ. 78 (SC)**.

13. In **S.C. Girotra v. United Commercial Bank 1995 Supp. (3) SCC 212**, Court set aside a dismissal order which was passed without giving employee an opportunity of cross-examination.

14. This Court in **Subhas Chandra Sharma v. Managing Director and another, 2000(1) UPLBEC 541**, said:-

"In our opinion after the petitioner replied to the charge-sheet a date should have been fixed for the enquiry and the petitioner should have been intimated the date, time and place of the enquiry and on that date the oral and documentary evidence against the petitioner should have been led in his presence and he should have been given an opportunity to cross-examine the witnesses against him and also he should have been given an opportunity to produce his own witnesses and evidence. If the petitioner in response to this intimation had failed to appear for the enquiry then an ex parte enquiry should have been held but the petitioner's service should have not been terminated without holding an enquiry. In the present case it appears that no regular enquiry was held at all. All that was done that after receipt of the petitioner's reply to the charge-sheet he was given a show-cause notice and thereafter the dismissal order was passed. In our opinion this

was not the correct legal procedure and there was violation of the rules of natural justice. Since no date for enquiry was fixed nor any enquiry held in which evidence was led in our opinion the impugned order is clearly violative of natural justice."

(emphasis added)

15. The above judgment was followed by another Division Bench in **Subhas Chandra Sharma v. U.P. Co-operative Spinning Mills and others reported 2001 (2) UPLBEC 1475** where Court held:

"In cases where a major punishment proposed to be imposed an oral enquiry is a must, whether the employee request, for it or not. For this it is necessary to issue a notice to the employee concerned intimating him date, time and place of the enquiry as held by the Division Bench of this Court in Subhash Chandra Sharma v. Managing Director, (2000) 1 UPLBEC 541, against which SLP has been dismissed by the Supreme Court on 16-8-2000." *(emphasis added)*

16. In **State of Uttar Pradesh v. Saroj Kumar Sinha reported (2010) 2 SCC 772** Court said :-

"An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/ disciplinary authority/ Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.

When a departmental enquiry is conducted against the government servant it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The inquiry officer has to be wholly unbiased. The rules of natural justice are required to be observed to ensure not only that justice is done but is manifestly seen to be done. The object of rules of natural justice is to ensure that a government servant is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/removal from service."

(emphasis added)

17. Similar view was taken in **Roop Singh Negi v. Punjab National Bank, (2009) 2 SCC 570** where Court said:

"Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected

during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence."

(emphasis added)

18. One of us (Justice Sudhir Agarwal) in **Rajesh Prasad Mishra v. Commissioner, Jhansi Division, Jhansi and others reported 2010 (1) UPLBEC 216** observed, as under, after detail analysis of authorities on the subject:

"Now coming to the question, what is the effect of non-holding of oral inquiry, I find that, in a case where the inquiry officer is appointed, oral inquiry is mandatory. The charges are not deemed to be proved suo motu merely on account of levelling them by means of the charge sheet unless the same are proved by the department before the inquiry officer and only thereafter it is the turn of delinquent employee to place his defence. Holding oral enquiry is mandatory before imposing a major penalty, as held by Apex Court in State of U.P. & another Vs. T.P.Lal Srivastava, 1997 (1) LLJ 831 as well as by a Division Bench of this Court in Subhash Chandra Sharma Vs. Managing Director & another, 2000 (1) U.P.L.B.E.C. 541."

19. In another case in **Subhash Chandra Gupta v. State of U.P., 2012 (1) UPLBEC 166**, a Division Bench of this Court, after survey of law on this issue, observed as under:

*"It is well settled that when the statute provides to do a thing in a particular manner that thing has to be done in that very manner. We are of the considered opinion that any punishment awarded on the basis of an enquiry not conducted in accordance with the enquiry rules meant for that very purposes is unsustainable in the eye of law. We are further of the view that the procedure prescribed under the inquiry rules for **imposing major penalty is mandatory in nature and unless those procedures are followed, any out come inferred thereon will be of no avail unless the charges are so glaring and unrefutable which does not require any proof.** The view taken by us find support from the judgement of the Apex Court in State of U.P. & another Vs. T.P.Lal Srivastava, 1997 (1) LLJ 831 as well as by a Division Bench of this Court in Subash Chandra Sharma Vs. Managing Director & another, 2000 (1) U.P.L.B.E.C. 541.*

*A Division Bench decision of this Court in the case of Salahuddin Ansari Vs. State of U.P. and others, 2008 (3) ESC 1667 held that **non holding of oral inquiry is a serious flaw which can vitiate the order of disciplinary proceeding including the order of punishment has observed as under:-***

" 10..... Non holding of oral inquiry in such a case, is a serious matter and goes to the root of the case.

11. A Division Bench of this Court in Subash Chandra Sharma Vs. Managing Director & another, 2000 (1) U.P.L.B.E.C. 541, considering the question as to whether holding of an oral inquiry is necessary or not, held that if no oral inquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in Subash Chandra Sharma Vs. U.P.Cooperative Spinning Mills & others, 2001 (2) U.P.L.B.E.C. 1475 and Laturi Singh Vs U.P.Public Service Tribunal & others, Writ Petition No. 12939 of 2001, decided on 06.05.2005."

(emphasis added)

20. Impugned order of punishment also shows that till the retirement, enquiry had not completed and if that be so there was no reason as to why an oral enquiry was not conducted by Enquiry Officer. No reason has been given therefor and counter affidavit is completely silent on this aspect.

21. There is another aspect of the matter. If the enquiry is conducted under Article 351 of CSR, punishment permissible therein can only be inflicted if retired employee is found guilty of grave misconduct or to have caused pecuniary loss to Government by misconduct or negligence during service. Impugned order shows that attached Primary School, Daulatpur of Sant Ramraj Goswami Junior High School, Daulatpur was not grant-in-aid and, therefore, Teachers and non-teaching Staff was unauthorizedly and illegally paid salary from State exchequer from January' 1991 to July' 1991 and loss suffered by State is attributable to petitioner. This is obviously a serious matter and therefore also departmental enquiry strictly in accordance with procedure prescribed ought to have been conducted, but the same has not been conducted. Meaning thereby petitioner has not been given adequate opportunity of defence and enquiry has not been conducted in accordance with Article 351A of CSR read with U.P. Government Servants (Discipline and Appeal) Rules, 1999 (hereinafter referred to as "Rules, 1999) which provides procedure to hold enquiry.

22. When confronted, learned Standing Counsel could not dispute the above proposition of law and also could not controvert that in the case in hand, no oral enquiry has been conducted at all.

23. In these facts and circumstances, the impugned order is patently illegal and in utter violation of principles of nature justice and also the procedure prescribed in the Rules.

24. In the result, the writ petition is allowed. Impugned order dated 19.02.2004 is hereby set aside. Petitioner shall be entitled to all consequential benefits.

BEFORE

Versus ...Respondents

Held (Paras:- 9-11)

1. In the present case, the matter is covered by Railway Board's Circular dated 3.9.1996 which permits regularization only in Group D posts. Even otherwise when a post is liable to be filled in by way of promotion, persons engaged directly on casual basis can neither claim regularization nor can be so regularized against such posts which are to be filled in by promotion.

2. We, therefore, find no infirmity or illegality in the approach of Tribunal and finding recorded by it cannot be said to be perverse or illegal so as to warrant interference by this Court in writ jurisdiction under Article 226 of the Constitution of India.

3. We, therefore, find no patent irregularity or illegality in the order of Tribunal. Writ petition is **dismissed**.

Case Law discussed:

1. Ram Kumar and others Vs. Union of India and others, Writ Petition (Civil) No. 15863 of 1984 — para 6
2. Ram Kumar and others Vs. Union of India and others, (1987) SCALE (2) 1192 — para 7
3. General Manager Northern Railway and others Vs. Jageshwar and others, Civil Appeal No. 6413 of 2002 — para 8
4. Union of India Vs. Moti Lal, (1996) 7 SCC 48 — para 8

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri A.D. Singh, learned counsel for petitioners and learned Standing Counsel for respondents.

2. Petitioners have filed this writ petition under Article 226 of the Constitution of India challenging order dated 31.12.1997 passed by Chief Administrative Officer (Construction), North Eastern Railway, Gorakhpur and against judgment and order dated 7.12.2004 whereby Original Application No. 1421 of 1998 filed by petitioners has been dismissed.

3. It appears that petitioners were engaged as casual labour (Black smith) in North Eastern Railway, Gorakhpur in the between 1978 to 1981. In 1982, petitioners were retrenched pursuant to Chief Engineer's order dated 14th April, 1992. Thereafter, respondents further engaged some casual workers in a project and consequent thereto, petitioners were engaged as casual labour (Black smith). One of such order dated 24.11.1989 in respect to petitioner no. 3 is on record. Petitioners continued to work and after completion of six months, they were granted regular pay scale as also temporary status.

4. Question of regularization was considered by Railway Board and we find that in this regard Railway Board issued a circular on 3.9.1996 and in reference thereto petitioners were also considered for regularization as Group-D employee and vide order dated 31.12.1997 petitioners were regularized in Group-D against newly created work-charged post.

5. Against aforesaid order dated 31.12.1997, original application was filed by petitioners before Tribunal, Gorakhpur on the ground that petitioners having discharged their duties as casual

labour against posts which are in Group-C, they ought to have been regularized in Group-C and not Group-D post.

6. Despite repeated query, learned counsel for petitioners could not show any provision or rule under which a person could have been regularized in Group-C posts in Railway where all posts are liable to be filled in by promotion. For this purpose Tribunal has relied on a Full Bench Decision in *Ram Kumar and others Vs. Union of India and others in Writ Petition (Civil) No. 15863 of 1984* wherein it was held that a Group-C post being a promotional post, a person even directly engaged on casual basis, cannot be regularized on such post but would be liable to be regularized in feeder cadre i.e. against posts in Group D, as Group C post is an only promotional post and hence regularization of directly engaged persons is not permissible. No law otherwise has been shown to us so as to entitle petitioners for being regularized on a Group-C post directly.

7. Learned counsel for petitioners sought to rely on an order of Supreme Court dated 6.9.1990, passed in Civil Misc. Petition No. 31378 of 1988, **Ram Kumar and others Vs. Union of India and others, (1987) SCALE (2) 1192**, but from a perusal thereof, we find that statement was made by counsel for Railways in that matter, relying on Board's instructions dated 20th January, 1985, that those people who were working for more than five years may be regularized in Class III post and on that statement, miscellaneous application was disposed of.

8. We may also notice here that subsequently similar issue has been considered by Supreme Court in **General Manager Northern Railway and others Vs. Jageshwar and others (Civil Appeal No.6413 of 2002)** decided on 1.4.2009, wherein Jageshwar and two others were engaged as casual labour Gangmen. Their services were temporarily used as Mates in construction organization. The post of Mate was a Group-C post. Subsequently, when the three workers became surplus they were screened and optioned for absorption in Group-D post for which they consented and accordingly regularized in Group-D post in October, 1996 and September, 1997. These three workers i.e. Jageshwar and two others approached Central Administrative Tribunal contending that since they were working as Mates, a Group-C post, they ought to have been regularized in Group-C. Tribunal though did not accept contention that they should have been regularized as Group-C on the ground that Group-C post since are liable to be filled in only by promotion, no person can seek direct entry by way of regularization. However, relying on earlier Supreme Court judgment in **Union of India Vs. Moti Lal, (1996) 7 SCC 48**, Tribunal directed that pay drawn by those workers as Mate shall be protected as personal to them till they are promoted to GroupC post. Railway Department aggrieved by judgment of Tribunal came to High Court but writ petition was dismissed hence, matter came before Supreme Court. It was held that judgment in **Moti Lal (supra)** was not applicable for the reason that casual appointment as Mate, a Group-C post, would give no benefit to such appointee since post of Mate is an exclusive promotional post and for that reason they were regularized in Group-D. In **Moti Lal (supra)** also it was held that in Railway, a person cannot seek regularization on Group-C post which is liable to be filled in by promotion and instead can be regularized only in Group-D post. Having said so Supreme Court said that in *Moti Lal (supra)* since in the mean time they were regularized as Mates hence their position was not disturbed by exercising power under Article 142 but that does not lay down a proposition of law and no person

who has screened and absorbed in Group-D can claim any benefit against higher post whether in regard to pay-scale or otherwise. Paras 3, 4 and 5 of the judgment in **General Manager Northern Railway and others Vs. Jageshwar (supra)** are reproduced as under :-

"3. Motilal (supra) has no application. In that case, respondents were directly appointed as casual mates in Class III, though the post of made was an exclusive promotion post. They were regularized in a lower post. The Tribunal directed that they should be regularized as 'mates'. This Court held that respondents were not entitled to be regularized in Group III posts. But having regard to their long service of 22 to 25 years, this Court in exercise of powers under Article 142 left their regularization as mates undisturbed making it clear that the direction should not be treated as precedent.

4. This Court in Motilal case (supra) did not lay down any proposition that when an employee is absorbed in a different organization, his previous pay should be protected. Absorption in Railways was not in pursuance of any legal right. To avoid hardship to the employees of the construction organization on humanitarian grounds, the Railways chose to consider the surplus labour of that organization for absorption after screening them. When being so screened and absorbed, an employee cannot counted that he should be absorbed in a post equivalent to a post he was holding in the previous organization nor could the Tribunal or High Court direct that his pay should be protected.

5. In view of the above, the appeal is allowed, the orders of the High Court and Tribunal are set aside and as a consequence the original application is dismissed."

9. In the present case, the matter is covered by Railway Board's Circular dated 3.9.1996 which permits regularization only in Group D posts. Even otherwise when a post is liable to be filled in by way of promotion, persons engaged directly on casual basis can neither claim regularization nor can be so regularized against such posts which are to be filled in by promotion.

10. We, therefore, find no infirmity or illegality in the approach of Tribunal and finding recorded by it cannot be said to be perverse or illegal so as to warrant interference by this Court in writ jurisdiction under Article 226 of the Constitution of India.

11. We, therefore, find no patent irregularity or illegality in the order of Tribunal. Writ petition is dismissed.

(2016) 8 ILRA 488
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.08.2016

BEFORE

THE HON'BLE ANIL KUMAR, J.
THE HON'BLE ANIL KUMAR SRIVASTAVA-II, J.

Criminal Appeal No.- 269 Of 2013

Munshi Lal @ Munshi Ram

...Appellant

Versus

State Of U.P.

...Respondent

Counsel for Appellant:

Amar Singh, Rajendra Prasad Misra

Counsel for Respondent:

G.A.

Legislation referred to : Indian Penal Code, 1860 – Ss. 300 (Exception I), 302, 304 Part I, 304 Part II; Code of Criminal Procedure, 1973 – S. 313.

FACTS :

The accused-appellant Munshi Lal was convicted by Additional District and Sessions Judge, Court No. 4, Gonda, vide judgment and order dated 08.02.2013 in S.T. No. 203/2011, arising out of Case Crime No. 122/2011 under Section 304 I.P.C., P.S.-Itiyathok, District Gonda, and was sentenced to life imprisonment with a fine of Rs. 5,000/- and, in default of payment of fine, six months rigorous imprisonment.

The prosecution case was that on 02.04.2011 the children of the accused-appellant and the deceased (Pushpa Devi) left for school. Returning home, they found the main door locked. On 03.04.2011 at 8:00 a.m. the accused-appellant informed his son on mobile that the key was kept inside the Ramayana. Upon opening the house the son found his mother lying dead with a nylon cord wrapped around her neck. An F.I.R. was lodged on 03.04.2011 under Section 302 I.P.C. The post-mortem conducted by Dr. P.K. Srivastava on 03.05.2011 recorded the cause of death as asphyxia due to strangulation, with multiple ante-mortem injuries including a ligature mark around the upper part of the neck with fracture of the right cornu of the hyoid bone.

Eight prosecution witnesses, including P.W.3 (Raj Kumar Pandey, son) and P.W.4 (Akshay Kumar, younger son), were examined. Both corroborated the prosecution version. The accused-appellant in his statement under Section 313 Cr.P.C. denied the charges. Two defence witnesses were produced to establish that on the date of the incident the appellant was not present at home, having gone to attend a cremation. The defence plea was also raised that the accused-appellant acted under grave and sudden provocation, having found the deceased in a compromising position with another man, and in the heat of passion wrapped a nylon cord around her neck.

In appeal, learned counsel for the appellant did not press the appeal on merits and confined arguments solely to the question of sentence, submitting that the case was one of sudden provocation without premeditation and that the sentence of life imprisonment was excessive. The A.G.A. did not dispute this approach.

QUESTIONS OF LAW :

(i) Whether, in a case of culpable homicide not amounting to murder where the act was committed under grave and sudden provocation without premeditation, attracting Exception I to Section 300 I.P.C. and conviction under Section 304 Part I I.P.C., the sentence of life imprisonment awarded by the trial court is warranted, or whether the same is liable to be modified?

(ii) What are the principles governing the sentencing of an accused convicted under Section 304 Part I I.P.C. where the offence was committed in the heat of passion upon sudden provocation and without premeditation?

HELD :

(i) **Conviction confirmed — No illegality in Trial Court's finding —** The Court, on appreciation of the evidence on record, particularly the testimony of P.W.3 and P.W.4 who are the real sons of the deceased and the accused-appellant, found no illegality or infirmity in the conviction recorded by the learned Trial Court under Section 304 Part I I.P.C. Since learned counsel for the appellant did not press the appeal on merits, the order of conviction as imposed by the Trial Court is confirmed.

(ii) **Principles of sentencing — Proportionality and deterrence —** Sentencing is one of the most important aspects of criminal adjudication. The primary objective of criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the offence and the manner in which it was committed. Undue sympathy resulting in inadequate sentencing undermines public confidence in the efficacy of law. Courts must award sentences that reflect the conscience of society. At the same time, a sentence that is disproportionately harsh where the statute itself provides a range of punishment is equally contrary to the ends of justice. [Relied upon: State of U.P. v. Shri Kishan, (2005) 10 SCC 420]

(iii) **Sudden provocation and absence of premeditation — Mitigating factors in sentencing under S. 304 Part I I.P.C. —** Where an accused has been convicted under Section 304 Part I I.P.C. on the basis that the act was committed under grave and sudden provocation — the accused having found his wife in a compromising position with another man — and where the charge sheet itself was filed under Section 304 I.P.C. (not Section 302 I.P.C.) indicating that there was no intention to cause death, and where there was no premeditation and the accused did not act in an unusual or cruel manner, imposition of the maximum sentence of life imprisonment is excessive. Any ordinary man with normal senses would be outraged upon witnessing such a scene, and the sudden derangement of mind in such circumstances is a significant mitigating factor at the stage of sentencing. [Relied upon: State of U.P. v. Lakhmi, 1998 CrL. L.J. 1411; Pulicherla Nagaraju alias Nagaraja Reddy v. State of A.P., (2006) 11 SCC 444]

(iv) **Distinction between Ss. 302 and 304 Part I I.P.C. — Intention as the determinative factor —** The court must proceed with care and caution to determine the pivotal question of intention, which distinguishes an offence under Section 302 I.P.C. from one under Section 304 Part I or Part II I.P.C. Relevant circumstances to be considered include: the nature of the weapon used; whether it was pre-carried or picked up from the spot; whether the blow was aimed at a vital part; the degree of force employed; whether there was a sudden quarrel or premeditated attack; the existence of prior enmity; the presence of grave and sudden provocation; whether the act was done in the heat of passion; and whether the accused acted in an unusual or cruel manner. This list is not exhaustive and the court must assess the totality of circumstances in each case. [Relied upon: Pulicherla Nagaraju alias Nagaraja Reddy v. State of A.P., (2006) 11 SCC 444]

RESULT :

Appeal partly allowed. The order of conviction under Section 304 Part I I.P.C. as recorded by the Trial Court is confirmed. The sentence of life imprisonment is however modified. The accused-appellant is sentenced to undergo rigorous imprisonment for nine (9) years under Section 304 Part I I.P.C. with fine of Rs. 5,000/- and in default of payment of fine, six months' rigorous imprisonment. The office is directed to send a certified copy of this order to the Trial Court forthwith along with the lower court record.

Cases Referred:

State of U.P. v. Shri Kishan, (2005) 10 SCC 420 (SC);

State of U.P. v. Lakhmi, 1998 Cri. L.J. 1411 (SC)
Pulicherla Nagaraju alias Nagaraja Reddy v. State of A.P., (2006) 11 SCC 444 (SC)
Bojh Adiwasi v. State, 1999 (39) ACC 72.

(Delivered by Hon'ble Anil Kumar, J.
&
Hon'ble Anil Kumar Srivastava-II, J.)

1. Heard Shri Rajendra Prasad Misra, learned counsel for the appellant, Shri Umesh Verma, learned A.G.A. and perused the record.

2. Instant appeal has arisen against the judgment and order dated 08.02.2013 passed by Additional District and Sessions Judge, Court No.4, Gonda in S.T. No.203/2011 arising out of Crime No.122/2011 under Section 304 I.P.C., P.S.-Itiyathok, District-Gonda, whereby accused-appellant was convicted under Section 304 Part I I.P.C. and was sentenced for life imprisonment and pay a fine of Rs.5000/- and in default of payment of fine, six months of rigorous imprisonment was also awarded.

3. Facts in brief of the present case are that complainant-Raj Kumar Pandey on 03.04.2011 submitted an information that there are no cordial relations between his parents, namely, Munshi Lal and Pushpa Devi and often they used to quarrel due to domestic problem.

4. On 02.04.2011 when complainant along with his younger brother-Akshay Kumar came back from school to home, they found that there was a lock on the main door of their home and searched for their parents.

5. On 03.04.2011 at 8:00 a.m. his father informed the complainant on his mobile phone that the key of lock is kept in the Ramayan and after getting the key, he opened the lock and went inside the house where he found their mother lying dead in the southern side of the room near court-yard and a nylon cord was wrapped around her neck.

6. Accordingly, an F.I.R. was lodged on 03.04.2011 at 9: 30 p.m., Case Crime No.122/11 under Section 302 I.P.C., P.S.-Itiyathok, District-Gonda was registered. Thereafter, a inquest report as well as site-plan was prepared by Ram Pyare, Investigating Officer, P.S.-Itiyathok, District-Gonda and post-mortem of dead body was conducted on 03.05.2011 at 3:50 p.m. by Dr. P. K. Srivastava and in the said report, the cause of death has been mentioned due to asphyxia as a result of strangulation. Following ante mortem injuries were found :-

1. Multiple abraded contusion 10cm x 5cm back of left arm.
2. Abraded contusion 2cm x 1 cm back of left elbow.

3. Ligature mark around upper part of neck obliquely placed size 30 cm x 3cm, 5cm below right ear, 5m below chin and 5cm below left ear, on dissection, Fracture Right corner of Hyoid Tissue.

4. Contusion 5sxm x 4cm on left maxillary region of face.

7. Thereafter, charge sheet was submitted by the Investigating Officer. A case at S. T. No.203/2011 arising out of Case Crime No.122/2011 under Section 304 I.P.C. has been instituted in the Court of Additional District and Sessions Judge, Court No.4, Gonda.

8. Accused-appellant denied the charges and claimed trial.

9. During the trial, eight witnesses were produced from the prosecution side in order to prove the prosecution case.

10. In addition to the said fact, statement of accused-appellant under Section 313 CPC has been recorded.

11. Beside the said facts, on behalf of the accused-appellant, two witnesses, namely, Ram Karan Mishra and Salig Ram were produced and they stated that on the day of incident the appellant was not present at his home and went to attend the cremation of mother of D.W.1 who died on 01.04.2011.

12. Further from the side of the accused-appellant, defence was taken that there was a sudden provocation on the part of the accused-appellant, who found his wife in compromising position with another man and due to the said fact, he became annoyed and wrapped a nylon cord around her neck.

13. Shri Rajendra Prasad Misra, learned counsel for the appellant initially argued the appeal on merit. Subsequently, he submits that he confined his argument only on the point of sentence.

14. Learned AGA does not dispute the said suggestion made by learned counsel for the appellant.

15. From the perusal of the statement given by P.W.3-Raj Kumar Pandey, who is son of the deceased and accused, the position which emerges out is that there are no cordial relations between his parents, namely, Munshi Lal and Pushpa Devi and they often used to quarrel due to domestic problem. On 02.04.2011 complainant and his younger brother-Akshay Kumar went to school for study. When in the noon complainant came back to the house, he found that there was a lock on the main door of his house. He searched for his parents in the neighborhood but could not find them. On 03.04.2011 at 8:00 a.m. his father phoned the complainant on his mobile phone informing him about the key being kept in the Ramayan and after getting the key, he opened the lock and went

inside the house where he found his mother lying dead in the southern room of court-yard, with a nylon cord wrapped around her (complainant's mother) neck.

16. Further, P.W.4-Akshay Kumar, who is younger son of the deceased and accused had also supported the prosecution version.

17. Taking into consideration the above said statement given by P.Ws.3 and 4 who are real son of the deceased and accused as well as fact that, learned counsel for the accused-appellant does not press the present appeal on merit, but confined his argument only to the extent that conviction is based on the point of sentence.

18. We are of the considered opinion that no illegality or infirmity has been done by trial Court by convicting the accused by means of the impugned judgment under challenge in the present appeal.

19. Next point which is to be considered in the present case is that "what sentence is to be awarded in the present case."

20. On appreciation of evidence on record of the present case, we agree with the contention of the learned counsel for the appellant that since it is a case of sudden provocation and there was no premeditation on the part of the appellant and he had not acted in unusual manner.

21. Sentence is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. With reference to sentencing by courts, this Court in the decision in ***State of U.P. vs. Shri Kishan (2005) 10 SCC 420*** made these weighty observations :

"5. Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc....."

7. The object should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be.

8. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be resultwise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

9. *The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal".*

22. In view of the above principle of law laid down by this Court, and considering the facts and circumstances of the case at hand, particularly, the fact that in the present case it is clear that there was a sudden provocation on the part of the accused-appellant, who found his wife in compromising position with another man and killed her by wrapping a nylon cord around her neck and further considering that there was no premeditation on the part of the appellant to commit the murder, we are of the view that it is a fit case to hold the offence punishable under Section 304 Part I IPC.

23. In this regard, Hon'ble the Apex Court in the case of **State of U. P. vs. Lakhmi 1998 CRL. L. J. 1411** held as under :-

"There can be little doubt that if the accused had witnessed any such scene, his mind would have become suddenly deranged. It is not necessary that a husband should have been hot tampered or hypersensitive to lose his equanimity by witnessing such scenes. Any ordinary man with normal senses or even sangfroid would be outraged at such a scene.

We are, therefore, inclined to afford to the respondent accused benefit of Exception I to Section 300 IPC. As the corollary, we find the respondent guilty only under Section 301 (Pare I), IPC.

In the result, we allow this appeal and set aside the judgment of the High Court, but in alteration of the conviction passed by the Sessions Court, we convict him under Section 304 (Part I), IPC. We sentence him to undergo rigorous imprisonment for a period of six years. We direct the Sessions Judge, Meerut to take steps to put the accused in jail for undergoing the remaining portion of the imprisonment term in accordance with the sentence imposed on him now. (Bojh Adiwasi vs. State 1999 (39) ACC 72)."

24. In **Pulicherla Nagaraju alias Nagaraja Reddy v. State of A.P. (2006) 11 SCC 444**, in paragraph 29, this Court has discussed the issue as to when the conviction can be converted from an offence punishable under Section 302 IPC to Section 304 Part I or 304 Part II IPC and the same is reproduced hereunder: -

"29. Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters -- plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and

group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention. Be that as it may."

25. So far as the question of sentence is concerned, it has already come on record that offence committed by the accused-appellant was under sudden provocation and has already been found by the Investigating Officer in the charge sheet. Relying upon the case law as stated herein above, we are of the considered view that imposition of maximum sentence of life in this case is too excessive, since charge sheet was also filed under Section 304 I.P.C. And trial Court has convicted and sentenced the accused-appellant under Section 304 I.P.C.

26. We are of the considered view that end of justice would meet if the sentence of accused-appellant is reduced upto nine years rigorous imprisonment and fine of Rs.5000/-.

27. Accordingly, appeal is partly allowed.

29. Order of conviction as imposed by learned Trial Court is confirmed and the sentence is modified to the extent that the accused-appellant is sentenced for rigorous imprisonment for nine years under Section 304 Part I I.P.C. and pay a fine of Rs.5000/- and in default of payment of fine, he shall undergo for six months imprisonment.

30. Office is directed to send the certified copy of this order to learned trial Court forthwith and send the lower court record forthwith.

(2016) 8 ILRA 495
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.08.2016

BEFORE

THE HON'BLE ARVIND KUMAR TRIPATHI, J.
THE HON'BLE MUKHTAR AHMAD, J.

Criminal Appeal No.- 333 Of 1983

Vijai Nandan Srivastava

...Appellant

Versus

State Of U.P.

...Respondent

Counsel for Appellant:

Sanjiv Ratan

Counsel for Respondent:

A.G. A.

Legislation referred to : Indian Penal Code, 1860 — Sections 299, 300 (Exception 4), 302, 304 Part I, 304 Part II, 324

Indian Evidence Act, 1872 — Section 27 (Admissibility of disclosure statement leading to recovery)

Code of Criminal Procedure, 1973 — Section 313.

FACTS :

The appellant-accused Vijai Nandan Srivastava was a tenant of the deceased Ashok Kumar Sharma, resident of Mohalla Peepal Mandi, Agra. He had vacated the tenanted premises but had not paid seven months' arrears of rent. On 14 December 1981, at about 5.30 p.m., the deceased along with P.W.4 Jai Gopal, P.W.2 Padam Chandra Sharma (brother of deceased), and P.W.6 Kali Charan went to the house of the appellant in Saraswati Nagar, Balkeshwar, to demand the arrears of rent and the key to the premises. When the deceased demanded the rent and key, the appellant abused him; the deceased abused him in return, whereupon the appellant stabbed the deceased with a knife on his left side chest and fled towards his house. The deceased fell down in the lawn and succumbed to the injury at the spot.

The appellant was apprehended from his house by P.W.1 Head Constable Mahipal Singh, who had rushed to the spot on hearing shouts. A blood-stained knife was recovered from a heap of piston and rings lying in the courtyard of the appellant's house, at his instance and on his pointing out, which was proved by P.W.5 Narendra Singh (witness of recovery) and P.W.7 Inspector Baljit Singh (Investigating Officer). The post-mortem conducted by P.W.9 Dr. Sudhir Chandra revealed a single ante-mortem incised wound 2.5 cm × 1 cm penetrating the chest cavity below the left nipple, with the pericardium punctured and filled with clotted blood, and the vessels of the right atrium and upper right ventricle cut — death being due to shock and haemorrhage. The chemical examiner's report confirmed human blood on the knife and clothing.

The defence version, set up under Section 313 Cr.P.C. and supported by D.W.1 Smt. Pranita Srivastava (wife of the appellant), was that it was the deceased who had placed an open knife on the appellant's chest and threatened him, whereupon the appellant twisted the deceased's wrist, and during the ensuing scuffle the deceased sustained injury from his own knife and fell. This version was denied by all three eyewitnesses. The trial court, relying upon the prosecution eyewitnesses, convicted the appellant under Section 302 IPC and

sentenced him to life imprisonment. The present criminal appeal was preferred against that conviction and sentence.

Questions of Law

- (i) Whether the testimony of eyewitnesses who are friends or close relatives of the deceased is liable to be discarded solely on account of such relationship or intimacy, or whether their evidence requires only closer scrutiny?
- (ii) Whether the absence of the accused's signature or thumb impression on a disclosure statement/recovery memo renders the statement inadmissible or the recovery unreliable under Section 27 of the Indian Evidence Act, 1872?
- (iii) Whether, in a case of a single knife blow inflicted during a sudden verbal altercation in the heat of passion — without premeditation, without repetition of blows, and without any undue advantage being taken — the offence falls under Exception 4 to Section 300 IPC so as to reduce the conviction from Section 302 IPC to Section 304 Part II IPC?
- (iv) What are the essential ingredients required to invoke Exception 4 to Section 300 IPC and what distinguishes Section 304 Part I from Section 304 Part II IPC in such circumstances?

Held

(i) Evidence of interested or related witnesses: The evidence of eyewitnesses who are friends or relatives of the deceased cannot be discarded merely on that ground. However, the court is required to exercise greater care and caution in scrutinising their testimony. In the present case, the ocular account of P.W.4 Jai Gopal and P.W.6 Kali Charan — whose presence on the spot was admitted by the accused himself — coupled with the evidence of the independent witness P.W.1 Head Constable Mahipal Singh and the recovery of the blood-stained knife at the instance of the appellant, inspired confidence and was sufficient to establish that it was the appellant who caused the fatal knife injury to the deceased.

(ii) Signature of accused on disclosure statement/recovery memo — not mandatory: There is no legal requirement that a disclosure statement under Section 27 of the Indian Evidence Act must bear the signature or thumb impression of the accused to be admissible. The earlier observation to the contrary in *Jackaran Singh v. State of Punjab*, 1995 Cri LJ 3992, was subject to suo motu review by the Supreme Court, and the corrigendum published in 1998 clarified that no such proposition was laid down. The Apex Court in *State of Rajasthan v. Teja Ram*, AIR 1999 SC 1776, categorically held that the Investigating Officer is not obliged to obtain the signature of the accused on the recovery memo. The recovery of the knife in the present case was fully proved by P.W.5 and P.W.7.

(iii) Application of Exception 4 to Section 300 IPC — ingredients: To invoke Exception 4 to Section 300 IPC, four conditions must be satisfied: (a) the act was done without premeditation; (b) it occurred in a sudden fight; (c) it was done in the heat of passion upon a sudden quarrel; and (d) the offender did not take undue (i.e. unfair) advantage or act in a cruel or unusual manner. The cause of the quarrel and who first offered provocation are not relevant; the decisive factor is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Where, on a sudden quarrel, a person in the heat of the moment uses a weapon that is handy and causes a single injury — one of which proves fatal — he is entitled to the benefit of Exception 4, provided he has not acted cruelly or taken undue advantage. [*Surinder Kumar v. Union Territory of Chandigarh*, (1989) 2 SCC 217; *Arumugam v. State*, (2008) 15 SCC 590 — relied upon]

(iv) Section 304 Part I vs. Part II — distinction: Where both intent and knowledge to cause death are present, the offence is one under Section 304 Part I IPC. Where there is only knowledge — without intention to cause death or such bodily injury as is likely to cause death — the offence falls under Section 304 Part II IPC. In the facts of the present case, the incident arose from a sudden exchange of abuses followed by an immediate scuffle in the heat of passion. The appellant caused only a single stab wound without repetition of blows, indicating he did not take undue advantage of being armed. The level of preparedness could not be characterised as premeditation. There was no intention to cause death — only knowledge that the act was

likely to cause death — and accordingly the case falls under Exception 4 to Section 300 IPC read with Section 304 Part II IPC.

Result: Appeal partly allowed. Conviction under Section 302 IPC set aside and modified to one under Section 304 Part II IPC. Sentence of life imprisonment substituted by rigorous imprisonment for ten years and a fine of Rs. 20,000/-, with six months' further rigorous imprisonment in default of payment of fine. Judgment and order of the Vth Additional Sessions Judge, Agra, modified accordingly.

Cases Referred:

Surinder Kumar v. Union Territory of Chandigarh, (1989) 2 SCC 217

Arumugam v. State, (2008) 15 SCC 590

Jackaran Singh v. State of Punjab, 1995 Cri LJ 3992 (and suo motu review reported in 1998 J.V.(1) Ker pp. 1–5)

Natarajan v. Union Territory of Pondicherry, 2003 Cri LJ 2372

State of Rajasthan v. Teja Ram, AIR 1999 SC 1776.

(Delivered by Hon'ble Mukhtar Ahmad, J.)

1. This criminal appeal has been preferred against the judgment and order dated 12.1.1983 passed by Vth. Additional Sessions Judge, Agra in Sessions Trial No. 206 of 1982, convicting the accused under Section 302 I.P.C. and sentencing him to undergo life imprisonment.

2. The prosecution case in nut shell is that an F.I.R. was got lodged by Jai Gopal (P.W.1) on 14.12.1981 at Police Station New Agra by stating that he is originally resident of Hanumangarhi, Hathras but presently residing in Mohalla Peepal Mandi, Police Station Chatta with his brother in law Ram Briksha Chimniwale; that he had friendship with Ahsok Kumar s/o Hari Shankar Sharma (deceased), resident of Peepal Mandi; that Vijai Nandan Srivastava- appellant was a tenant of Ashok Kumar and had not given rent for about seven months; that the house was kept locked by him though he was not residing therein and was residing in a rented house in Saraswati Nagar, Balkeshwar; that on the day of incident i.e. on 14.12.1981 at about 5.30 p.m. he along-with Ashok Kumar, Padam and Kali Charan went to the house of Vijai Nandan Srivastava to get the rent and key and when they reached at the door of his house he came out. Ashok Kumar demanded the rent and key from him but he asked "**which rent and which key**" and started abusing. Ashok Kumar too abused him on which Vijai Nandan Srivastava stabbed in his left side chest by knife and thereafter he ran away towards his house. Ashok Kumar fell down in the lawn and succumbed to the injury sustained. On their shouting people of nearby and police personnel came there. Vijai Nandau Srivastava was caught by the police . On this information an FIR (Ex Ka 2) bearing case crime No.509/81 under section 302 I.P.C. was registered against accused appellant Viajy Nandan Srivastava by PW 1 Constable Krishna Baboo Chauhan. Entry in G.D. was also made by him. Investigation was entrusted to Inspector Baljit Singh (P.W.7). He reached on the spot, prepared site plan Ex. Ka 9. On the pointing out of the accused-appellant recovery of knife was made from his house and Fard Ex. Ka 2 was prepared. He also took blood stained and plain mud from the spot and and prepared fard Ex. Ka-8. Inquest of deceased was also conducted by him. Clothes recovered from the dead body, knife, sample of blood stained and plain mud were sent for chemical analysis thereafter. Dead body was sent for postmortem through constable Mahipal Singh PW 3. Dr Sudhir

Chandra PW 9 conducted post mortem on the dead body of deceased. As per chemical analyst report, on all the articles there was human blood, however, blood group could not be ascertained on account of having been disintegrated. He also recorded the statements of the witnesses. After concluding investigation he submitted the charge-sheet against accused appellant under section 302 I.P.C. Learned Magistrate concerned committed the case to the court of sessions, where charge under Section 302 I.P.C. was framed against accused appellant, who pleaded not guilty and claimed trial.

3. In order to bring home the charge of murder against appellant the prosecution has examined nine witnesses. P.W.1 Head constable 280 Mahi Pal Singh is the witness who after being relieved from the V.I.P. duty was going with constable Kamlesh Kumar . Hearing the shouting he had rushed to the spot just after the incident. He had caught the accused from his house. P.W. 2 Padam Chandra Sharma is the brother of the deceased. He is examined as eye witness. P.W. 3 Constable 1324 Mahipal Singh had taken the dead body of the deceased in sealed cover to the Post Mortem House. . P.W. 4 Jai Gopal is the first informant. He has also deposed an eye witness account of the incident. P.W. 5 Narendra Singh is the witness of recovery of knife at the instance of the accused-appellant. P.W. 6 Kali Charan was also produced as an eye witness of the occurrence. P.W. 7 Baljit Singh is the Investigating Officer who had conducted the investigation and submitted the charge-sheet. Constable Krishna Baboo Chauhan P.W. 8 is a witness who had made the G.D. Entry and lodged F.I.R. against the accused-appellant. Dr. Sudhir Chandra P.W. 9 is a witness who conducted post-mortem on the dead body of the deceased. He has proved the post mortem report Ex. Ka 16.

4. After concluding the prosecution evidence statement of accused under Section 313 Cr.P.C. was recorded. He admitted that he resided in the house of deceased as tenant but vacated the same. Though it was admitted that rent was due but he has specifically denied about putting the lock thereon. Except Padam presence of first informant Jai Gopal and Kalicharan on the place of occurrence was also admitted. He further stated that it was the deceased who had put open knife on his chest and demanded rent forcibly, then he caught the hand of Ashok Kumar in which he was having the knife and twisted it. Thereafter scuffling took place between them, in which the knife of deceased stabbed in his own left side chest, consequently he fell on the ground and scummed to the injuries sustained. Thereafter Jai Gopal and Kali Charan ran away from there. He denied from making recovery of knife on his instance. It was also stated that deceased Ashok Kumar was facing trial under Section 376 and 307 I.P.C, Kali Charan was also accused in a case under Section 307 I.P.C. and Jai Gopal was also an accused in a case under Section 307 and 324 I.P.C. As such all the three were history- sheeted criminals. D.W.1 Parinita Srivastava, wife of the accused was examined from the side of defence.

5. Learned Trial Judge relying on the evidence adduced on behalf of the parties and in particular, the deposition of the eye witnesses found the appellant guilty and sentenced him to under go rigorous imprisonment for life and story set up by the defence was dis-believed. Aggrieved by that judgment and order of conviction and sentence, the instant appeal has been preferred.

6. We have heard Mr. Mewa Lal Shukla, amicus curiae for the appellant, Mr. Mahendra Bahadur Yadav, learned A.G.A. and gone through the record .

7. Perusal of the record indicates that it is a case where the happening of incident is more or less admitted. It is not disputed that appellant resided in the house of deceased as a tenant. It is also not disputed that the accommodation was vacated by the appellant but as per the prosecution version it was locked by him while as per defence version no lock was lying thereon. There is also no dispute that seven months rent was due against the appellant. Place of occurrence and time of incident is also admitted. The defence has not denied the presence of the prosecution witnesses Jai Gopal PW4 and Kali Charan PW6 on the spot at the time of occurrence while presence of Padam PW2, brother of deceased has specifically been denied. It is also not in dispute that deceased died on the spot by sustaining injury of knife. The main dispute is that as per prosecution version appellant stabbed Ashok Kumar with knife on his left side chest which resulted in his death while as per defence version, the deceased, in scuffle with appellant sustained injuries from his own knife which proved fatal.

8. Challenge to the impugned judgment inter-alia is primarily on the following grounds-

A) That eye witnesses PW 4 Jai Gopal and P.W. 6 Kali Charan are close friends of the deceased as such these witnesses are highly interested witnesses but conviction is based merely on the evidence of aforesaid witnesses, which is not trust worthy and reliable, as such conviction of appellant is liable to be set aside .

B) That P.W.2 Padam Chandra Sharma, brother of the deceased was not present on the spot otherwise he would be the first informant of the incident. Further, he was serving as Lower Division Clerk in Hindi Sansthan and was on duty on the date of incidence though he in his deposition before the court has stated that he had taken half day leave on that day but no such proof is made is made available on record. (C) That the incident has not occurred as per prosecution version but deceased sustained injuries at his own.

(D) That no recovery of knife was made at the instance of the appellant and fact of bearing no signatures of accused on it is sufficient to prove the same as fake.

9. Learned A.G.A. has denied these arguments by saying that prosecution witnesses are natural and truthful and they have given the true version of the occurrence. The prosecution case is constant with the facts disclosed in the FIR. The accused was arrested from his own house and weapon of assault i.e. knife was recovered on his pointing out from his own house which was having blood stains. As per chemical examination report there was human blood on it; that P.W. 2 was also present on the spot and learned Trial Court has rightly relied upon the prosecution evidence. It is also argued that recovery of weapon was proved by P.W. 5 and P.W.67 and mere on the ground of non bearing signature of accused, the same cannot be disbelieved.

10. Admittedly the friendship and intimacy of P.W. 1 Jai Gopal and P.W. 6 Kalicharan and relationship of P.W.2 Padam Chandra Sharma being brother of deceased are not in dispute. But we are of the view that the evidence of witnesses cannot be discarded merely on such ground, of course much care and caution shall be required in scrutinizing their evidence.

11. The sequence of events and manner of occurrence are properly revealed by the evidence of following witnesses adduced on behalf of prosecution.

12. The prosecution has examined Head Constable Mahipal Singh PW1 as an independent witness, who in his deposition has stated that on 14.12.1981 he along-with constable Kamlesh Kumar was coming after being relieved from V.I.P. duty. They heard shouting by people "*Chakoo Maar Diya Khoon Kar Diya*" upon which they rushed towards the place of occurrence where he saw the deceased lying dead on the ground having a lot of blood. The culprit was said to be in his house and he caught him there from.

13. P.W.2 Padam Chandra Sharma, elder brother of the accused has stated that along-with Ashok Kumar Sharma (deceased) Kalicharan and Jai Gopal had gone to the house of the accused in Mohalla Saraswati Nagar to demand the arrears of rent and key of the tenamant. When Ashok Kumar demanded the rent and key from the appellant accused but he started abusing him upon which Ashok Kumar also abused him. Then accused stabbed by knife towards left side of the chest of the deceased and soon thereafter rushed to his house. Ashok Kumar Sharma succumbed to the injuries sustained.

14. PW 4 Jai Gopal, is the first informant and the eye witness of the incident . He is permanent resident of Hathras but at the time of occurrence was living with his brother-in-law Ram Chandra in Agra. He happened to be a friend of the deceased. This witness showing his presence on the spot narrated that it was the accused who has committed the murder of the deceased by causing knife blow on his chest and rushed towards his house from where he was detained by the police. Blood stained knife was also recovered on his pointing out from the heap of piston and rings etc. lying in the lawn of his own house. He has also proved the F.I.R. which was got lodged by him.

15. P.W.5 Narendra Singh has stated that weapon of assault i.e. knife was got recovered by the accused on his pointing out from the heap of piston and rings etc. lying in the court yard of his own house. He has proved the recovery memo of knife, Ex-Ka-8 prepared on the spot.

16. P.W.6 Kalicharan is also an eye witness of the occurrence. He by showing his presence along-with Ashok Kumar and Padam Chandra Sharma at the place of occurrence has stated that Ashok Kumar Sharma demanded rent and key from the appellant but accused-appellant denied and abused Ashok Kumar upon which Ashok Kumar also abused him on which accused Vijai Nandau Srivastava committed murder of Ashok Kumar by causing knife blow in the left side of chest and after causing injury accused-appellant rushed towards his house. Ashok Kumar after running 2-3 steps fell down on the ground and succumbed to the injuries. He has also stated that when accused caused knife blow on the deceased at that time Padam and Jai Gopal were also present. They all

shouted on which two police constables came on the spot. We informed them that accused was inside his house on which he was detained by PW1 constable Mahipal Singh there from. He has also narrated that inquest of the dead body was conducted on the spot by the police. In his cross examination he has admitted that he was arrested in a false case lodged by Ram Kishan Topiwala in which he was bailed out. He has denied that he was ever convicted in any case of pick-pocketing. He further stated in his cross examination that it was wrong to allege that Ashok Kumar with a view to kill Vijai Nandau Srivastava attacked on him.

17. P.W.7 Baljit Singh, the Investigating Officer has narrated that after lodging of F.I.R. he arrived on the spot where inquest of dead body of Ashok was conducted on his dictation by S.I. P.P. Karnwal and has proved the inquest report and other papers prepared at that time. He has also stated that on interrogation by police accused had stated that knife by which he had committed murder of Ashok Kumar Sharma was hidden in the heap of piston and rings in his house and got recovered blood stained knife. According to him accused-appellant further stated that it was the knife by which he had caused injury to Ashok Kumar; that the blade of the blood stained knife was covered with cotton and thereafter it was sealed; that signature of witnesses were obtained on the Fard. He also stated that statement of witnesses were recorded and after concluding investigation charge-sheet was submitted. He has proved the charge-sheet.

18. P.W.9 Dr. Sudhir Chandra is the witness who has conducted autopsy on the dead body of the deceased. He found following injury on the body of deceased:-

"Anti mortem incised wound 2.5 cm x 1 cm up to chest cavity deep 1.5 cm lat. and below the left nipple. Pericardium was punctured and full of clotted blood. Lower part Vessels of right Antrim and upper part of right Ventricle were cut down".

19. It was stated by him that death was caused due to shock and hemorrhage on account of anti-mortem injuries. He has also proved post-mortem report. In his cross examination he further stated that direction of injury was from upward to downward. It is also opined that heart of the deceased was also punctured due to the knife injury.

20. Defence case is that it was the deceased Ashok Kumar who puts open knife on the chest of the appellant on which appellant twisted his hand in which he was having the knife and during scuffle deceased sustained injury by his own knife. It would be proper to mention here that a suggestion of this effect was given to the eye witnesses PW-2, PW-4 and PW-6 that deceased himself was having a knife and tried to assault the appellant-accused, who twisted the hand of deceased in which it stabbed the left chest of deceased and all the witnesses denied from such happening.

21. D.W.1 Smt. Pranita Srivastava was produced to establish the defence version. She also admitted that they were tenant in the house of deceased Ashok Kumar but it was vacated unlocked, however rent for 7 months was due on them. As the deceased was criminal, he wanted to extract money in the garb of rent. She also stated that occurrence took place at about 6.00 p.m. After

hearing the abuse, she came out from her house and saw that abuses were being exchanged between her husband and Ashok Kumar. That Ashok Kumar put opened knife on the chest of her husband and threatened him that he would recover the rent on the point of knife. Her husband twisted the wrist of Ashok Kumar in which he was having knife on which Kali Charan, Jai Gopal and two others made an attempt to pounce over her husband, in which Ashok Kumar fell down and his own opened knife entered into his left side chest. Thereafter she and her husband came into the room of their house. It was also stated by her that Padam Kumar was not present on the spot.

22. Adverting to the ocular evidence of PW-4 Jai Gopal and PW-6 Kali Charan (even if the evidence of PW2 Padam Chand Sharma is ignored) coupled with the evidence of PW1 Constable Mahi Pal Singh and fact of recovery of weapon of assault, knife are sufficient to show that appellant-accused is the person, who caused injuries on vital part (chest) of the deceased, which proved fatal and the defense version that deceased sustained injury by his own knife does not appear to be believable. As per suggestion given to the eye witnesses deceased sustained injuries by his own when his hand was twisted by the appellant-accused. There was nothing about scuffling or felling down of deceased. First time in the statement of accused under Section 313 Cr.P.C. appellant disclosed improved version that scuffling had taken place between appellant and deceased in which deceased sustained injury by his own knife then fell down but as per D.W.1 deceased fell down on open knife kept by him which entered in his left side chest. These three versions shows that defence set up by the appellant could have not been established. It cannot be disputed that the prosecution has to prove his case beyond any reasonable doubt. If the prosecution succeeds in proving its case and defence has not succeeded in proving its case in that situation too the accused persons shall be held guilty. In this case presence of the witnesses of fact P.W. 4 Jai Gopal, first informant and P.W.6 Kalicharan is admitted. They have narrated the prosecution story and the way of causing injury by appellant and their evidence supported with other evidence inspire confidence. The statement of D.W.1 is not reliable as it is a changed and improved version of defence which has been tried to be established by D.W.1. The direction of injury was found downward from upward and doctor has suggested that such type of injury was possible to be inflicted by the knife, which was shown in the court. Further the knife was recovered from the house of the appellant containing blood stains at his instance. The recovery of knife and disclosure statement in which appellant admitted his guilt, have been very well proved by PW5 Narendra Singh and PW7 Baljit Singh Investigating officer in their oral testimonies.

23. We shall now consider whether there is any merit in the argument that the Investigating Officer must obtain the signature of the accused in the recovery memo to make it admissible. In **Jackaran Singh v. State of Punjab** 1995 Cri LJ 3992 originally there was an observation by the Apex Court to the effect that the failure to obtain the signature in the disclosure statement affects the reliability of the same. The said case was decided on April 20, 1995. The Apex Court subsequently held that the observation contained to that effect in that decision was to be reviewed. Therefore, the registry was directed to post the case before the same Bench for suo motu review. It was heard on 25-4-1996. The Supreme Court issued a corrigendum, which is reported in **Jackaran Singh v. The State of Punjab** (1998 J. V. (1) (Ker) pp 1 to 5). It reads as follows :--

Page	Instead of	Read
Page 6	does not bear the signatures or thumb	was made long time after the
Line 8	impression of the appellant. Even,	appellant was taken into custody
to 17	the recovery memo of the revolver and the cartridges, Ex. P-9/A, which is also attested by Yash Pal and Sukhdev Singh, ASI does not bear either the signatures or the thumb impression of the accused. The absence of the signatures or the thumb impression of an of an accused on the disclosure of the Evidence Act detracts materially from the authenticity and the reliability of the disclosure statement.	by the investigating agency and it is doubtful whether the same was voluntarily made by appellant

24. So, the legal effect is that there is no dictum laid down in Jackaran Singh's case (**supra**) to the effect that the statement made by an accused to be admissible under **Section 27** must contain his signature or thumb impression. These aspects were elaborately considered in **Natarajan v. Union Territory of Pondicherry** 2003 Cri LJ 2372. Further, in **State of Rajasthan v. Teja Ram** AIR 1999 SC 1776 the Apex Court held that the Investigating Officer is not obliged to obtain the signature of an accused. Since the Apex Court had suo motu reviewed the observations contained in Jackaran Singh's case (**supra**), that decision is not an authority to hold that to accept a statement under **Section 27**, it must contain the signature or thumb impression of the accused. It only makes that part of such statement relevant and admissible in evidence as would fall within the ambit of that section. Further knife and clothes of deceased were sent for chemical analysis where from it is reported that the blood on all these articles was human blood. As such the submission advanced by learned counsel for appellant has no substance

25. In our view learned Trial Judge after thread bare analysis of the evidence of both sides and also taking into account the entire material brought on record arrived at a correct conclusion that it was the appellant-accused who stabbed the deceased resulting his death. The prosecution had succeeded in establishing its case beyond all reasonable doubt against the accused-appellant. We have no reason to differ from the finding recorded by learned Additional Session Judge as such we also endorse the same view.

26. Learned counsel for appellant has lastly contended that the matter in hand does not fall within section 302 I.P.C. and considering single injury and all round facts, at the most it was a case under section 324 I.P.C. But learned counsel for the appellant has failed to demonstrate as to how this case shall come within the ambit of section 324 I.P.C. Hence we found no force in his arguments.

27. The question however still remains as to the nature of the offence committed by the accused and whether it falls under Exception 4 of Section 300, IPC.

In the case of **Surinder Kumar vs Union territory of Chandigarh (1989)2 SCC 217**, the Apex Court has held as under:-

"7. To invoke this Exception four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) The assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this Exception provided he has not acted cruelly."

(emphasis supplied)

28. Further in the case of **Arumugam v. State,(2008) 15 SCC 590 at page 595** in support of the proposition of law that under what circumstances Exception 4 to Section 300, IPC can be invoked if death is caused, it has been explained as under:-

"18. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 IPC is not defined in the Penal Code, 1860. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'."

29. Thus, if there is intent and knowledge then the same would be a case of Section 304 Part I and if it is only a case of knowledge and not intention to cause murder and bodily injury then the same would fall under Section 304 Part II. We are inclined to accept the view that in the facts and circumstances of the present case, it cannot be said that the appellant/accused had any intention of causing the death of the deceased when he committed the act in question. The incident took place out of sudden fight and scuffling, hence the accused is entitled to the benefit of Section 300 Exception 4 of IPC.

30. In this matter it is a fact that there was exchange of abuses and just there after sudden scuffling took place between appellant and deceased in heat of passion. Level of preparedness namely being armed with knife was not such that it could be called a premeditation attack, coupled with this fact also that appellant caused a single stab injury. Absence of any repetition of blow clearly reveals that the appellant did not take any undue advantage of his having been armed with knife or having acted in any cruel or unusual manner. Thus, in entirety, considering the factual scenario of the case on hand, the evidence on record and in the background of legal principles laid down by Apex Court in the cases referred to above, we are inclined to hold that the case of appellant comes under Exception 4 to section 300 IPC. and as such, the appropriate conviction of the appellant would be under Section 304 Part II, IPC instead of Section 302 IPC. Consequently the conviction of appellant is modified from 302 IPC into one under section 304 (II) IPC, sentencing him to undergo rigorous imprisonment for 10 years with fine of (Rs. 20,000/-) rupees twenty thousand. In case of default of fine, he shall further undergo six months rigorous imprisonment.

31. The judgment and order impugned is modified up to the extent indicated above.

32. Accordingly the appeal is hereby partly allowed.

(2016) 8 ILRA 506
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.08.2016

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Appeal No.- 1317 Of 2008
&
Criminal Appeal No.- 1268 Of 2008

Santosh

...Appellant
Versus

State Of U.P.

...Respondent

Counsel for Appellant:

Dilip Kumar, Bakhteyar Yusuf, Rajiv Gupta, S.V.Singh, Ashwini Kumar Awasthi, Anoop Trivedi, Ashok Kumar Srivastava, D.S. Chauhan, Kuldeep Saxena, Manish Tiwary, Pankaj Kr. Shukla, Pankaj Sharma, Pawan Bhardwaj, Pramod Bhardwaj, Rajeev Goswami, S.V.Goswami

Counsel for Respondent:

Govt. Advocate.

Legislation referred to Indian Penal Code, 1860 – Ss. 34, 302; Code of Criminal Procedure, 1973 – S. 313.

CHARGE AND SENTENCE IMPOSED BY TRIAL COURT :

Each of the three accused-appellants — Ali Ahmad, Zameel and Abdul Sattar — was convicted under Section 302 read with Section 34 of the Indian Penal Code by the Additional Sessions Judge, Court No. 2, Etawah in S.T. No. 20 of 2000, arising out of Case Crime No. 337 of 1999, P.S. Kotwali, District Etawah, and sentenced to life imprisonment with a fine of Rs. 5,000/- each, with a default stipulation of one year additional rigorous imprisonment in case of non-payment of fine.

FACTS :

The prosecution case originated from a written First Information Report (Ext. Ka. 1) lodged by Mohd. Arif (P.W. 1), son of the deceased, at P.S. Kotwali, District Etawah on 24.06.1999. The FIR was registered at 9.35 A.M. as Case Crime No. 337 of 1999 under Section 302 IPC. The motive disclosed in the FIR was a dispute over construction of shops in a graveyard situated near an overhead water tank on the bye-pass road at Etawah. Appellant Ali Ahmad had been constructing shops in this graveyard, assisted by the other two appellants Zameel and Abdul Sattar. The City Magistrate, Etawah, issued a stay order on the construction. The appellants suspected that the stay order was procured at the instance of the deceased Mohd. Israel (first informant's father), who allegedly intrigued with Bashiruddin, the then Mutawalli (manager) of the graveyard. On 23.06.1999 at 10.30 A.M., the appellants came to the saw mill of the deceased and warned him that he had deprived them of their livelihood by getting the construction stopped and he would have to face consequences.

On 24.06.1999 at approximately 8.30 A.M., the deceased Mohd. Israel was proceeding to his saw mill from his residence on a scooter. He was being followed at some distance by his brother Mohd. Afzaal (P.W. 3, the star eye-witness) and the latter's friend Chand on a motorcycle. When the deceased reached in front of Nafees

Haji's National Road Lines Transport, the appellants, who had laid in ambush behind two trucks, suddenly appeared on the scene accompanied by one unknown person. Abdul Sattar gave a kick blow to the scooter of the deceased, stopping it, and exhorted Ali Ahmad and Zameel to kill him. Ali Ahmad and Zameel thereupon fired upon the deceased using country-made pistols, causing him to fall to the ground. When Mohd. Afzaal (P.W. 3) and Chand challenged the assailants, the appellants fired shots in the air and escaped from the scene. Mohd. Arif (P.W. 1) arrived at the spot within a minute of the incident, having heard the sound of firing from a nearby saw mill where he had gone to arrange labourers. The deceased was taken to the District Hospital, Etawah in a Jeep by P.W. 3 and P.W. 1. On the way to hospital, the deceased reportedly told P.W. 1 that Zameel and Ali Ahmad had fired on him after Abdul Sattar stopped his scooter. The deceased expired before reaching the hospital, being declared dead at the hospital.

Post-mortem examination was conducted on the body of the deceased Mohd. Israel on 24.06.1999 at 5.00 P.M. at District Hospital, Etawah by Dr. M.M. Arya (P.W. 2), who found three ante-mortem firearm injuries: (i) Gunshot wound of entry 1.5 cm × 2 cm, thoracic cavity deep, right side of back, 19 cm from nipple, with blackening and charring in 3 cm area; (ii) Gunshot wound of exit, front of chest, left, 3 cm below left nipple, measuring 3 cm × 1.5 cm; (iii) Firearm wound 5 cm × 2 cm, skull deep, 5 cm above right eyebrow, lacerated, with blackening in 1 cm area. The doctor opined that death was caused by shock and haemorrhage resulting from the ante-mortem firearm injuries and that the injuries could have been caused around 8.30 A.M. on 24.06.1999.

Seven prosecution witnesses were examined: P.W. 1 Mohd. Arif (first informant and son of deceased); P.W. 2 Dr. M.M. Arya (proved post-mortem report Ext. Ka. 2-A); P.W. 3 Mohd. Afzaal (brother of deceased and star eye-witness, proved occurrence); P.W. 4 Head Constable Sobaran Singh (proved Check FIR Ext. Ka. 3 and GD entry Ext. Ka. 4); P.W. 5 Harshvardhan Nagaich, first Investigating Officer (proved site plan Ext. Ka. 5 and memo of simple and blood-stained soil Ext. Ka. 6); P.W. 6 S.S.I. Vikramjeet Singh, second Investigating Officer (took over on 21.07.1999 and filed charge sheets Ext. Ka. 6 and Ka. 7); P.W. 7 Constable Chiranji Lal (proved inquest report Ext. Ka. 8 and ancillary papers Ext. Ka. 9 to 12). No defence evidence was led. The appellants in their statements under Section 313 Cr.P.C. denied their involvement and claimed false implication at the instance of and in consultation with Bashiruddin.

CONTENTIONS OF THE APPELLANTS :

- (i) None of the prosecution witnesses of fact actually witnessed the occurrence; all witnesses are interested, partisan or close relatives of the deceased and their testimony is wholly unreliable.
- (ii) None of the prosecution witnesses of fact has been named as a witness in the inquest report.
- (iii) The theory that the deceased narrated the incident to P.W. 1 (his son) and P.W. 3 (his brother) on the way to hospital, identifying the appellants as the assailants, is an afterthought and a result of deliberation: given that the post-mortem report reveals that the heart and lungs of the deceased were lacerated causing massive haemorrhage, the deceased could not have been in a position to utter a single word after sustaining such injuries.
- (iv) The investigation is riddled with laches and the testimony of witnesses is full of contradictions; the prosecution case does not inspire confidence and no conviction can be based upon it.

HELD :

(i) **Quality of testimony of solitary eye-witness — Primacy of quality over quantity —** It is the quality of testimony of a witness that gets primacy and not its quantity. The testimony of a solitary eye-witness, after cautious appraisal of facts and circumstances of the case, if found to be based on solid consistency intensifying its creditworthiness and proving the occurrence unambiguously, is sufficient to sustain a conviction. In the present case, the testimony of P.W. 3 Mohd. Afzaal, who was present on the spot at the time of the incident at a distance of 20-25 paces from the deceased, is found to be consistent, clinching and wholly reliable. He described every detail of the incident in his examination-in-chief and these details stood the test of cross-examination without any material contradiction or adverse circumstance having surfaced. He demonstrated the physical position of the deceased at the time of the attack (prostrate, face down, one leg

entangled in the scooter) in court, a detail that is self-explanatory and corroborates his actual presence at the spot. His testimony carries ample weight and is sufficient to sustain the conviction of the appellants.

(ii) Testimony of a relative of the deceased — Not inherently unreliable; not to be treated as interested witness without proof of malafide — The mere fact that a witness is a close relative of the deceased does not, by itself, render his testimony unreliable or tainted. A relative who happens to be a natural witness of the incident cannot altogether be regarded as an 'interested' witness so as to discard his testimony. The settled legal position is that unless it is specifically shown that the witness is directly interested in securing the conviction of the accused and is acting with malafide intent or bias against the appellants, the relationship of the witness to the victim alone will not suffice to render his testimony wholly unreliable. In the present case, no evidence or circumstance has been brought on record to establish that P.W. 3 Mohd. Afzaal bore any grudge or malafide against the appellants or was otherwise motivated to falsely implicate them and spare the real culprits. The contention that his testimony is tainted by reason of relationship is accordingly rejected. [Relied upon: Gurjit Singh alias Gora v. State of Haryana, (2015) 2 SCC (Cri) 624]

(iii) Dying declaration / statement of deceased to witnesses — Even if excluded, does not affect conviction based on eye-witness account — Even if the portion of the testimony of P.W. 1 and P.W. 3 to the effect that the deceased Mohd. Israel told them on the way to hospital that the appellants had fired on him after Abdul Sattar stopped his scooter — is excluded from consideration (on the basis of the medical argument that a person with lacerated heart and lungs could not have spoken) — it has no adverse impact upon the prosecution case. This is because the occurrence has been independently, consistently and reliably proved by the direct eye-witness account of P.W. 3 Mohd. Afzaal, who personally witnessed the entire incident from a distance of 20-25 paces. The dying declaration-like narration is not the sole plank of the prosecution case and its exclusion does not create any infirmity in the proof of the occurrence.

(iv) Non-mention of prosecution witnesses in inquest report — Not fatal to prosecution case — The absence of the names of the prosecution witnesses of fact (P.W. 1 and P.W. 3) from the inquest report does not by itself render the prosecution case doubtful or falsify the testimony of these witnesses. The inquest report (Ext. Ka. 8) was proved by P.W. 7 Constable Chiranji Lal and was found to be genuine, innocuous and complete in all material particulars, disclosing the case crime number, sections of IPC, and the fact that the inquest was completed around 11.00 A.M. on 24.06.1999. Non-mention of witness names in the inquest report is not a ground sufficient to discredit the consistent, cogent and reliable testimony of the eye-witness.

(v) Motive — Established from FIR; corroborates prosecution case — The motive for the crime is clearly established from the FIR itself. The appellants suspected that the City Magistrate's stay order on the construction of shops in the graveyard was procured at the instance of the deceased Mohd. Israel. On 23.06.1999, the day preceding the murder, the appellants had visited the saw mill of the deceased and openly warned him that he had deprived them of their livelihood and would have to face consequences. This prior threat, followed by the murder the very next morning in a pre-planned ambush, establishes the motive and the pre-meditation of the appellants. While motive loses its independent significance in the presence of direct eye-witness testimony, its establishment strengthens the prosecution case and negatives the theory of false implication.

(vi) Medical evidence — Consistent with ocular account; confirms firearm injuries at relevant time — The post-mortem report (Ext. Ka. 2-A) proved by Dr. M.M. Arya (P.W. 2) discloses three ante-mortem firearm injuries on the body of the deceased, including a gunshot wound of entry with blackening and charring at the back of the right side of the chest (indicating firing at close range) and a lacerated firearm wound above the right eyebrow with blackening. The doctor's opinion that these injuries could have been caused around 8.30 A.M. on 24.06.1999 by firearm was never challenged by the appellants in cross-examination. The nature and location of the injuries are consistent with the manner of assault described by P.W. 3. The medical testimony accordingly corroborates the ocular account of the incident.

(vii) FIR — Prompt; not ante-timed; consistent with inquest and investigation papers — The FIR was lodged at 9.35 A.M. on 24.06.1999, barely about an hour after the incident which occurred at 8.30 A.M. The FIR is prompt, consistent in its details, and contains no hallmarks of ante-timing or deliberation. The inquest report (Ext. Ka. 8) was completed at 11.00 A.M. on the same day and contains the case crime number

and relevant details in consistent ink and handwriting, establishing that the FIR pre-dated the inquest. No circumstance or witness testimony suggests that the FIR was lodged after the inquest report was prepared. The investigation was fair and upto the mark; the site plan (Ext. Ka. 5) was prepared at the spot in the presence of P.W. 1 and P.W. 3; and the blood-stained soil, simple soil and blood-stained clothes of the first informant were properly seized and proved.

RESULT :

All Criminal Appeals dismissed as devoid of merit. The judgment and order of conviction dated 26.09.2006 passed by the Additional Sessions Judge, Court No. 2, Etawah in S.T. No. 20 of 2000 convicting the appellants under Section 302 read with Section 34 IPC and sentencing each of them to life imprisonment with fine of Rs. 5,000/- is upheld. Appellants Ali Ahmad and Zameel, already in jail, shall serve out their remaining sentences. Appellant Abdul Sattar, who was on bail, has had his bail bond cancelled and sureties discharged; he shall be taken into custody forthwith to serve out his remaining sentence. A certified copy of this order shall be sent to the concerned Trial Court for necessary information and follow-up action.

Cases Referred:

Gurjit Singh alias Gora and Another v. State of Haryana, (2015) 2 SCC (Cri) 624 – Criminal Appeal No. 519 of 2010 (SC).

(Delivered by Hon'ble Bala Krishna Narayana, J.)

1. Since both the aforementioned criminal appeals arise out of the same judgement and order they are being heard and decided together by a common judgment.

2. Criminal appeal no. 1317 of 2008 has been preferred by Santosh while criminal appeal no. 1268 of 2008 has been filed by Smt. Kamla Devi against the judgement dated 15.02.2008 and order dated 16.02.2008 passed by Additional District & Sessions Judge, Court No. 3, Mathura in Sessions Trial no.422 of 2005 (State Vs. Santosh and two others) arising out of case crime no. 18 of 2005, under Sections 498A, 304B, 316, 201 IPC and Section 3/4 D.P.Act, P.S. Raya, District Mathura by which the appellants have been convicted under Section 3/4 D.P.Act, 498A and 304 B IPC and sentenced to two years imprisonment and fine of Rs. 1000/- each under Section 3/4 D.P.Act, two years rigorous imprisonment and a fine of Rs. 1000/- each under Section 498A IPC and imprisonment for life under Section 304B IPC. All the sentences were directed to run concurrently. It was further provided that in case the appellant committed default of payment of fine they shall be liable to one month additional imprisonment on each count.

3. The facts of the case lie within a very narrow compass. Complainant Devi Prasad lodged a written report Ex. Ka-1 at P.S. Raya, District Mathura on 30.01.2005 at about 22.10 hours stating therein that he had got his daughter Madhuri married to Santosh Kumar son of Yaadram, r/o Karav on 22.04.2000 and he had spent about Rs. Two Lakhs in the marriage of his daughter and given dowry according to his status and financial means, however her husband Santosh, mother-in-law Smt. Kamla Devi and Sister in law Smt. Guddi were not satisfied and they were putting pressure upon his daughter Madhuri to ask her father to pay Rs. 50,000/- as additional dowry. After the marriage, they started torturing his daughter Madhuri for non fulfillment of their additional demand of dowry of Rs. 50,000/- cash. With a view to settle the matter amicably the dispute was repeatedly

referred to "panchayats" held in Karav village and in Gupta Colony and the complainant had assured that he will fulfill the demand and had further told his daughter that she had no option but to live with her husband as she was destined to be tortured in her matrimonial home. It was also stated in the written complaint that on 29.01.05 at about 11a.m.-12p.m. Santosh Kumar- husband, Smt. Kamla Devi-mother in law and Smt. Guddi-sister in law of his daughter Madhuri had attempted to commit her murder by pouring kerosene oil on her and setting her ablaze as a result of which she was severely burnt and under the pressure of the villagers they had taken her for treatment to Swarna Hospital, Mathura and when the managent of the hospital informed him about the incident they had run away from there and got his daughter admitted in S.N.Hospital, Agra, where her treatment was going on. Before the death of the victim, the Doctor had got her dying declaration recorded before the City Magistrate Ashok Kumar Agarwal.

4. On the basis of the aforesaid written complaint case crime no. 18 of 2005 under Section 498A, 307 IPC and Section 3/4 D.P.Act was registered on 30.01.2005 at 22.10 hours against Santosh, Smt. Kamla Devi and Smt. Guddi. Complainant's daughter Smt. Madhuri died on 13.02.2005 at about 8.40 a.m. during treatment where upon the case was converted to one under Section 304B IPC. The Investigating Officer of the case prepared the inquest report and send the dead body of the deceased for post mortem and after collecting the relevant documents and evidence submitted charge sheet under Sections 498A, 304B, 316, 201 IPC and Section 3/4 D.P.Act against husband Santosh Kumar, mother in law Smt. Kamla Devi and sister in law Smt. Guddi before the C.J.M. Mathura who after complying with the mandatory requirement of Section 207 Cr.P.C.submitted the case to the Court of Sessions by the committal order dated 28.07.2005 for trial of the accused from where it was made over to the Court of Additional District and Sessions Judge, Court No. 3 Mathura and registered as S.T. No. 422 of 2005. Charge was framed against all the accused on 02.09.2005 under Section 498A, 304BIPC and Section 3/4 D.P.Act. The accused denied the charge and claimed trial. The prosecution in order to prove the charges framed against the accused examined as many as nine witnesses, namely, PW-1 Devi Prasad, PW-2 Dr. A.P.Singh, PW-3 Ratan Lal, PW-4 Dr. Rahul Sah, PW-5 Ashok Kumar Agarwal, PW-6 Dr. R.L.Sharma, PW-7 Dr. A.A.Khan, PW-8 Vipin Kumar Mishra and PW-9 Anendra Singh. The documentary evidece adduced by the prosecution has been referred to and dealt with in detail by the trial judge in the impugned judgement and the same need not be reproduced. Sri Santosh in his statement recorded under Section 313 Cr.P.C. denied the prosecution case and apart from the alleging false implication stated that at the time of the incident he was not present in his house and as soon as he got information of the occurrence, he reached his house and took his wife Madhuri to the hospital for treatment. Appellant Kamla Devi apart from denying the prosecution case further stated that she had been living separately from her son Santosh and she is not aware about the circumstances under which the incident had taken place.

5. After considering the submissions made by learned counsel for the parties before him and scanning the evidence on record learned Additional District & Sessions Judge, Court No.3 Mathura convicted the accused Santosh and Smt. Kamla Devi and awarded them the aforesaid sentences. Smt. Guddi was however acquitted of all the charges.

6. Learned counsel for the appellant has assailed the conviction of the appellants recorded by the trial court and the sentence awarded to them on the ground that the only prosecution witness PW-1 Devi Prasad, the complainant of this case and the father of the deceased Madhuri having failed to support the prosecution case during the trial and declared hostile, the appellant's conviction solely on the basis of the dying declaration of the deceased which neither inspires any confidence nor stands corroborated from any other evidence on record cannot be sustained. Even otherwise the victim Madhuri who was admitted to the hospital with hundred percent burn injuries could not have been in a fit mental condition to give her dying declaration. He further submitted that even if the dying declaration of the deceased is accepted and the facts stated therein are believed to be gospel truth there being no whisper of any allegation in her dying declaration about any demand of dowry from her or her parents or her being tortured or treated with cruelty for non fulfillment of any demand of dowry and there being no other reliable evidence on record, even remotely indicating that there was any demand of dowry either from the deceased or her father or that she was tortured or treated with cruelty on account of non fulfillment of demand of dowry soon before her death, the appellant's conviction under Section 304B, 498A and 3/4 D.P. Act cannot be sustained and is liable to be scored out. He next submitted that it is evident from the bare reading of the dying declaration of the deceased that the incident was neither premeditated nor preplanned. Appellant was provoked by his mother Smt. Kamla Devi on the fateful day when he had returned to his house after purchasing "ghee" for preparing "ladoos", his mother taunted him by saying that he had given "ladoos" to eat to his wife alone and not to her on which the appellant Santosh picked up a quarrel with his mother Smt. Kamla Devi and greatly enraged shouted that he was going to finish her and sprinkled kerosene oil on his wife while his mother Smt. Kamla Devi caught hold of her and set her ablaze and thereafter he took her to his field where he tried to burn her with cow dung cakes, thereafter he and his sister Smt. Guddi took her to the hospital in Agra, although the Investigating Officer had failed to locate either the field of appellant Santosh, where the deceased had been allegedly taken by her husband after being set on fire inside the house for burning her further with cow dung cakes nor he could find any burnt or half burnt cow dung cakes. It appears that the mother in law of the deceased Madhuri used to taunt her son whenever he did anything for his wife and alleged her neglect by him and fed up with her persistent nagging and bickerings which had shattered the peace of his house and totally ruined his marital life, appellant Santosh lost his equilibrium on the date of the incident and committed the offence in a fit of rage with the object of putting to an end his mother's constant bickerings and hence under the facts and circumstances of the case, the offence if any committed by the appellants does not travel beyond Section 304(1) IPC.

7. Per contra Sri Sagir Ahmad learned AGA appearing for the State of U.P. submitted that the dying declaration in this case has been recorded in accordance with law and the very fact that the deceased remained alive for 15 days after the incident and died after recording of the dying declaration, is in itself material evidence showing that her condition, notwithstanding her having received hundred percent burns was not overtly critical or precarious when her dying declaration was recorded.

8. He further submitted that doctrine of dying declaration is enshrined in the legal maxim "Nemo moriturus proesumitur mentiri" which means a man will not meet his maker with lie in his mouth and hence the trial judge did not commit any error or infirmity in convicting the appellants on the basis of the dying declaration of the deceased. The impugned judgement is based upon relevant considerations and the finding guilt recorded therein is supported by cogent evidence and the same warrants no interference by this Court. The appeals lack merit and are liable to be dismissed.

9. We have heard the learned counsel for the parties and perused the entire lower court record.

10. Before proceeding to examine interalia the issues regarding reliability and veracity of the dying declaration of the deceased and whether the conviction of the appellants recorded under Sections 3/4 D.P.Act, 498A and 304B IPC on the basis of the dying declaration of the deceased alone can be sustained, we consider it appropriate to have a glance at evidence on record and the various pronouncements on the interpretation of Section 32 of Evidence Act which provides for admission of dying declaration in evidence.

11. The only witness of fact PW-1 Devi Prasad, complainant and the father of the deceased Madhuri examined on behalf of the prosecution to prove the charges framed against the accused failed to support the prosecution case. PW-1 Devi Prasad in his examination in chief stated that the marriage between Santosh and his daughter Madhuri was solemnized on 23.04.2000 in which he had spent about Rs. Two Lakhs. Her husband, mother in law and sister in law of his daughter, namely, Santosh, Smt. Kamla Devi and Smt. Guddi were fully satisfied with the dowry given by him to them at the time of marriage and Santosh, Kamla Devi and Guddi had not committed the murder of his daughter Madhuri on 29.01.2005 between 11-12 p.m. by pouring kerosene oil on her. A hotel owner had informed him that his daughter has been burnt to death and after receiving the aforesaid information he had rushed to S.N.Hospital where his daughter was being treated after being admitted there by her husband Santosh. He further stated that in the hospital he had heard that dying declaration of his daughter Madhuri has been recorded and he had lodged the written report Ex.Ka-1 against the husband, mother in law and sister in law of his daughter at the behest of the villagers. His daughter had died in the hospital after fifteen days of the incident. He admitted his signatures on the inquest report of his deceased daughter Ex. Ka-2.

12. On the request of the prosecution PW-1, was declared hostile and cross examined by the prosecution with the permission of the Court. PW-1 in his cross examination by the prosecution admitted that before his daughter had died a demand of Rs. 50,000/- cash as additional dowry was made, however in the same breath he denied that any demand of additional dowry of Rs. 50,000/- cash was made by the accused.

13. PW-2 Dr. A.P.Singh, Senior Specialist Women Hospital, Agra who had conducted the post mortem of the dead body of the deceased on 12.09.2005 at about 9.00 p.m. and prepared the post mortem report noted following ante mortem injuries on the cadaver of the deceased :-

"1.Body examined after surgical dressing superficial to deep burn with infected lesions all over the body. Hair signed.

2.Cut open present on medial side of Rt upper arm.

3.Cut open present on medial side of Rt ankle".

14. He further testified that the deceased had died due to burn injuries and proved the post mortem report of the deceased Ex. Ka-3. In his cross examination he admitted that although in the post mortem it is stated that the body of the deceased was totally burnt but the percentage of the burn was not mentioned.

15. PW-3 Ratan Lal Saraswat, who was posted as Pharmacist to S.N.Medical College, Agra on 29.01.2005 testified that on the date of the incident at about 5.50 p.m. Smt. Madhuri was admitted in the hospital with severe burn injuries and she was medically examined by Dr. A.A.Khan. He proved the medical examination report of the deceased prepared on 29.01.2005 Ex. Ka-4.

16. PW-4 Dr. Rahul Shah testified that deceased was admitted to the hospital with hundred percent burns on 29.01.2005 and treated there till her death on 12.02.2005 at 9.00 p.m.. He proved the treatment report of the deceased which was prepared by his subordinate doctors Ex. Ka.5 as well as the progress report records relating to her treatment between 29.01.2005 and 11.02.2005 as Ex. Ka-6, Ka-7 and Ka-8. PW-4 also testified that the deceased Madhuri was able to speak during the period when she was under his treatment. Sri Ashok Kumar Agarwal Additional City Magistrate before whom dying declaration of the deceased was recorded, was examined by the prosecution as PW-5. He in his statement made before the Court on oath stated that the dying declaration of Madhuri wife of Santosh was recorded on 30.01.2005 at 9.00 a.m., she had given her statement in full consciousness and without any pressure. Before her statement was recorded certificate regarding her mental fitness to give her statement was obtained by him from the doctor. The condition of the victim during the recording of her statement also had remained stable. Thumb impression of her right feet was obtained on her dying declaration. He proved the dying declaration of the deceased Ex. Ka-9.

17. P.W.-6, Dr. R.L.Sharma, who was posted in the emergency department of S.N.Medical college on 30.01.2005 deposed that he had certified the mental fitness of Smt. Madhuri to give her statement in his handwriting on the dying declaration Ex. Ka-9 itself.

18. PW-7 Dr.A.A.Khan testified that he was posted as Medical Officer, Agra on 20.01.2005 and had examined Smt. Madhuri and prepared her medical report in his own hand writing, photo copy whereof was brought on record and proved by him as Ex. K-4. He further testified that at the time of recording of her dying declaration Smt. Madhuri was in a position to speak and give her dying declaration.

19. PW-8 Vivek Kumar Mishra, who was entrusted with the investigation of this case after it was converted one under Section 304B IPC following the death of Smt. Madhuri, testified in his statement recorded before the trial court narrated the various steps taken by him, the documents and the evidence collected by him during the course of investigation. He proved the charge sheet Ex. Ka -10 and the site plan of the place of incident Ex. Ka-11 prepared by him.

20. PW-9 Constable 918 Anendra Singh proved the chek FIR Ex. Ka.-12 and the G.D.entry prepared by him on 30.01.2005, carbon copy whereof was brought on reocrd as Ex. Ka-13.

21. Having scanned the evidence on record, we now proceed to examine the judicial pronouncement on the issue in hand.

22. The Apex Court in paragraph 34 of its judgment reported in **AIR SC (weekly) 2010, Sharda Vs. State of Rajasthan** has held as hereunder :-

"34. Though a dying declaration is entitled and is still recognized by law to be given greater weightage but it has also to be kept in mind that accused had no chance of cross-examination. Such a right of cross- examination is essential for eliciting the truth as an obligation of oath. This is the reason, generally, the court insists that the dying declaration should be such which inspires full confidence of the court of its correctness. The court has to be on guard that such statement of deceased was not as a result of either tutoring, prompting or product of imagination. The court must be further satisfied that deceased was in a CrI.A.No. 699/08 fit state of mind after a clear opportunity to observe and identify the assailants. Once the court is satisfied that the aforesaid requirement and also to the fact that declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It is not an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence."

23. In this regard, we may profitably quote the following para from **(1985) 4 SCC 476 titled State (Delhi Administration) Vs Laxman Kumar & Ors :**

"40. We have also come to the conclusion that the High Court failed to take into account one material aspect while appreciating the evidence of the prosecution witnesses. It is a fact that Sudha had been burnt and according to the medical opinion that was to the extent of 70%.As the evidence shows, Sudha was in her senses and was capable of talking at the time when she was being removed to the hospital or even after she had been admitted as an indoor patient. The two sisters or their respective husbands had no apprehension that Sudha would not live. In case Sudha came round, she was to have lived in the family of her husband. No one interested in the welfare of Sudha was, therefore, prepared to make a statement which might prejudice the accused persons and lead to the straining of relationship in an irreparable way. Therefore, CrI.A.No. 699/08 the silence or avoidance to make a true disclosure about the cause of fire particularly so long as Sudha was alive, cannot be over- emphasised an adverse inference drawn

by the High Court from the conduct of the sisters was indeed not warranted in the facts of the case."

24. In this connection we may also refer to the case of **Munnavar and others Vs. State of U.P. and others 2010 (70) ACC 853 (SC)** wherein the Apex Court has held as under -

"that a dying declaration can be relied upon if the deceased remained alive for a long period of time after the incident and died after recording of the dying declaration, that may be evident to show that his condition was not overtly critically or precarious when the dying declaration was recorded"

25. It would be pertinent to note the case of **Bajju @ Karan Singh Vs. State of M.P. 2012 (77) ACC 182 SC, Km. Anita Vs. State of U.P. [2013 (80)ACC 46]** before the Apex Court which had more or less identical facts. In this case also the dying declaration of the deceased was relied upon and the witnesses of fact did not support the prosecution case and were declared hostile, wherein the Supreme Court has observed as under:-

*"Reliance by the learned counsel appearing for the appellant/accused upon the judgment of this Court in the case of **Munnu Raja and Another v. The State of Madhya Pradesh (1976) 3 SCC 104** to contend that a dying declaration cannot be corroborated by the testimony of hostile witnesses is hardly of any help. As already noticed, none of the witnesses or the authorities involved in the recording of the dying declaration had turned hostile. On the contrary, they have fully supported the case of the prosecution and have, beyond reasonable doubt, proved that the dying declaration is reliable, truthful and was voluntarily made by the deceased. We may also notice that this very judgment relied upon by the accused itself clearly says that the dying declaration can be acted upon without corroboration and can be made the basis of conviction. Paragraph 6 of the said judgment reads as under:-*

*".....It is well settled that though a dying declaration must be approached with caution for the reason that the maker of the statement cannot be subject to cross-examination, there is neither a rule of law nor a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated (see **Khushal Rao v. State of Bombay**). The High Court, it is true, has held that the evidence of the two eyewitnesses corroborated the dying declarations but it did not come to the conclusion that the dying declarations suffered from any infirmity by reason of which it was necessary to look out for corroboration."*

In para-22 of this report the Hon'ble Court has further held that -

"The law is very clear that if the dying declaration has been recorded in accordance with law, is reliable and gives a cogent and possible explanation of the occurrence of the events, then the dying declaration can certainly be relied upon by the court and could form the sole piece of evidence resulting in the conviction of the accused. This Court has clearly stated the

principle that Section 32 of the Evidence Act, 1872 (for short 'the Act') is an exception to the general rule against the admissibility of hearsay evidence. Clause (1) of Section 32 makes the statement of the deceased admissible, which is generally described as a 'dying declaration'."

The Apex Court relying upon the dying declaration of the deceased being consistent with the prosecution case which was fully corroborated by medical evidence did not disturb the concurrent findings of guilt of accused-appellant recorded by the two Courts. In view of the aforesaid preposition of the law the dying declaration of the deceased recorded in this case fulfills all the legal requirements and it is in consonance with the prosecution story as also the medical evidence."

26. A Division Bench of this Court in the case of **Km. Anita Vs. State of U.P. reported in ACC (2013) Vol (1)** has in paragraph 20 of its judgment observed as hereinunder :-

*"A dying declaration recorded by a competent Magistrate would stand on a much higher footing than the declaration recorded by officer of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim, however, circumstances showing anything to the contrary should not be there in the facts of the case.[vide **Ravi Chander & Ors. v. State of Punjab, (1998) 9 SCC 303; Harjit Kaur V. State of Punjab (1999) 6 SCC 545; Koli Chunilal Savji &Anr. v. State of Gujarat, (1999) 9 SCC 562; and Vikas & Ors. v. State of Maharashtra, (2008) 2 SCC 516.**] Thus we find that the dying declaration of the deceased has no legal infirmity at all and it is also consistent with the case of the prosecution. The deceased has spoken about ill-treatment of accused on account of dowry demand as also illicit relations of her husband with his own real sister Anita. She had also assigned specific role to each accused in her dying declaration. She could not give the date of incident, but has stated that it is of instant Saturday. The calendar of year-2003 shows that 17th May, 2003 was Saturday. Thus, the date of the incident is fully corroborated from the dying declaration of the deceased. The defence could not show that the dying declaration is the result of tutoring Smt. Ram Rati in any manner. If the statements of PW 1 (later part of PW 1) to PW 9 is believed then there was no problem with the deceased in her matrimonial home, so why she had levelled allegations against the accused in her dying declaration, could not be explained by the defence."*

27. Thus what follows from the reading of the aforesaid authorities is that a dying declaration can form sole basis of conviction, if it is free from any kind of doubt and it has been recorded in the manner as proved under the law, is reliable and gives cogent and plausible explanation of the occurrence of the events. It may not be necessary to look for corroboration of the dying declaration, as envisaged if a dying declaration is jointly to be recorded by a Executive Magistrate with certificate of a medical doctor about the mental fitness of the declarant to make the statement. Now we proceed to test the reliability of the dying declaration of the deceased Ex. Ka-9 in this case on the touch stone of the principles expounded herein above. The dying declaration of the deceased Madhuri recorded in this case before the Additional City Magistrate, is being reproduced herein below:

"मैं माधुरी पत्नी संतोष कुमार उम्र लगभग २४ वर्ष ग्राम करव पी. एस. राया जनपद मथुरा बयां करती हु की कल सुबह लगभग ग्यारह बजे मेरे पति लड्डू बनाने के लिए घी लेकर आये तो मेरी सास कमल ने झगड़ा किया तथा कहा की मैने तो लड्डू खाये नहीं इसे खिला रहे हो, मेरे पति और मेरे सास में झगड़ा हुआ तो गुस्से में मेरे पति ने कहा आज इसका काम कर देता हु तथा मेरे ऊपर मिट्टी का तेल दाल दिया सां ने पकड़ लिया पति ने आग लगा दिया फिर मुझे खेत में ले गये और देर मुझे खेत में कंडो से जलाने की कोशिश की फिर मुझे मेरे पति तथा ननद गुड्डी अस्पताल आगरा ले कर आयी, इसके अतिरिक्त मुझे कुछ नहीं कहना."

28. As we have already noted certificate regarding the fit mental condition of the deceased to give her statement before the recording of her statement and during the recording of her statement was given by Dr. A.A.Khan Medical Officer which is on record as Ex. Ka-9. The dying declaration was recorded by PW-5 Additional City Magistrate, Mathura in S.N.Hospital, Mathura. The facts stated by the deceased in her dying declaration give cogent and plausible explanation of the occurrence although the Investigating Officer has failed to collect any evidence to corroborate that part of her dying declaration in which she stated that after she was set ablaze by her husband in his house with the help of her mother in law, he had taken him in a field where he had tried to burn her with cow dung cakes. The veracity of the dying declaration of the deceased cannot be doubted merely on the ground urged by the learned counsel for the appellant that there was discrepancy in the evidence of the Additional City Magistrate with regard to the form in which it was recorded as we find that PW-4 Dr. Rahul Sah, PW-5 Ashok Kumar Agarwal and PW-7 Dr. A.A.Khan have beyond reasonable doubt proved that the dying declaration of the deceased Smt. Madhuri is reliable, truthful and voluntarily made by her while she was in a fit state of mind. The very fact that the dying declaration in this case was recorded by a competent magistrate puts the same on a higher pedestal than the declaration recorded by an officer of lower rank. The dying declaration of the deceased is further consistent with the prosecution case which stands fully corroborated by medical evidence. Thus in view of the foregoing discussion, we do not find any reason to doubt the deceased's dying declaration. None of the witness or the authorities involved in the recording of the dying declaration have turned hostile. On the contrary they had fully supported the case of prosecution and have beyond reasonable doubt proved that the dying declaration recorded truthfully and was made voluntarily by the deceased.

29. Now coming to the next limb of challenge to the impugned judgment by the learned counsel for the appellant that even if the recitals contained in the dying declaration of the deceased are taken to be true the appellant's conviction under Section 3/4 D.P.Act, 498A and 304 B IPC on the basis thereof cannot be sustained is concerned, the same appears to have merit. In order to appreciate the submission made by learned counsel for the appellant in this regard it will be useful to extract the sections 3/4 D.P.Act, 498A and 304 B IPC herein below :-

"498A:- Husband or relative of husband of a woman subjecting her to cruelty:-

Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation- For the purpose of this section, "cruelty" means-

(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.]

304B:-Dowry death :-

(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

Explanation- For the purpose of this sub-section, "dowry" shall have the same meaning. as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.]

3/4 D.P.Act :-

3. Penalty for giving or taking dowry.--1[(1)] If any person, after the commencement of this Act, gives or takes or abets the giving or taking of dowry, he shall be punishable 2[with imprisonment for a term which shall not be less than 3[five years, and with fine which shall not be less than fifteen thousand rupees or the amount of the value of such dowry, whichever is more]: --1[(1)] If any person, after the commencement of this Act, gives or takes or abets the giving or taking of dowry, he shall be punishable 2[with imprisonment for a term which shall not be less than 3[five years, and with fine which shall not be less than fifteen thousand rupees or the amount of the value of such dowry, whichever is more]\": " Provided that the Court may, for adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a term of less than 4[five years].] 5[(2) Nothing in sub-section (1) shall apply to, or in relation to,-- 1[(2) Nothing in sub-section (1) shall apply to, or in relation to,--"

(a) presents which are given at the time of a marriage to the bride (without any demand having been made in that behalf): Provided that such presents are entered in a list maintained in accordance with the rules made under this Act;

(b) presents which are given at the time of a marriage to the bridegroom (without any demand having been made in that behalf): Provided that such presents are entered in a list maintained in accordance with the rules made under this Act: Provided further that where such

presents are made by or on behalf of the bride or any person related to the bride, such presents are of a customary nature and the value thereof is not excessive having regard to the financial status of the person by whom, or on whose behalf, such presents are given.]

1[4. Penalty for demanding dowry.--If any person demands, directly or indirectly, from the parents or other relatives or guardian of a bride or bridegroom, as the case may be, any dowry, he shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to two years and with fine which may extend to ten thousand rupees: 2[4. Penalty for demanding dowry.--If any person demands, directly or indirectly, from the parents or other relatives or guardian of a bride or bridegroom, as the case may be, any dowry, he shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to two years and with fine which may extend to ten thousand rupees\:" Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months.]]"

30. Even the most superficial perusal of the dying declaration of the deceased Ex. Ka-9 indicates that she has not alleged any demand of dowry either by her husband or her mother in law or sister in law, either at the time of marriage or after marriage nor she has alleged her torture by them for non fulfillment of any demand of dowry or she was treated with cruelty either by her husband or her mother in law. There is no whisper of any allegation in her dying declaration that soon before she was set ablaze by her husband Santosh with the aid of her mother in law Kamla Devi she had either been tortured or treated with cruelty in connection with any demand of dowry.

31. The only witness of fact examined on behalf of the prosecution to prove the demand of dowry PW-1 Devi Prasad father of the deceased failed to support the prosecution case during the trial and was declared hostile. Although on being cross examined by the prosecution after being declared hostile PW-1 had stated that Rs. 50,000/- was demanded as additional dowry from his daughter Madhuri before her death but immediately corrected himself by denying that the accused had ever demanded Rs. 50,000/-.

32. Thus after a very carefully scrutiny of the dying declaration of the deceased Ex. Ka-9 and statement of PW-1 recorded during the trial we are constrained to observe that the prosecution has miserably failed to prove by any cogent and reliable evidence that accused appellant had started demanding Rs. 50,000/- as additional dowry after the marriage of the deceased with appellant Santosh and that she was tortured or treated with cruelty soon before her death in connection with any demand of dowry and in view of the above. The prosecution has further miserably failed to prove the ingredients of offences under Section 498A and 3/4 D.P.Act also and hence the conviction of the appellant under Section 3/4 D.P.Act, 498A and 304 B IPC cannot be sustained and is liable to be scored out. There is no iota of any evidence even remotely suggesting that the unfortunate occurrence was either premeditated or pre-planned. The facts stated by the deceased in her dying declaration indicate that the appellant Smt. Kamla Devi, the mother in law of the deceased Madhur was in the habit of taunting her son Santosh, husband of the deceased when ever he did something for his wife and was consistently bricking and nagging her son and on the

fateful day when he had returned back home after purchasing "ghee" from the markert for preparing "ladoos", his mother Smt. Kamla taunted her husband, appellant Santosh Kumar on which he lost is mental equilibrium and in a sudden rage and in the heat of the moment sprinkled kerosene oil on his wife and set her ablaze hoping to put an end to his mother's constant nagging and brickerings. It is true that the facts stated by the deceased in the dying declaration indicate that after setting her ablaze inside the house her husband had taken her out to a field and had tried to burn her with cow dung cakes but at the same time we cannot ignore another very relevant aspect of the matter which stands proved from the evidence on record including the deceased's dying declaration Ex. Ka-9, that it was her husband appellant Santosh who had taken her for treatment first to Swarna Hospital Mathura and when they referred the deceased for specialized treatment to S.N.Medical College, Agra, it was appellant Santosh who took the deceased from Mathura to Agra and got her admitted to S.N.Medial College, Agra on 29.01.2005 at about 5.50 p.m. and if the appellant had intended to commit the murder of his wife Madhuri, he would not have taken her from one hospital to another for treatment, desperately trying to save his life. Thus in view of the foregoing discussion, we are satisfied that the conviction of the appellant recorded under Sections 3/4 D.P.Act, 498A and 304B IPC passed by the trial court cannot be maintained and is accordingly liable to scored out.

33. Considering the evidence on record and the peculiar facts and circumstances of this case and the different roles assigned to the appellants by the deceased in her dying declaration, we are of the view that the ends of justice will be met if the conviction of the appellants Santosh and Smt. Kamla Devi is converted to one under Section 304 (I) IPC and the sentence awarded to appellant Santosh Kumar is palliated to ten years rigorous imprisonment and fine of Rs. 5000/- and in case of default further six months additional rigorous imprisonment, and the setence awarded by the trial court to appellant Kamla Devi who was about 68 years old on the date on which her statement under Section 313 Cr.P.C. was recorded and is at present aged about 76 years old is reduced to the period already under gone. The bail bonds of appellant Smt. Kamla Devi are cancelled and her sureties discharged. The appellant Santosh who is in jail since 03.02.2005 has already served out the sentence of ten years rigorous imprisonment awarded by us to him and also six months additional imprisonment under the default clause and hence he shall be released forthwith unless he is not wanted in any other case. The impugned judgement and order dated 15.02.2008 and 16.02.2008 stand modified to the extent indicated herein above. Both the appeals stand allowed in part and decided accordingly.

33. There shall however be no order as to costs.

34. Let a copy of this order be transmitted to the trial court for intimation and necessary follow up action.

(2016) 8 ILRA 521
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.08.2016

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Appeal No.- 2805 Of 2011
&
Criminal Appeal No.- 8126 Of 2010

Raeesh

...Appellant

Versus

State Of U.P.

...Respondent

Counsel for Appellant:

Meraj Ahmad Khan, Dileep Kumar, G.S. Chaturvedi, M.P.S. Chauhan, Manish Tiwary, Rajshri Gupta

Counsel for Respondent:

Govt. Advocate, Anil Srivastava

Legislation referred to Indian Penal Code, 1860 — Ss. 302, 302/34, 504; Arms Act, 1959 — S. 25(1B)(b); Code of Criminal Procedure, 1973 — S. 313

FACTS:

On 15.02.2009 at about 12.00 noon, at the Government Slaughter House, Police Station Kotwali Nagar, District Aligarh, the appellant Raeesh arrived armed with a knife, accompanied by his brother Haji Munna (appellant) and father Haji Rasheed (co-accused, since deceased). They entered the slaughter house and demanded delivery of slaughtered goods already purchased by the first informant's side. On being refused, Haji Rasheed and Haji Munna caught hold of the deceased Irshad (brother of the first informant), and Raeesh inflicted a knife blow on his chest with intent to kill him. Irshad was taken to Malkhan Singh Government Hospital, Aligarh, where he was declared dead. Raeesh was apprehended on the spot along with the knife. A first information report was lodged by the first informant Bahar Ahmad @ Chhotey (P.W. 1) at 1.00 P.M. on the same day. After investigation, charge-sheets were filed against the appellants.

The Sessions Court, Aligarh, by judgment and order dated 14.12.2010, convicted appellant Raeesh under Section 302 I.P.C. and Section 25(1B)(b) of the Arms Act and convicted appellant Haji Munna under Section 302/34 I.P.C. and sentenced both to life imprisonment. Both the appellants challenged their conviction before this Court.

ISSUES:

- (i) Whether the prosecution witnesses, being close relatives of the deceased, are to be treated as interested witnesses and their testimony discarded on that ground alone.
- (ii) Whether the first information report was ante-timed.
- (iii) Whether non-collection of blood-stained earth from the spot and non-examination of fingerprints on the recovered knife vitiated the prosecution case.

- (iv) Whether the testimony of eye-witnesses P.W. 1 and P.W. 2 was reliable, consistent, and sufficient to sustain conviction.
- (v) Whether common intention under Section 34 I.P.C. was established against appellant Haji Munna.

HELD:

(i) Testimony of relative/interested witnesses — Mere relationship of witnesses with the deceased is not by itself a ground to discard their testimony. In many cases, only relatives are available to depose, particularly having regard to the prevailing trends in our society where persons other than relations are not ready to depose before the court. Such testimony, however, must be subjected to scrupulous and careful scrutiny and if, on such scrutiny, it inspires confidence, it cannot be rejected.

Relied on: Birender Poddar v. State of Bihar, 2011 Cri. L.J. 3120 (S.C.)

(ii) Prompt lodging of the FIR — The place of occurrence was the Government Slaughter House, situated at a distance of 2 kilometres from the police station. The occurrence took place at about 12.00 noon. The first information report was lodged at 1.00 P.M. on the same day. This constitutes a prompt report. The timeline stated in the FIR stands corroborated by: the inquest report commencing at 2.30 P.M. and concluding at 4.30 P.M.; despatch of the dead body for post-mortem after 4.30 P.M.; and its receipt at the mortuary at 5.20 P.M. The contention that the FIR was ante-timed is, therefore, unsustainable.

(iii) Non-collection of blood from spot — The occurrence took place in a government slaughter house where blood of slaughtered animals had spread all over the premises. It was, therefore, virtually impossible to segregate and collect blood attributable exclusively to the deceased. Non-collection of blood-stained earth under such peculiar facts creates no doubt about the place of occurrence. Footwear left behind at the scene by reason of the stampede that followed were, in fact, seized under a recovery memo by the Investigating Officer.

(iv) Reliability of ocular testimony — The two eye-witnesses, P.W. 1 (first informant and brother of deceased) and P.W. 2 (uncle of deceased), were naturally present at the slaughter house supervising slaughtering work. Their presence at the spot is wholly consistent with the nature of their work and the time of day. Their testimonies are consistent inter se and corroborate the contents of the first information report in all material particulars. The specific description that, after the knife blow, the deceased did not fall immediately but was caught by the witnesses while in the act of falling, is a detail that only persons actually present on the spot could furnish. Cross-examination did not elicit any material contradiction. The defence's own suggestion that the appellant Raeesh was caught by the first informant after a short chase amounts to an implicit admission of the witnesses' presence at the spot.

Medical evidence of Dr. S.K. Sharma (P.W. 3) corroborates the mode of assault — a single ante-mortem stab wound, 4 cm × 2 cm × chest cavity deep, on the front of the chest on the left side — sufficient in the ordinary course of nature to cause death. The doctor opined that death could have occurred between 12.00 noon and 12.15 P.M., which is consistent with the prosecution case and was not challenged in cross-examination.

(v) Common intention under Section 34 I.P.C. — The conjoint act of Haji Rasheed and appellant Haji Munna in catching hold of both hands of the deceased Irshad — thereby immobilising him — while the appellant Raeesh inflicted the knife blow establishes that all the accused persons were acting in furtherance of a common intention to commit the offence. The manner and participation of the accused persons in the incident leads to an inescapable inference of shared common intention.

RESULT:

Both the appeals lack merit and are accordingly dismissed. The judgment and order of conviction dated 14.12.2010 passed by the Sessions Judge, Aligarh, in Sessions Trial No. 395 of 2009 (under Sections 302 and 302/34 I.P.C.) and Sessions Trial No. 396 of 2009 (under Section 25(1B)(b) of the Arms Act) is upheld and confirmed. The bail of appellant Haji Munna stands cancelled and his sureties are discharged. He is directed to be taken into custody forthwith to serve out the remaining period of the sentence imposed upon him by the trial court.

Cases Referred:**Birender Poddar v. State of Bihar**, 2011 Cri. L.J. 3120 (S.C.)

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.)

1. By way of aforesaid Criminal Appeals, the two appellants Raeesh and Haji Munna, have challenged the judgment and order of conviction dated 14.12.2010 passed by the Sessions Judge, Aligarh in Sessions Trial No. 395 of 2009, arising out of case crime no. 43 of 2009 State Vs. Raeesh and others under section 302, 302/34 I.P.C. and in Sessions Trial No.396 of 2009 arising out of Case Crime No.44 of 2009 State Vs. Raeesh, under sub section 1 (b) Part (b) of Section 25 Arms Act, respectively, whereby the appellant Raeesh has been sentenced to life imprisonment coupled with fine of Rs. 10,000/- under Section 302 IPC and three years rigorous imprisonment coupled with fine of Rs.3000/- under sub section (1B) (b) of Section 25 Arms Act, and appellant Haji Munna has been sentenced to life imprisonment coupled with fine of Rs.10,000/- under Section 302/34 IPC, in case of default in payment of fine, additional simple imprisonment for two months and one month, respectively. Sentences to run concurrently.

2. Heard Sri P.C. Srivastava, Sri R. K. Srivastava and Sri Manoj Kumar Srivastava, learned counsel for the appellants, Sri S.G. Hasnain, learned Senior Advocate assisted by Sri Anil Kumar Srivastava and Ms. Pinki Rani Singh, learned counsel for the complainant and Sri J.K. Upadhyay, Sri N.K. S. Yadav, Km. Meena, Ms. Manju Thakur and Sri Rahul Asthana learned A.G.As. for the State and perused the record.

3. The prosecution case as reflected from the record and particularly from first information report appears to be that first informant Bahar Ahmad @ Chhotey son of Mohd. Tahir resident of Nadir Mahal, Hathi Wala 'Pul', Police Station Delhigate District Aligarh, lodged a written report at Police Station Kotwali Nagar District Aligarh on 15.2.2009 at about 1 P.M. against the aforesaid appellants with allegations that contractor Hazi Zahir had engaged him to supervise work (slaughtering of animals) at the govt. slaughter house. While supervising work, on 15.2.2009, at that point of time, Muddasir son of Mohd. Yasin , Hazi Wahid son of late Hazi Mohd Sabir and Hamid son of late Hazi Mohd. Safir, were also present over there and his brother Irshad was also helping him in his work. Around 12 noon, Mohd. Raeesh son of Hazi Rasheed possessing knife in his hand, accompanied by his brother Hazi Munna and his father Hazi Rasheed, came through the door inside the slaughter house and hurled abuses and after coming close to the informant, they insisted upon delivery of the goods which had already been purchased by the first informant. They said that except them no one else can take the goods. First informant and his brother Irshad asked them not to do the same, whereupon, Hazi Rasheed exhorted (co-accused) to kill and today they would not spare them, whereupon, Hazi Mulla and Hazi Rasheed caught informant's brother Irshad and Mohd. Raeesh inflicted knife blow on the chest of Irshad with intention to kill him. Consequently, Irshad was seriously injured. He was taken to Malkhan Singh Government Hospital Aligarh by Mumtaj and Arif Munshi by motorcycle where Irshad was declared dead. First information report also contains description that Mohd. Raeesh was caught on the spot with knife by the first informant, Muddassir, Hazi Wahid, and Hamid. However other, co-accused Hazi

Munna and Hazi Rasheed made their escape good towards Mathura Bye-pass. Number of people arrived at the spot after hearing hue and cry. They also tried to nab the two culprits, but in vain. The first informant has come to lodge this report along with captured accused Mohd. Raesh with recovered weapon knife. Report be lodged and appropriate action be taken. This written report is Ext. Ka. 1.

3A. Contents of this written report were taken down in the concerned check first information report at case crime no. 43 of 2009, under sections 302, 504 I.P.C. and at case crime no. 44 of 2009, under section 4/25 Arms Act (against Raesh). Check FIR is Ext. Ka. 4.

4. On the basis of entries so made in the check FIR, the case was registered against the appellants in G.D. Entry No. 22 at 1.00 P.M. under aforesaid sections of I.P.C. and Arms Act, respectively, on 15.2.2009 at Police Station Kotwali Nagar, District Aligarh, which G.D. entry is Ext. Ka. 5.

5. It is also reflected from record and particularly from the testimony of Amar Pal Singh P.W. 4, that a recovery memo of knife was also prepared by him which memo of recovery is Ext. Ka-2, while Knife is material Ext. 2.

6. Thereafter, investigation of the case followed and was initially taken over by Mohd. Faiz Kamal P.W. 6. He proceeded to Malkhan Singh Government Hospital Aligarh along with the other police personnels and got prepared inquest report through S.I. Balram Singh Yadav which inquest report is Ext. Ka. 8. In the opinion of witnesses of inquest report it was thought appropriate to send the dead body for post-mortem examination for ascertaining real cause of death. Relevant papers, for sending the dead body for autopsy, were prepared. In the process relevant papers-letter to R.I., letter to the Chief Medical Officer Aligarh, challan of dead body, Photo Nash etc. were prepared and these papers have been proved as Ext. Ka. 9 to Ka. 13 by Mohd. Faiz Kamal PW-6.

7. Thereafter, the post mortem examination on the dead body of the deceased Irshad, took place at mortuary Aligarh at 5.30 P.M. on 15.2.2009 wherein one ante mortem injury was noted which is extracted hereinbelow as:-

"Stabbed wound at front of chest left side 4 cm medial to nipple at 9.30 O'clock position; size of wound is 4 cm x 2 cm x chest cavity deep; partly clotted blood oozing from the wound."

8. In the opinion of doctor, cause of death was due to shock and haemorrhage as a result of ante mortem injury. This post mortem examination report has been proved by Dr. S.K. Sharma P.W. 3 as Ext. Ka. 3.

9. The Investigating Officer Faiz Kamal PW-6 also proceeded to spot and prepared the site plan at the instance of first informant (Bahar Ahmad @ Chhotey) which site plan is Ext. Ka.14. He also found certain shoes and slippers scattered on the spot, and prepared memo of the same which

is Ext. Ka. 15. Thereafter, investigation was taken over by another Inspector Veer Pal Sirohi P.W. 5. He recorded statement of prosecution witnesses of fact and formal witnesses during the course of investigation besides recording statement of the accused persons. After completing the investigation Charge-sheet against the appellants was filed at case crime no. 43 of 2009 under section 302, 504 I.P.C. which is Ext. Ka. 6. Charge sheet no. 34/09 filed in case crime no. 44 of 2009 against accused Raeesh under section 4/25 of the Arms Act- which is Ext. Ka. 7.

10. Thereafter, the case of the prosecution was committed to the court of Session where the appellants were tried under aforesaid sections of I.P.C. and Arms Act, respectively. In this regard, two Sessions Trials were conducted i.e. Sessions Trial No.395 of 2009 dealt with offences arising out of case crime no. 43 of 2009 and Sessions Trial No. 396 of 2009 arising out of case crime no. 44 of 2009 against accused Raeesh under section 4/25 Arms Act, Police Kotwali Nagar, district Aligarh.

11. Relevant to mention that both the aforesaid sessions trials were connected with the same incident, therefore, both were consolidated and were disposed of by common judgment and order dated 14.12.2010 passed by the Sessions Court, Aligarh.

12. The trial court heard the appellants on point of charge and, prima facie, ground was found existing for framing charges under section 302/34, 504 I.P.C. against the appellants and section 25 Arms Act. The accused persons denied the charges and opted for trial. Thereafter, the prosecution was asked to adduce its testimony, whereupon the prosecution produced six witnesses out of whom Bahar Ahmad @ Chhotey- PW-1 and Hazi Abdul Wahid PW-2 are said to be the eye witnesses of the incident and they have described the manner of happening of occurrence. Out of the two witnesses, Bahar Ahmad @ Chhotey PW- 1 is first informant, and brother of deceased Irshad and Hazi Abdul Wahid P.W. 2 is uncle of deceased. Dr. S.K. Sharma P.W. 3 conducted autopsy on the dead body of Irshad and has proved the post mortem examination report (Ext. Ka-3). Constable Amar Pal Singh P.W. 4 has made certain entries in the concerned check FIR and the G.D. entry on 15.2.2009. Besides, he has also proved material Ext. 2, the alleged weapon (knife) used in the incident. The first Investigating Officer, who initiated the investigation after the report was lodged on 15.2.2009 till evening of 15.2.2009 is Mohd. Faiz Kamal P.W. 6 He got prepared inquest report Ext. Ka. 8, besides completing various other formalities like preparing relevant papers for sending dead body of Irshad for post mortem examination at mortuary Aligarh. Subsequently, the second, Investigating Officer Inspector Veer Pal Singh Sirohi, who took over the investigation on the very same day (15.2.2009) around 10.40 P.M. recorded statement of various witnesses including accused persons and filed charge sheets against the appellants.

13. Thereafter, the evidence for the prosecution was closed and statement of accused person was recorded under section 313 Cr.P.C. wherein they termed their implication false on account of enmity and alleged that the witnesses of fact being relative of the deceased are highly interested witnesses. The appellants, on their turn got examined Mohd. Mumtiyaz @ Mumtaj son of Babu Khan as D.W. 1. He has testified to the fact that he was not present on the spot at the time of occurrence. He reached at the slaughter house around 7.30 A.M. on 15.2.2009 where he saw

Irshad lying on the ground seeped with blood. He has been cross examined at length by the D.G.C.(CrI.)

14. Learned trial court after hearing both the sides on merit, passed the aforesaid impugned judgment and order of conviction dated 14.12.2010 against the appellants and imposed on them sentences (aforesaid).

15. Consequently this appeal.

16. It would be pertinent to record at this stage that one of the co-accused Hazi Rasheed, who had also preferred Criminal Appeal No. 250 of 2011 against same impugned judgment and order of conviction (14.12.2010), died during pendency of this appeal, as such his aforesaid appeal stood abated vide order of this Court dated 4.7.2016.

17. We have been persuaded vigorously on behalf of the appellants on several specific counts by contending that prosecution witnesses are chance witnesses. Their presence on the spot is doubtful. Their conduct on the spot is not natural. Their testimony contradicts each-other in material particulars. If testimony of one witness of fact is taken to be correct, then, testimony of the other witness of fact is rendered highly unreliable. The manner and style of the occurrence is not proved. Accused Raesh is an old person and had undergone surgical operation of his stomach and he was not in a position to cause knife blow on the deceased Irshad.

18. On the motive count, it can be said that the same is weak and not sufficient for committing murder. Testimony of witnesses is partisan and they being relatives of the deceased, are highly interested witnesses, as such, their testimony is wholly unreliable. Testimony of witnesses of fact is not corroborated by testimony of any independent witness. Neither blood stained earth nor simple earth was collected from the spot which renders place of occurrence doubtful. The first information report is ante timed. In fact, the relevant general diary entry was stopped and FIR was lodged only after preparation of inquest report.

19. The entire investigation was mechanically done by the two Investigating Officers and no worthy evidence was collected which may justify filing of chargesheet and the conviction against present appellants. The distance from place of occurrence to the police station is stated to be 2 Kms. as per reference contained in the check FIR. However, the report was lodged after one hour of the incident which is ante timed. No weapon, in fact, was recovered from the possession of the accused Raesh and nature of injury sustained by the deceased cannot be caused by use of such weapon. The description of manner of the incident by so called eye-witnesses virtually throws doubt on the entire testimony of the witnesses particularly in the circumstances, when the father and one son escaped from the scene leaving behind the (other) son to be caught on the spot ! Under the circumstances, it is obvious that the deceased was killed somewhere-else in the darkness of night by some unknown persons and the present appellants have been roped in, in this case on account of enmity and 'Partibandi'. No effort was made by the Investigating Officer to send the alleged knife for examination of finger print existing on it.

20. Learned counsel summed up that the appellants have also produced D.W. 1 Mumtiyaj @ Mumtaj who has correctly testified that he reached at the slaughter house at 7.30 a.m. in the morning where he found crowd of 40 to 50 persons and deceased Irshad was lying on the spot seeped with blood. This story is self explanatory of fact that the incident did not take place around 12 noon on 15.2.2009. D.W. 1 has denied fact that he ever saw any such incident and that he took the deceased on his motor cycle to the concerned govt. hospital. He has also denied the fact that he ever saw the appellant Raeesh being caught by the informant.

21. Per contra, the aforesaid arguments have been replied by the learned A.G.As. by submitting that it is broad day light occurrence when murder was caused in government slaughter house. The place of occurrence is definite i.e. govt. slaughter house. The cause/motive for occurrence is also established that the appellants insisted for taking the already purchased flesh of animals of informant's side and when refused, the appellants retaliated with force and caused death of Irshad without any reason. The report was promptly lodged at concerned police station.

22. There is no doubt about the place of occurrence-the govt. slaughter house and at the time of occurrence, number of animals had been slaughtered and pool of blood of animals was scattered all over the spot and the ground was more or less soaked with animals' blood, therefore, it was not possible for the Investigating Officer to collect any blood stained soil. Had it been so done, that could have been artificial act on the part of the Investigating Officer and question mark would have been raised on such investigation. However, slippers/shoes left behind after the incident were collected by S.I. Mohd. Faiz Kamal, Investigating Officer PW-6 and recovery memo of the same was prepared which is Ext. Ka. 15. Not only this, the accused Raeesh was also caught on the spot after little chase, just after murder of Irshad. In this backdrop of events, there was hardly any possibility for sparing real accused and naming falsely innocent persons like the present appellants and there is no such strong motive for false implication of the appellants if they were unconcerned with the incident. Moreover, the motivating force behind the offence arose on the spot and their adamant behaviour that was very specific to the point that the accused persons insisted upon taking animals' flesh which had already been purchased by the informant's side.

23. The various details of the incident and the manner of assault and particularly the fact that the two accused caught hold of the deceased Irshad and Raeesh gave knife blow on his chest, stands corroborated by the medical testimony, therefore, it cannot be said that the testimony of the prosecution witnesses of fact is not worthy of credence. On the contrary, their testimony on the whole, is consistent, clinching and inspiring confidence. The presence of the prosecution witnesses (of fact) on the spot is natural and there is no whisper from the circumstances or fact that the incident was caused by some unknown persons in the darkness of night. Merely because, the witnesses are close relatives of the deceased, will not be a ground for throwing away the prosecution case in absence of any determination that these witnesses are highly inimical towards the accused persons and were interested in ensuring conviction of the accused persons. Therefore, the prosecution has proved its case beyond reasonable doubt against the appellants. Death of the deceased cannot be said to have occurred during night, because, the doctor witness has himself stated that the death of the deceased could have taken place between 12 noon to 12.15 p.m.

24. We have also considered above rival submissions.

25. The moot point that arises for our consideration is primarily confined to fact whether the prosecution has been able to establish its case against the appellants beyond reasonable doubt?

26. The very foundation of the prosecution case is grounded in the written report Ext. Ka. 1 wherein allegations have been made against the appellants to the ambit that the occurrence took place on 15.2.2009 around 12.00 noon and place of occurrence is govt. slaughterhouse and the contractor of this slaughterhouse was Hazi Jaheer who had asked the first informant Bahar Ahmad @ Chhotey to supervise work in the slaughterhouse. It is stated that while the work was under progress, the accused persons namely Mohd. Raeesh son of Hazi Rasheed bearing knife in his hand and his brother Hazi Munna son of Haji Rasheed in company with his father Hazi Rasheed son of Jaleel came on the spot and insisted insolently upon purchasing goods (animals' flesh), which had already been purchased and they were adamant that they alone will take all the above goods. The first informant and his brother Irshad asked them not to do so whereupon Hazi Rasheed exhorted to kill them and they should not be spared alive. At this stage, Hazi Munna and Hazi Rasheed caught informant's brother Irshad and Mohd. Raeesh with intent to kill, gave knife blow on the chest of Irshad due to which Irshad was seriously injured and he was taken to Malkhan Singh Government Hospital Aligarh by Mumtaj son of Babu and Arif Munshi where, the doctor declared him dead. The written report also alleges the fact that the first informant caught one of the accused Mohd. Raeesh with knife on the spot with the help of Muddassir, Hazi Wahid and Hamid. Accused Haji Munna and Haji Rasheed made their escape good towards Mathura Bye Pass Road. In the last line of this report, it has been stated that informant has come to lodge this report with the captured accused Mohd. Raeesh bearing knife.

27. Thereafter, the investigation ensued and Mohd. Faiz Kamal P.W. 6 was initially entrusted with the investigation. He arrived at the spot and took note of the situation and prepared site plan and before doing so he rushed to Malkhan Singh Hospital where he got prepared the inquest report. Preparation of inquest report commenced at 2.30 p.m. and ended at 4.30 p.m. on 15.2.2009 at Malkhan Singh Government Hospital Aligarh. Besides, the Investigating Officer also prepared memo of certain slippers and shoes that were left over on the spot as a result of stampede that followed the alleged incident.

28. Now, in such scenario, we may appraise and dip into factual testimony qua circumstances of the case and particularly testimony of the two eye witnesses- PW-1 and PW-2 i.e. Bahar Ahmad @ Chhotey and Hazi Abdul Wahid, respectively. Cummulative reading of their testimony corroborates the contents of FIR when they say that the incident took place around 12 noon on 15.2.2009. At that point of time, Hazi Wahid, Muddassir, Hamid and deceased Irshad were present in the concerned slaughterhouse. P.W. 1 (Bahar Ahmad @ Chhotey) was supervising work over there and a number of traders had come for slaughtering of their animals. First informant P.W. 1 had purchased the slaughtered goods. Informant's brother Irshad was assisting the work. In the meanwhile, the accused persons Hazi Munna Hazi Rasheed and Raeesh came over there abusing. Raeesh was possessing knife in his hand and they insisted that none else, except they alone, will

take the goods and with such utterance they forcibly started taking away the goods (slaughtered flesh), first informant (Bahar Ahmad @ Chhotey) and his brother Irshad opposed the same. Then Hazi Rasheed exhorted to kill them and, in the meanwhile, Hazi Rasheed and Hazi Munna caught hold of two hands of the deceased Irshad and Raeesh with intent to kill, pierced knife into his chest. P.W. 1 and 2 and two others chased Raeesh and caught him with knife while Hazi Rasheed and Haji Munna the other co-accused secured their escape good towards Mathura bye-pass.

29. It has also come in their testimony (PW-1 and PW-2) that the deceased was taken to Malkhan Singh Government Hospital Aligarh by Arif and Mumtaj on motorcycle and thereafter report was lodged at the police station where Raeesh was kept in confinement and seizure/recovery memo of knife was also prepared. PW-1 Bahar Ahmad @ Chhotey has proved written report Ext. Ka. 1 and also recovery memo of knife- Ext. Ka. 2. Testimony of both the above eye- witnesses discloses fact that Irshad died in Malkhan Singh Government Hospital Aligarh. Both these witnesses have been cross examined. In their cross examination, certain facts have emerged relating to routine work of the government slaughterhouse that ordinarily, work begins at the slaughterhouse around 7 a.m. but on the day of occurrence it started at 11.00 a.m. On that day Bahar Ahmad @ Chhotey (PW- 1) went to slaughter house at 7.00 a.m. It also emerges from their cross examination that on that day the goods (animals meant for slaughtering) were supplied around 11.00 a.m. therefore, the work started at 11.00 a.m. and the incident took place around 12 noon when lot of work had been accomplished. A number of specific questions have been asked from both the witnesses on the point of time, manner of assault and presence of accused on the spot, which have been specific replied by the eye-witnesses; but nothing adverse emerged which may throw any doubt on their testimony. Presence on the spot of the two eye-witnesses also appears natural.

30. Perusal of their testimony (PW-1 and PW-2) on the whole appears to be clinching and consistent on the point of description of the occurrence. It has not been suggested by the defence that PW 1 Bahar Ahmad @ Chhotey was engaged somewhere-else in some other work. The distance of police station from the place of occurrence has been stated to be 2 kms. Therefore, lodging of the FIR at 1.00 P.M. after the incident took place around 12.00 noon, at police station Kotwali Nagar District Aligarh, is found to be prompt one.

31. Perusal of the inquest report, Ext. Ka. 8, indicates that all the relevant details i.e. case crime numbers, sections of I.P.C. commencement of preparation of inquest report at 2.30 p.m. and its closure at 4.30 p.m. also indicates that prompt action was taken by the police soon after the report was lodged about the incident in question.

32. Argument has been advanced that the FIR is ante time but such contention, in the face of testimony and circumstances of this case, appears to be unsustainable in view of the fact that the time of preparation of inquest report, suitably matches the relevant time of lodging of the FIR. At this stage, it would be relevant to take note of the fact that the post mortem examination on the dead body was done at 5.30 p.m. on 15.2.2009 itself. Police Form No. 13 challan of dead body Ext. Ka. 10 reflects that the dead body was sent for post mortem examination after 4.30 p.m. on

15.2.2009 and the same was received at mortuary at 5.20 p.m. Each and every relevant paper made during course of investigation has been proved by the prosecution witnesses. Therefore, argument that the first information report is ante time, cannot be accepted under the facts and circumstances of the case.

33. A number of questions have been asked regarding non presence of these two witnesses (PW-1 and PW-2) on the spot whereupon, it has been testified by both the witnesses P.W. 1 and 2 that at that relevant point of time, they were engaged in slaughtering of animals at the govt. slaughterhouse. Their presence at any other place at that point of time, can not be inferred from their cross examination and examination in chief.

34. Relevant to mention that doubt has been tried to be raised regarding place of occurrence because no blood stained earth/soil and simple earth/soil was collected by the Investigating Officer from the spot. But testimony has come forth from Mohd. Faiz Kamal PW- 6 that he prepared site plan at the instance of first informant PW- 1. He has been cross examined on the relevant point of collection of blood stained earth from place of occurrence wherein he has stated that blood in plenty was spread all over the places and certainly this blood was due to the slaughtering of animals in the concerned slaughter house, therefore, it was virtually impossible to collect exclusively any blood sample from the spot. Moreover, the witnesses of fact have also been cross examined on this point and they have stated that the blood had not spilled on the ground but it remained confined to the clothes of the deceased. Therefore, collection of blood from the spot was not possible. Moreso, regarding presence of the prosecution witnesses and particularly presence of Raeesh on the spot is virtually admitted to the defence when it suggested that Raeesh in fact was caught at a distance of 50-60 steps by the first informant, which suggestion has been denied that this is not correct to say that the first informant ran for about 50-60 steps and then caught Raeesh. It has been testified by P.W. 1 on page-33 of the paper book that Raeesh was chased and caught after running 5-6 steps. This way, by extending particular suggestion, defence has admitted the presence of the witnesses of fact on the spot. Both the witnesses have testified in their cross examination that the place of the occurrence has been shown to the Investigating Officer, who visited the spot at 5.30 p.m. on 15.2.2009, therefore, presence of both the witnesses of fact P.W. 1 and P.W. 2, on the spot is established.

35. Now, so far as the motive point of the offence is concerned, it can be conveniently observed, that motive has got no significance in view of the ocular testimony of the offence by the two witnesses of fact. However, motive suggested is quite relevant that accused persons said that they will take away the goods which had already been purchased by the first informant and on the refusal of the same, the accused persons became adamant and insisted for delivery of the goods and started taking away the goods and in the process the offence was committed. Therefore, the motive to commit crime was act of the accused themselves on the spot and it just preceded the incident and this fact has been satisfactorily proved by the two prosecution witnesses of fact.

36. One particular aspect of the case engages our attention that both the witnesses have described the incident, manner of assault and have stated that after the assault was caused on the

chest of deceased Irshad, he did not fall down on the ground, but the witnesses caught him while he was in the process of falling down. This particular description of occurrence is very special and persons who were present on the spot alone, can describe the incident in such a manner. We are conscious of fact that certain minor contradictions are bound to be there but both the witnesses of fact have proved comprehensively about the manner and style of the occurrence, which testimony, under facts and circumstances, is unimpeachable, therefore, we see no reason to disbelieve their version.

37. Our attention has also been invited to the testimony of P.W. 2 Hazi Abdul Wahid in the last paragraph of his cross examination as appearing on Page 59 of the paper book when this witness has stated that Irshad deceased came on the spot around 11.00 a.m., whereas, in the testimony of PW-1, it has been described that Irshad had accompanied him to the concerned slaughter house from the house. But, this variation cannot be said to have any relevance about absence of the deceased at the relevant point of occurrence which took place around 12.00 noon. Therefore, the statement so appearing in the cross examination of P.W. 2 does not effect the fact of presence of deceased Irshad on the spot. This statement may be taken as an isolated aberration and will not have any relevance on the actual occurrence.

38. At this stage, it would be relevant to have appraisal of testimony of doctor witness P.W. 3 S.K. Sharma who conducted post mortem examination on the body of deceased Irshad in order to assess the approximate time of death of the deceased as to when death of Irshad took place. This doctor witness has testified that he conducted the post mortem examination on the dead body of Irshad on 15.2.2009 around 5.30 p.m., on the date when the incident took place. Only one ante mortem injury in form of stab wound on front of chest left side 4 cm medial to nipple on 9.30 O'clock position measuring 4 cm x 2 cm x cavity deep was found. Wound was partly clotted and blood oozing from the wound. Duration of death was stated to be within six hours. Cause of death was due to shock and haemorrhage as a result of aforesaid ante mortem injury. It has come in the testimony of prosecution witnesses of fact particularly P.W. 1 that he cannot say whether the deceased had taken any break fast in the morning of 15.2.2009 or not. The Doctor has submitted that the deceased might have taken food 4-5 hours before his death. However, in the post mortem report, stomach has been shown to be empty. Therefore, opinion of doctor that the deceased might have taken food 4-5 hours before his death remains an opinion based on his personal knowledge and cannot be applied squarely in this case and it cannot be said whether the deceased had taken any food or breakfast in the morning of fateful day or not. Doctor has himself opined in the last line of his examination in chief that death in question could have occurred around 12.00 noon to 12.15 P.M. This specific testimony regarding time of death has neither been challenged nor put to any doubt in cross examination by the appellants. In this view of the matter, there is no doubt regarding approximate time of death that coincides with occurrence and we have discussed above about the incident that it took place around 12 noon on 15.2.2009.

39. Now, we may also consider and analyze the attendant circumstances of the case as appearing in the testimony on record vis a vis the fact of the case. Obviously, the first informant used to supervise slaughtering work of animals at the govt. slaughter house where work in fact

started around 11.00 A.M. though the routine work at the govt. slaughterhouse usually began at 7.00 a.m., but on the day of occurrence, the goods/material (animals) meant for slaughtering was received late around 11.00 a.m., therefore, work on the day of the incident began at 11.00 a.m. and when the major part of slaughtering work had been over, three accused persons arrived on the spot amongst whom Raeesh was possessing knife, thereafter the accused persons became insolent and adamant and demanded purchased goods (i.e. animals' flesh) which demand was resisted by the informant's side and this was the motivating factor for causing assault, injury and death of Irshad by the appellants. Here, conjoint act on the part of all the accused and particularly two accused who caught hold of the hands of the deceased shows that the act was done in furtherance of common intention of all the accused persons who had the common intention to commit the offence which they intended. The very manner of occurrence and participation of the accused persons in the incident lead us to inescapable inference that the accused persons were acting in furtherance of their common intention and they committed the offence what they intended. The injury caused on the chest is grievous and fatal and appellants should and must have sufficient cause to believe the outcome of offence committed by them in ghastly manner.

40. Dr. S.K. Sharma PW-3 has also proved that injury inflicted on the deceased was sufficient in the ordinary course of nature to cause death of the deceased. At the cost of repetition, we may add that no intriguing fact and circumstance has been brought on record which may impel us to affirm opinion that the prosecution witnesses of fact are trying to avail conviction of accused persons and they have bias towards them. In this way, we are of the view that the testimony of the witnesses of fact cannot be discarded on that count. Before parting with this aspect of the case, it would be relevant and proper at this stage to express that law is well settled that such testimony of relative witnesses is not to be discarded merely on fact of their being relatives of deceased. Reason being that, in number of cases, we find that only relatives are available for giving evidence and particularly so having regard to the prevailing trends of our society, where persons other than relations are not ready to depose before the court. We can also be careful that such testimony should be scrutinized scrupulously and carefully, which testimony we have already gone into. In such a matter, we have similar guiding context and we also take note of ratio of the decision of Hon. Apex Court in the case of **Birender Poddar Vs. State of Bihar -2011 Cri.L.J. 3120 (S.C.)**. Therefore, the ratio laid down by Hon. Apex Court also stands on the similar guidelines of scrupulous and careful scrutiny of such evidence. We, after careful scrutiny of facts and evidence as discussed above, are of firm opinion, that presence of the witnesses on the spot is found to be natural and their version is corroborated in material particular with each other and the same cannot be said to be either embellished or tutored, therefore, their testimony on the whole is inspiring confidence.

41. We have already considered the material aspects of the occurrence which fit in the attendant circumstances and facts of this case and it eventually turns out that the prosecution has been able to prove charge against the accused appellants. The learned trial court has also taken comprehensive view of the entire occurrence and has discussed its various aspects and rightly recorded the conviction against the present appellants and has passed sentence against them which needs no interference at this juncture.

42. Accordingly, we uphold the judgment of conviction and order dated 14.12.2010 passed by the Sessions Judge, Aligarh in Sessions Trial No. 395 of 2009, arising out of case crime no. 43 of 2009 State Vs. Raeesh and others under section 302, 302/34 I.P.C. and in Sessions Trial No.396 of 2009 arising out of Case Crime No.44 of 2009 State Vs. Raeesh, under sub section (1B) (b) of Section 25 Arms Act. Consequently, the aforesaid appeals lack merit and the same are dismissed.

43. In this case, appellant Raheesh is in jail, whereas, the appellant Haji Munna is on bail. His bail bond is cancelled and sureties are discharged. He shall be taken into custody forthwith. Both the appellants shall serve out their respective remaining sentence imposed upon them by the trial court.

44. Let a copy of this judgment/order be certified to the court concerned for necessary information and follow up action.

(2016) 8 ILRA 534
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.08.2016

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Appeal No.- 2966 Of 2005

Babbal @ Harendra & Ors.

...Appellants

Versus

State Of U.P

...Respondent

Counsel for Appellants:

Meraj Ahmad Khan, Dileep Kumar, G.S. Chaturvedi, M.P.S. Chauhan, Manish Tiwary, Rajshri Gupta

Counsel for Respondent:

Govt. Advocate, Anil Srivastava

Legislation referred to Indian Penal Code, 1860 — Ss. 302, 302/34, 504; Arms Act, 1959 — S. 25(1B)(b); Code of Criminal Procedure, 1973 — S. 313

FACTS:

On 15.02.2009 at about 12.00 noon, at the Government Slaughter House, Police Station Kotwali Nagar, District Aligarh, the appellant Raeesh arrived armed with a knife, accompanied by his brother Haji Munna (appellant) and father Haji Rasheed (co-accused, since deceased). They entered the slaughter house and demanded delivery of slaughtered goods already purchased by the first informant's side. On being refused, Haji Rasheed and Haji Munna caught hold of the deceased Irshad (brother of the first informant), and Raeesh inflicted a knife blow on his chest with intent to kill him. Irshad was taken to Malkhan Singh Government Hospital, Aligarh, where he was declared dead. Raeesh was apprehended on the spot along with the knife. A first information report was lodged by the first informant Bahar Ahmad @ Chhotey (P.W. 1) at 1.00 P.M. on the same day. After investigation, charge-sheets were filed against the appellants.

The Sessions Court, Aligarh, by judgment and order dated 14.12.2010, convicted appellant Raeesh under Section 302 I.P.C. and Section 25(1B)(b) of the Arms Act and convicted appellant Haji Munna under Section 302/34 I.P.C. and sentenced both to life imprisonment. Both the appellants challenged their conviction before this Court.

ISSUES:

- (i) Whether the prosecution witnesses, being close relatives of the deceased, are to be treated as interested witnesses and their testimony discarded on that ground alone.
- (ii) Whether the first information report was ante-timed.
- (iii) Whether non-collection of blood-stained earth from the spot and non-examination of fingerprints on the recovered knife vitiated the prosecution case.
- (iv) Whether the testimony of eye-witnesses P.W. 1 and P.W. 2 was reliable, consistent, and sufficient to sustain conviction.
- (v) Whether common intention under Section 34 I.P.C. was established against appellant Haji Munna.

HELD:

(i) Testimony of relative/interested witnesses — Mere relationship of witnesses with the deceased is not by itself a ground to discard their testimony. In many cases, only relatives are available to depose, particularly having regard to the prevailing trends in our society where persons other than relations are not ready to depose before the court. Such testimony, however, must be subjected to scrupulous and careful scrutiny and if, on such scrutiny, it inspires confidence, it cannot be rejected.

Relied on: Birender Poddar v. State of Bihar, 2011 Cri. L.J. 3120 (S.C.)

(ii) Prompt lodging of the FIR — The place of occurrence was the Government Slaughter House, situated at a distance of 2 kilometres from the police station. The occurrence took place at about 12.00 noon. The first information report was lodged at 1.00 P.M. on the same day. This constitutes a prompt report. The timeline stated in the FIR stands corroborated by: the inquest report commencing at 2.30 P.M. and concluding at 4.30 P.M.; despatch of the dead body for post-mortem after 4.30 P.M.; and its receipt at the mortuary at 5.20 P.M. The contention that the FIR was ante-timed is, therefore, unsustainable.

(iii) Non-collection of blood from spot — The occurrence took place in a government slaughter house where blood of slaughtered animals had spread all over the premises. It was, therefore, virtually impossible to segregate and collect blood attributable exclusively to the deceased. Non-collection of blood-stained earth under such peculiar facts creates no doubt about the place of occurrence. Footwear left behind at the scene by reason of the stampede that followed were, in fact, seized under a recovery memo by the Investigating Officer.

(iv) Reliability of ocular testimony — The two eye-witnesses, P.W. 1 (first informant and brother of deceased) and P.W. 2 (uncle of deceased), were naturally present at the slaughter house supervising slaughtering work. Their presence at the spot is wholly consistent with the nature of their work and the time of day. Their testimonies are consistent inter se and corroborate the contents of the first information report in all material particulars. The specific description that, after the knife blow, the deceased did not fall immediately but was caught by the witnesses while in the act of falling, is a detail that only persons actually present on the spot could furnish. Cross-examination did not elicit any material contradiction. The defence's own suggestion that the appellant Raees was caught by the first informant after a short chase amounts to an implicit admission of the witnesses' presence at the spot.

Medical evidence of Dr. S.K. Sharma (P.W. 3) corroborates the mode of assault — a single ante-mortem stab wound, 4 cm × 2 cm × chest cavity deep, on the front of the chest on the left side — sufficient in the ordinary course of nature to cause death. The doctor opined that death could have occurred between 12.00 noon and 12.15 P.M., which is consistent with the prosecution case and was not challenged in cross-examination.

(v) Common intention under Section 34 I.P.C. — The conjoint act of Haji Rasheed and appellant Haji Munna in catching hold of both hands of the deceased Irshad — thereby immobilising him — while the appellant Raees inflicted the knife blow establishes that all the accused persons were acting in furtherance of a common intention to commit the offence. The manner and participation of the accused persons in the incident leads to an inescapable inference of shared common intention.

RESULT:

Both the appeals lack merit and are accordingly dismissed. The judgment and order of conviction dated 14.12.2010 passed by the Sessions Judge, Aligarh, in Sessions Trial No. 395 of 2009 (under Sections 302 and 302/34 I.P.C.) and Sessions Trial No. 396 of 2009 (under Section 25(1B)(b) of the Arms Act) is upheld and confirmed. The bail of appellant Haji Munna stands cancelled and his sureties are discharged. He is directed to be taken into custody forthwith to serve out the remaining period of the sentence imposed upon him by the trial court.

Cases Referred:

Birender Poddar v. State of Bihar, 2011 Cri. L.J. 3120 (S.C.)

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.)

1. This Criminal Appeal has been filed by the aforesaid appellants against the judgement and order of conviction and sentence dated 17.6.2005, passed by the Additional Sessions Judge, Court No. 5, Ghaziabad, in S.T. No. 247 of 2001- State Vs. Babbal @ Harendra and others, arising out of case crime no. 373 of 2000, under sections 147, 148, 149, 504, 506, 307, 302/34 120-B, I.P.C. and section 7 of Criminal Law Amendment Act, Police Station Pilkhua district Ghaziabad, whereby, the each of the appellants, has been sentenced to life imprisonment and fine of Rs. 10,000/- under sections 302/149 I.P.C., one year R.I., under section 148 I.P.C., 7 years R.I. under sections 307/149 I.P.C. and one year R.I., under section 504 I.P.C. 2 years R.I. under section 506 I.P.C. and one year R.I. under section 7 of Criminal Law Amendment Act. In case of default in payment of fine concerned appellant was directed to undergo imprisonment for one year. These sentences were directed to run concurrently.

2. We have heard at length Shri A.B.L. Gaur learned Senior Counsel assisted by Shri P.K. Srivastava learned counsel for the appellants and Shri Indradeo Mishra, Kapildev Pandey learned counsel on behalf of the complainant as well as Ms. Meena and Shri J.K. Upadhyaya learned A.G.A. for the State and perused record.

3. The facts germane as reflected from the record, giving rise to this appeal, appear to be that one Veer Sain son of Kanak Singh resident of Chhijarsi, Police Station Pilkhua district Ghaziabad lodged written report on 27.9.2000 at 3.40 p.m. at P.S.- Pilkhua to the effect that one Gambhir and his family members of his village had murdered his brother Fakir Chandra in the year 1996. In the year 1999, Rakesh and Narendra also badly assaulted him and had been extending life threat to him and his family members and since then they had been threatening off and on. On 27.9.2000, his son Babbal and nephew Jitendra went to Qasba/township Pilkhua for purchasing "T" for tractor around 9.00 A.M. in the morning. He along with one Naresh son of Sheoraj of his village had gone to enquire about rate of bricks to Dhaulana at some brick-kiln. As soon as they reached near Sharma Petrol Pump, it was around 11.25 A.M. when his son Babbal and nephew Jitendra were sighted coming from infront of Petrol Pump on Yamaha Motor Cycle and some white coloured Maruti Car following his motor cycle. In the meanwhile white Maruti Car hit from behind the motor cycle. The motor cycle was being driven by his son Babbal. Due to this collision, both Babbal and Jitendra fell down on the ground. As soon as they stood up, Babbal @ Harendra, Chumman @ Narendra, Gambhir and Jain Singh sons of Sardar Singh, possessing country made pistol in their hands and Kuldeep son of Bheem Singh, possessing 'Farsa' alighted from car and Gambhir exhorted that they will take revenge today and it is opportune moment to kill them and while saying so the assailants opened indiscriminate firing on son and nephew of first informant. Both boys sustained gun shot injuries and fell down on the ground. In the meanwhile, Kuldeep assaulted Jitendra with 'Farsa'. First informant and Naresh raised alarm and tried to save them but they were threatened by firing and this compelled the first informant and the other person to take shelter behind bush. Since the first informant was unarmed, therefore, he could not do anything further. Due to indiscriminate firing on the spot, employees of petrol pump and employees of nearby factory ran away from the place of occurrence and panic and silence prevailed over the area.

In the meanwhile, assailants threatened that in case, any persons tried to intervene, he will also be dealt with in the same manner. Assailants made their escape good by using their Maruti Car towards Masoorie. The incident was witnessed by a number of persons. First informant and the other person Naresh, after a short while came on the spot when the police Gypsy also arrived (on the spot), whereupon, both the injured persons were taken to Yashoda Hospital in Gypsy. Nephew Jhitendra succumbed to his injury while on way to the Hospital. Condition of Babbal was serious. He is undergoing treatment in the Hospital. Dead body of his nephew has been sent to Ghaziabad Hospital. Report be lodged and action be taken. It is written in the last line of the report that occurrence has its base in deeply rooted conspiracy hatched by Subhash son of Sardar of his village, who is on inimical terms with the first informant. This report is Ext. Ka. 1 on record.

4. Contents of aforesaid report were taken down in the Check FIR at 3.40 P.M. on 27.9.2000 at crime no. 373 of 2000 under sections 147, 148, 149, 504, 307, 302/34, 120-B, I.P.C. and section 7 Criminal Law Amendment Act, Police Station Pilkhua, which is Ext. Ka.-3 on record.

5. On the basis of entries so made in the Check FIR, a case was registered against the accused persons under aforesaid case crime number and sections of IPC and Criminal Law Amendment Act at Police Station Pilkhua in the concerned G.D. Rapat No. 24 at 15.40 hours on 27.9.2000, which is marked as Ext. Ka. 4.

6. Injured Babbal was got admitted in Hospital Nehru Nagar, Ghaziabad on 27.9.2000 at 12.10 P.M. and was admitted there at 12.40 P.M. on the same day. His medical examination was conducted wherein he sustained six injuries on his person which are extracted herein below:

1. Wound 1 cm x 1 cm ragged margins over junction of cervical and thoracic region at back surrounding skin-black, profuse bleeding and viscera deep.
2. Wound $\frac{1}{2}$ cm x $\frac{1}{2}$ cm ragged margins over mid part of chest below throat, bone deep. Bleeding.
3. Wound $1\frac{1}{2}$ cm x $1\frac{1}{2}$ cm over right temporal region. Post auricular. Blackening. Bleeding on almost half of right pinna cut very severally.
4. Wound over post aspect of right chest about 1 cm x 1 cm at level of 7-8 rib, inverted margins. Bleeding and Tattooing present.
5. Abrasions both shoulders.
6. Tattooing all over right chest, shoulder, upper arm and back.

7. In the opinion of doctor, injuries no. 1 to 4 might have been caused by fire arm and similarly, injury no. 6 may also be caused by use of fire arm. Injury no. 5 may be caused by falling down on the ground.

8. Record reflects that inquest report of deceased Jitendra was prepared on 27.9.2000. It commenced at 5.30 P.M. and completed at 6.30 P.M. Inquest report is Ext. Ka.-10.

9. Relevant papers were also prepared for sending the dead body of Jitendra for post mortem examination. Relevant papers were prepared for the same which papers are photo-nash Ext. Ka. 14, challan dead body (Police Form-13) Ext. Ka. 15, specimen seal Ext. Ka. 12, letter to concerned Chief Medical Officer Ext. Ka. 13, letter sent to the Surgeon by R.I. Ghaziabad Ext. Ka. 11. Thereafter, the post mortem examination on the dead body of Jitendra was conducted on 28.9.2000, at 2.00 P.M. at mortuary Ghaziabad, wherein, the following ante-mortem injuries were found on the dead body by the Dr. J.R. Jiyani P.W. 5:

1. Gunshot wound of entry 1 cm x 1 cm on right side of head 4 cm above ear brain cavity deep-communicating to Injury No.2. Blackening present.

2. Gunshot wound of exit 7 cm 6 cm x brain cavity deep-communicating to Injury no.1 left parietal-temporal region-underneath parietal temporal bone fractured. Brain lacerated.

3. Incised wound 10 cm x 2.5 x brain cavity deep on occipital region transversely placed underneath occipital bone cut.

4. Incised wound 8 cm x 1 ½ cm x muscle deep left side of back, upper part, near spine.

5. Gunshot wound of entry 1 cm x 1cm on abdomen 7 cm above umbilicus at 12 O' clock communicating to Injury No.6 underneath intestines are lacerated at places.

6. Gunshot wound of exit 4 cm x 2 cm x abdomen deep communicating to Injury No.5 on right side back at lumber region.

7. Gunshot wound of entry communicating to Injury No.8 at middle part of back, near spine on right side 1 cm x 1 cm chest cavity deep, tattooing present all around.

8. Gunshot wound of exit 2 cm x 2 cm abdominal cavity deep-communicating to Injury No.7.

9. Gunshot wound of entry 4 cm x 2 cm on left upper part of chest on mid clavicular region, cavity deep, tattooing present around in an area of 15 cm x 15 cm, a bullet, metallic recovered from chest cavity deep.

10. Gutter shaped wound 7 cm 1 cm on back of right forearm 7 cm below elbow joint, tattooing present on whole of back of forearm.

11. Lacerated wound 2 cm x 1 cm x bone deep on lower part of back right side near spine.

10. In the opinion of doctor, cause of death was due to shock and haemorrhage as a result of ante mortem injuries. Dr. Jiyani P.W. 5 has proved post mortem examination report as Ext. Ka. 5.

11. During the course of investigation, the Investigating Officer recorded the statement of various persons including prosecution witnesses and also prepared relevant papers, a mention of which may be made i.e. recovery memo of simple soil and blood stained soil, empty cartridges, shoes, slipper and Motor Cycle No. U.P. 15-H-3389 Yamaha red colour. This recovery memo is Ext. Ka. 7. The investigating Officer also took blood stained clothes of injured Babbal and prepared memo of the same as Ext. Ka. 8. Apart from above, the Investigating Officer also prepared site plan of the place of occurrence which is marked as Ext. Ka. 6 on record.

12. After completing the investigation, the Investigating Officer submitted charge sheet against the appellants at case crime number no.373 of 2000, under sections 147, 148, 149, 504, 307, 302/34 and 120B IPC and Section 7 Criminal Law Amendment Act, which is Ext. Ka. 9 on record. Thereafter, the case of the accused persons was committed to the court of Session from where, it was made over for trial to the concerned Additional Sessions Judge, who after hearing the appellants on the point of charge, framed charges under sections 147, 148, 307/149, 302/149, 504, 506, 120-B, I.P.C. and section 7 of Criminal Law Amendment Act. The charges were readover and explained to the accused who denied the charges and opted for trial. Consequently, the prosecution was asked to adduce its testimony to prove its case.

13. The prosecution produced in all six witnesses. Brief reference whereof is being given hereinbelow.

14. Veersen P.W. 1 is the first informant and claims himself to be an eye witness of the incident. He has proved written report Ext. Ka. 1. P.W. 2 Babbal Singh is the injured eye witness and is also star witness for the prosecution. He has narrated about the incident. P.W. 3 Dr. Sushil Fotedar has examined aforesaid injured witness P.W. 2 Babbal Singh on 27.9.2000 at Yashoda Hospital and has proved injury report of injured Babbal Singh as Ext. Ka. 2. K.L. Suman Head Constable is P.W. 4. He has proved check FIR as Ext. Ka. 3 and relevant G.D. entry and registration of case against the appellants as Ext. Ka. 4. P.W. 5 is J.R. Jiyani. He has conducted autopsy on the dead body of the deceased Jitendra at 2.00 P.M. on 28.9.2000 and has proved post mortem report as Ext. Ka. 5. P.W. 6 -S.I. Pyare Lal Yadav is the Investigating Officer of this case and he has described the various steps he took in completing the investigation. He has elaborated every relevant aspect of the investigation in his testimony and has proved filing of charge sheet against the appellants as Ext. Ka.9. Besides, he has proved other relevant papers either prepared by himself or got prepared from his colleagues in completing the investigation.

15. Thereafter the evidence for the prosecution was closed and statement of accused appellants was recorded under section 313 Cr.P.C. wherein the appellants termed their implication false and submitted that they have been falsely implicated on account of old enmity and village Parti-Bandi.

16. In turn, the defence got examined constable Banwari Lal as D.W. 1. As per his testimony, he has described about certain entries made by him in the City Control Room on the relevant date of occurrence (i.e. 27.9.2000). Thereafter, the case was heard on its merit by the learned Trial Judge, who after appraisal of facts, recorded conviction against the appellants and sentenced them to various terms of imprisonment and fine under sections 148, 307 read with section 149, 302 read with Section 149, 504, 506 I.P.C. and section 7 of the Criminal Law Amendment Act in Sessions Trial No. 247 of 2001. Consequently, this appeal.

17. Shri A.B.L. Gaur learned counsel for the appellants has vigorously persuaded that the prosecution has not been able to establish its charges beyond reasonable doubt and the occurrence itself becomes doubtful. Lodging of the First Information Report is ante timed. P.W. 1 the first

informant has, infact, not seen the occurrence. Investigation is tainted. Even injured witness is not worthy of credit and he infact did not see the real assailants. In this case, the circumstances are so placed that the injury report of Babbal, as claimed by the prosecution, has not been properly proved by Dr. Sushil Fotedar P.W. 3. Injury report Ext. Ka. 2 becomes waste paper.

18. D.W. 1 constable Banwari Lal happens to be an independent witness of so called post occurrence and has proved various entries and information received in the City Control Room of Ghaziabad. D.W. 1, if believed, then first information report becomes ante dated. It is claimed by the prosecution that the police arrived immediately on the spot and took the injured to hospital in Police Gypsy. As per testimony of D.W. 1, the police control room was informed about the incident around 11.30 A.M. and it was also admitted that white coloured Maruti Car has been abandoned and only two persons were seen alighting from the aforesaid Car. If this is the state of affairs on the factual side, then this must have to be repelled first in order to establish consistency of the prosecution version and the charges, but these vital facts in shape of attendant circumstances adversely make deep dent in the prosecutions story and create lot of doubt which doubt has not been dispelled. Obviously, the first information report was lodged at 3.40 P.M. and as per testimony of D.W. 1, no such intimation was given to the city control room regarding lodging of first information report by 4.05 p.m. From 3.40 P.M. to 4.05 P.M. on 27.9.2000, if no information regarding the lodging of first information report was received at the police control room then it is obvious that no information report was in existence till 4.05 on 27.9.2000. These factual aspects and circumstances show handy work of police and false implication of the accused persons. Even one person was apprehended by the police, but this particular fact was not properly brought before the trial court. All these anomalies generated lot of doubts and loopholes in the prosecution story and same cannot be believed as such.

19. Per contra, learned A.G.A. submitted that the prosecution case rests on the ground that the lodging of the first information report under the relevant sections of IPC and Criminal Law Amendment Act has been reasonably proved. The same cannot be said to be ante time. D.W.1 is working as a commentator. In common parlance, it is not necessary that each and every first information report, which is lodged, just before 4.00 P.M. will be immediately communicated to the City Control Room because, Government agencies who man the situation, take their own time and pause in which mathematical calculation and immediate execution of information cannot be expected of them. The testimony of injured witness cannot be done away merely on the asking. He has narrated the entire incident in consistent way and his presence on the spot is established and it is also established that he was fully conscious of the occurrence till he fell down unconsciously. The first informant also happened to be present on the spot and his presence cannot be doubted and his testimony regarding the details of the incident inspires confidence. The case of the prosecution is proved consistently against the appellants.

20. Shri Indradeo and Shri Kapildeo Pandey learned counsel for the complainant added further to the above arguments of the learned A.G.A. and engaged our attention to the various injuries sustained by Babbal and submitted that there was blackening in some injuries sustained by injured witness P.W. 2. The testimony of P.W. 1 and P.W. 2 cannot be said to be contradictory in

material particulars and particularly regarding the manner and style of the incident. The incident occurred in broad day light and identity of the appellants was well known to them i.e. first informant and Babbal, therefore, participation of the appellants in the commission of the crime resulting into death of one person and vital injuries to another person have been ably proved by direct testimony of prosecution witnesses of fact and the same gets corroboration from the circumstances of the case and on the whole inspires confidence in the prosecution case that the appellants have committed ghastly crime.

21. Learned counsel concluded by submitting that very motive for committing the crime is virtually admitted to the defence and the appellants have themselves stated that their implication is on account of old enmity and village Parti-bandi, whereas the fact of enmity has been proved by P.W. 1 in his examination in chief, and fact of enmity goes without challenge by the defence in cross-examination. Thus fact of old enmity acts as strong motive for committing offence in question.

22. We also considered the rival submissions so placed by the learned counsel for both the sides. We may scrutinize facts and circumstances of the case in the light of testimony on record.

23. Therefore, the moot point arises for adjudication of this appeal hinges on central point whether in the incident in question and participation of the appellants in the commission of the crime have not been reasonably proved and a doubt is created in favour of the appellants as claimed by them?

24. At the outset, we may take note of contents of the first information report. As per description contained in the first information report, we discover that first information was lodged at 3.40 P.M. on 27.9.2000 regarding the incident having taken place at 11.25 A.M. on the very same day. All the appellants were named in the first information report and first informant Veersain happens to be father of the injured witness Babbal and maternal uncle (Mama) of deceased Jitendra. On the motive part of the incident, it has been described in the first information report that brother of first informant Fakir Chandra was murdered by the accused side in the year 1996 and similar attempt was made on the life of first informant in the year 1999 and threat continued periodically from time to time from the accused side and in this background, instant incident was allegedly caused by the present appellants.

25. First information report leads us to facts that the incident took place on 27.9.2000 when the injured Babbal and the deceased Jitendra were returning home from the market at Pilkhua Kasba and as soon as they reached near Sharma Petrol Pump, it was around 11.25 A.M. with Yamaha Motor Cycle (on which both injured and deceased were riding), was hit from behind by white coloured Maruti Car, due to which, both motor cycle riders were thrown away and fell down on the ground. As soon as both the victims of vehicular collision were in the process of recovery and stood on the ground, the assailants Babbal @ Harendra, Chumman @ Narendra, Gambhir and Jai Singh, possessing country made pistol in their hands and one Kuldip possessing 'Farsa' in his hand alighted from White Coloured Maruti Car and at the exhortation of Gambhir, opened fire on

both the victims due to which both the victims fell on the ground, then Kuldeep assaulted Jitendra by 'Farsa'. The first informant and his companion raised alarm whereupon, the assailants opened fire also on these persons. Though the first informant somehow escaped unhurt and took shelter behind bushes. Due to indiscriminate firing on the spot, panic was created in and around, therefore, staff of Petrol Pump and persons working in nearby factory, fled away from the scene. Due to this, the assailants waiving their weapons and threatening, made their escape good from the place of occurrence. The incident was witnessed by the first informant and his companion Naresh. In the meanwhile, some police Jeep also arrived on the spot and took both the injured to Yashoda Hospital where the nephew of the first informant Jitendra succumbed to his injuries on way to hospital and his son Babbal was admitted in critical condition in the hospital. The dead body of first informant's nephew was sent to the Government Hospital at Ghaziabad while his son Babbal was under-treatment. This first information report was scribed by Saudan Singh son of Shyam Singh.

26. Now, we may switch over to testimony of the two prosecution witnesses namely P.W.1 Veer Sain and P.W. 2 injured eye witness Babbal Singh. Testimony of P.W. 1 first informant Veer Sain, gives very motive for committing the crime. His testimony discloses fact that his brother Fakir Chandra was murdered by Gambhir and his family members of his village in the year 1996 and in the year 1999, Rakesh and Narendra had attacked first informant with intention to kill him and they kept on threatening the first informant and his family. In this view of the matter, it is obvious that motive suggested for committing crime in shape of old enmity has been reasonably established. Though in presence of eye account testimony motive loses significance. However, establishment of fact of motive as the prime cause for committing offence strengthens case of the prosecution.

27. Further, it has come in the examination in chief of P.W. 1 that Jai Singh, Gambhir, Narendra and one another person have been convicted for committing murder of Fakir Chandra, brother of first informant and have been sentenced to life imprisonment. This aspect virtually proved the existence of old enmity between the first informant and the accused persons. The testimony regarding occurrence has come forth from two eye-witnesses P.W.1 Veersain and P.W.2 Babbal Singh wherein they have described about the occurrence to have taken place around 11.25 A.M. at short distance of Sharma Petrol Pump. The first informant saw Babbal and his nephew riding Yamaha motor cycle coming from Pilkhua side. Their motorcycle was being followed by white coloured Maruti Car. In the meanwhile, said Maruti Car collided with the motor cycle from behind causing falling down of both the motor cycle riders on the ground. As soon as both the riders of motorcycle somehow stood up or were in the process when the appellants Babbal @ Harendra, Chumman @ Narendra, Gambhir and Jai Singh who were possessing country made pistol in their hands, appeared on the spot and at the exhortation of Gambhir, they fired indiscriminately on both the motor cycle riders due to which both of them fell down on the ground. The first informant raised alarm whereupon, the appellants opened fire on him too with intention to kill him and also tried to lay hold on him.

28. However, the first informant along with other companion, took shelter behind bushes. Lot of panic was created and people working over their fled away from the scene and the accused

persons also secured their escape from the spot. In the meanwhile, some police vehicle (Gypsy) arrived on the spot and took both the injured to the hospital. Nephew Jitendra died on way to hospital while informant's son Babbal was admitted in Yashoda Nursing Home and thereafter, first informant got the first information written by Saudan Singh son of Shyam Singh and made his endorsement on the same and handed over the same at the concerned police station. It has come in his testimony that both injured Babbal and deceased Jitendra had gone to purchase tractor 'T' from Pilkhua market and in the meanwhile, first informant accompanied by one Naresh, had proceeded around 11.15 A.M. on 27.9.2000 for knowing price of bricks at some brick-kiln at Dhaulana. The incident as per testimony took place around 11.25 A.M.

29. Before we enter into meritorial aspect of above testimony, it would be relevant to take note of testimony of injured witness Babbal P.W. 2. His testimony carries force more than that of P.W. 1. P.W. 2 Babbal Singh has testified that on the fateful day, on- 27.9.2000, he left his home around 9.00 A.M. along with Jitendra cousin brother on motor cycle for purchasing tractor 'T' from Pilkhua market. They searched for tractor "T" but could not find the same and they were returning home. He was driving the motorcycle and Jitendra was pillion rider. It was around 11.30 A.M. when they reached near Sharma Petrol Pump on Delhi road, one white coloured Maruti Car hit his motor cycle from behind due to which they fell on the ground and as soon as they stood up Babbal @ Harendra, Chumman @ Narendra, Gambhir, Jai Singh and one Kuldip came out of Car and opened fire on both of them. Due to this, Babbal fell down on the ground and became unconscious. As per his testimony, he regained consciousness thereafter on 7.10.2000, then his statement was recorded by the Investigating Officer. PW-2 has been cross examined wherein he has stated that after falling on the ground pursuant to collision, and when he stood up, the assailants appeared in front of him and then assailants opened fire from a distance of 3-4 ft. He has been cross examined as to when he fell down then he stated that he fell down after receiving 2-3 gun shots. In his cross examination, it has emerged that one fire was also made at point blank range on his right ear. On this aspect contention has been raised by the defence that there is no such injury being caused on the right ear at point blank range. Had the said shot been fired at point blank range, the skull of the injured would have been damaged severely, but no such injury was caused to the injured, therefore, testimony of fire from point blank range becomes wholly unreliable.

30. This contention does not carry force in view of the fact that though the attempt was so made but it has not surfaced in the testimony of the injured witness that it did in fact hit directly on the skull or somewhere else. This witness also spelled number of Maruti Car which hit the Motor Cycle. It also emerged in cross examination that after he was hit by pellet, he fell down unconscious within one and half minute (of the incident). He claims that he was conscious when the police arrived on the spot.

31. In view of the above testimony, we may conveniently discuss injury report of Babbal (Ext. Ka.2) which reflects that as many as six injuries were caused on his person with following description:

1. Wound 1 cm x 1 cm ragged margins over junction of cervical and thoracic region at back surrounding skin-black, profuse bleeding and viscera deep.

2. Wound $\frac{1}{2}$ cm x $\frac{1}{2}$ cm ragged margins over mid part of chest below throat, bone deep. Bleeding.

3. Wound $1\frac{1}{2}$ cm x $1\frac{1}{2}$ cm over right temporal region. Post auricular. Blackening. Bleeding on almost half of right pinna cut very severally.

4. Wound over post aspect of right chest about 1 cm x 1 cm at level of 7-8 rib, inverted margins. Bleeding and Tattooing present.

5. Abrasions both shoulders.

6. Tattooing all over right chest, shoulder, upper arm and back.

32. Dr. Sushil Fottedar PW-3 has proved medical examination report as Ext. Ka. 2 and has stated that this medical examination report was signed by Dr. Arvind Sharma whose signature appeared on the medical report. In the opinion of doctor, the four injuries might have been caused by fire arm. Injury no. 6 may have been caused by fire arm and injury no. 5 may be caused by falling down on the ground. In the opinion of doctor these injuries could have been caused around 11.25 A.M. on 27.9.2000. and these injuries might have caused death. In his cross examination, this doctor has suggested that one bullet was found at the vulnerable point embedded in injury no.3, therefore the same was not extricated. Had it been extricated, it could have caused death of injured.

33. He has also stated that one pellet was also extricated after opening chest of the injured. He has suggested that there may be margin of six hours in the timing. On this margin count, the doctor witness has not been suggested specifically by the appellants that these injuries could not have been caused at the relevant point of time on 27.9.2000.

34. In this view of the matter, obviously, causing of such injuries on the person of Babbal has been proved and the presence of at least P.W. 2 Babbal is established on the spot. He has specifically named the assailants who caused injuries to him as well as his cousin brother Jitendra.

35. Here, we may go through the contents of the post mortem report Ext. Ka. 11. From perusal of ante mortem injuries, it trickles out that as many as 11 injuries were caused on the body of the deceased Jitendra. It was conducted around 2.00 P.M. on 28.9.2000. Out of 11 ante mortem injuries most of the injuries were stated to be gun shot wounds. These injuries are as follows:

1. Gunshot wound of entry 1 cm x 1 cm right side of head 4 cm above ear brain cavity deep-communicating to Injury No.2. Blackening present.

2. Gunshot wound of exit 7 cm 6 cm x brain cavity deep-communicating to Injury no.1 left parietal-temporal region-underneath parietal temporal bone fractured. Brain lacerated.

3. Incised wound 10 cm x 2.5 x brain cavity deep on occipital region transversely placed underneath occipital bone cut.

4. Incised wound 8 cm x 1 ½ cm x muscle deep left side of back, upper part, near spine.

5. Gunshot wound of entry 1 cm x 1cm on abdomen 7 cm above umbilicus at 12 O' clock communicating to Injury No.6 underneath of intestines are lacerated at places.

6. Gunshot wound of exit 4 cm x 2 cm x abdomen deep communicating to Injury No.5 on right side back at lumber region.

7. Gunshot wound of entry communicating to Injury No.8 at middle part of back, near spine on right side 1 cm x 1 cm chest cavity deep, tattooing present all around.

8. Gunshot wound of exit 2 cm x 2 cm abdominal cavity deep-communicating to Injury No.7.

9. Gunshot wound of entry 4 cm x 2 cm on left upper part of chest on mid clavicular region, cavity deep, tattooing present around in an area of 15 cm x 15 cm, a bullet, metallic recovered from chest cavity deep.

10. Gutter shaped wound 7 cm 1 cm on back of right forearm 7 cm below elbow joint, tattooing present on whole of back of forearm.

11. Lacerated wound 2 cm x 1 cm x bone deep on lower part of back right side near spine.

36. In the opinion of doctor cause of death was shock and haemorrhage as a result of aforesaid ante mortem injuries and these injuries were stated to have been caused one day prior (to post mortem report). In the opinion of doctor, death could have occurred around 12.00 noon on 27.9.2000. Except injury no. 1, 3 and 4, rest of the injuries could have been caused by fire arm. The doctor also proved extricated pellet from the chest of deceased as material Ext. 1.

37. One thing is obvious that injuries caused to both the deceased and injured (Jitendra and Babbal) were gun shot wounds and injuries were found on their body and person respectively. Certain injuries were diagnosed with blackening and tattooing, which fact by itself reflects that some shots might have been fired from at close range and that too under the circumstances subject to actual distance between the assailants and the victim vis-a-vis actual position of the weapons and the seat of injuries, its angle, and the ultimate position of its touch point. It cannot be said that the

assailants, deceased and the injured remained static and stagnant all through the incident. It cannot be said under facts and circumstances that gun shots would have and must not have caused such tattooing and blackening. As per testimony of injured witness Babbal, injuries were caused at a distance of 2-3 ft. It is common experience that if a person is being hit by firearm he will vary his position and so the assailants. During course of commotion, injuries could have been caused, as the case may be, on person or body depending on actual positioning of the weapon used and the length covered by out stretched hand and the weapon, thus causing injuries with blackening and tattooing, whereas it can be under such circumstances that there was no such symptom (blackening and tattooing) present in other injuries. In the opinion of doctor, these injuries could have been caused on 27.9.2000 at relevant point of time.

38. In such a factual scenario, injuries caused on the person of Babbal stands corroborated by the medical testimony of the doctor. P.W. 5 who has not even been suggested that these injuries could have been caused at different point of time in different manner; but nothing adverse has come out in the cross examination of doctor witness P.W. 5 Dr. J.R. Jiyani, therefore, the medical evidence is corroborated by the ocular testimony of the injured.

39. On the point of presence of the injured on the spot, it is obvious that there is no suggestion from defence regarding whereabouts of injured Babbal at relevant point of time when he could have sustained these injuries on his person. Similarly P.W. 1 has also corroborated version of P.W. 2 and in that perspective, presence of (P.W. 1) on the spot also appears to be natural. Contention raised by the appellants to the extent that another eye witness Naresh was not examined will not by itself falsify otherwise cogent, consistent and corroborative testimony of the above two witnesses of fact. Further contention regarding non-examination of the scribe does not carry force, for the reason that the first informant was strenuously cross-examined by the defence and the defence could have at least suggested some facts which may render timing of first information report being ante time, but from his testimony (P.W.1) nothing inconsistent has come to surface, therefore, non examination of Naresh and scribe Saudan Singh would not erode the prosecution case.

40. Now, we may take note of testimony of D.W. 1 whose testimony is said to be reflecting on several aspects of the case and particularly, first information report being ante timed. Core argument advanced relates to the fact that on 27.09.2000 till 4.05 P.M., register meant for indicating number of first information report lodged did not bear description of present first information report though lodged at 3.40 P.M. on 27.9.2000. Merely because the relevant register did not contain such description will not by itself render the first information report ante timed, for the reason that lot of other activities also take place at the concerned police station after first information report is lodged and particularly a report relating to such ghastly crime will necessary take time for other follow up action. It may reasonably take half an hour or so much time to communicate about such report to the police control room. We in India know how the police authorities discharge such type of duties. Thus non description of number of FIR at 4.05 P.M. on 27.9.2000 in the register meant for it will not render the FIR ante-timed.

41. Bare perusal of the first information report entails every relevant detail and factum of death of Jitendra, which by itself indicates that the first information report cannot be treated to be an after thought or outcome of deliberation, because as per testimony of doctor witness, the death of Jitendra might have occurred around 12 noon on 27.9.2000 and this specific piece of testimony virtually went unchallenged by the defence.

42. Further, what compulsion was working on the first informant that instead of naming the real culprits, he would conceal their identity and would press for participation of such innocent persons like the present appellants- who have nothing to do with the offence. The defence even could not suggest specifically any natural fact to the first informant, therefore, claim of false implication, under the circumstances stands ruled out. Besides ocular testimony on the point of incident we have before us testimony of D.W. 1 Banwari Lal who has given information regarding the incident to the city control room around 11.30 A.M. and the same was taken down in the relevant register by one Lala Singh. Here, it is obvious that this is an exclusive act of the police and it was incumbent on the police to have taken cognizance of such information and could have proceeded further in its own way, but to all intents and purposes, the police refrained from taking any action, for which prosecution is not to be blamed. It is further reflected from the testimony of D.W. 1 that Maruti Car was said to have been traced out near the Garg Engineering College around 12.22 hours on 27.9.2000. This was also informed that two persons alighted from the Maruti Car. This fact itself cannot be directly related and confined to the overall number of assailants and the actual car used in the occurrence.

43. As per testimony of the Investigating Officer P.W. 6 Pyare Lal Yadav, Sub Inspector, at page 43 of the paper book, it has been specifically stated that on 9.2.2001, information was sought regarding the car used in the commission of crime and search was made on 10.2.2001. On 11.1.2001, it so transpired that this car was stolen car. There is no such confirmation by the Investigating Officer that Maruti Car used in the crime was exactly the same as pointed out by D.W. 1 in his testimony at page 71 of the paper book. Therefore, contention raised to the extent that in case testimony of D.W. 1 is believed then the first information report becomes ante dated and ante-time stands negated under the facts and circumstances of the case.

44. In this context, we may also note of testimony of P.W. 4 K. L. Suman who has proved the lodging of the first information report at 15.40 hours at crime no. 373 of 2000 under sections referred to above, bearing first information report no. 230 of 2000. This first information report is Ext. Ka. 3 and similarly registration of the case at relevant G.D., Rapat No. 24 on 27.9.2000 at the same crime number is Ext. Ka. 4 on record. He has denied suggestion that the first information report was lodged after the inquest report of deceased Jitendra was prepared.

45. Perusal of the inquest report Ext. Ka. 10 which is proved by the P.W. 6 the investigating Office, reflects that preparation of inquest report commenced at 5.30 P.M. on 27.9.2000 and was completed at 6.30 P.M. First page of this inquest report contains details of case crime number with sections of IPC and name of the police station and these descriptions are in the same ink and same hand writing. Under circumstances, it is hard to believe that first information

report came into existence only after the inquest report had been prepared. Not only this, other relevant papers Photo Nash Ext. Ka. 14 specimen seal Ext. Ka. 12, letter to C.M.O. Ghaziabad is Ext. Ka. 13 also bear case crime number and the ink used is the same, therefore, authenticity of these papers is self explained and cannot be doubted as such. In so far as contradictions appearing in the testimony of prosecution witnesses of fact P.W. 1 and 2 is concerned, there is no such material contradiction which may render the prosecution story doubtful. On the contrary, both the eye witnesses of the occurrence particularly injured eye witness Babbal is most consistent, clinching and his testimony is inspiring confidence and the same is in conformity to medical testimony on record. This way medical testimony becomes worthy of credit- leaving no room for doubt regarding the occurrence.

46. We may further note that Investigating Officer also prepared memo of blood stained and simple soil and the recovery of empty cartridges, missed cartridges, slipper, shoes etc. which also confirms place of occurrence and this memo has been ably proved by the Investigating Officer Ext. Ka. 7, therefore, there is no doubt about the place of occurrence. Thus, we have no doubt in recording verdict in favour of the prosecution and we cannot doubt the very occurrence. Whatever inconsistency are there in the ocular testimony of prosecution witnesses, the same are trivial and minor in nature and they do not hit at the root of the prosecution case. The testimony of D.W. 1 in the presence of innocuous testimony of prosecution witnesses of fact P.W. 1 and 2 is rendered insignificant vis-a-vis, circumstances of this case. The learned trial court took genuine view of facts and circumstances and evidence on record, and recorded just finding of conviction based on material on record and awarded just sentence.

47. Therefore, judgement and order of conviction and sentence dated 17.6.2005, passed by the Additional Sessions Judge, Court No. 5, Ghaziabad, in S.T. No. 247 of 2001- State Vs. Babbal @ Harendra and others, arising out of case crime no. 373 of 2000, under sections 147, 148, 149, 504, 506, 307, 302/34 120-B, I.P.C. and section 7 of Criminal Law Amendment Act, Police Station Pilkhua district Ghaziabad, is hereby upheld by us. This appeal lacks merit and is accordingly dismissed.

48. In this case, appellants are languishing in jail, they shall serve out the remaining sentences imposed on them by the trial court.

49. Let a copy of this order be certified to the court concerned for information and necessary follow up action.

(2016) 8 ILRA 549
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.08.2016

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Appeal No.- 5176 Of 2012

Ram Awadh Pandey & Ors. ...Appellants
State Of U.P Versus
...Respondent

Counsel for Appellants:

Brijesh Sahai, Amit Kumar Singh, Gaurav Kakkar

Counsel for Respondent:

Govt. Advocate, R.L. Shukla, S.K. Yadav, Sanjay Yadav

Legislation referred to Indian Penal Code, 1860 — Ss. 302, 302/34, 504; Arms Act, 1959 — S. 25(1B)(b); Code of Criminal Procedure, 1973 — S. 313

FACTS:

On 15.02.2009 at about 12.00 noon, at the Government Slaughter House, Police Station Kotwali Nagar, District Aligarh, the appellant Raeesh arrived armed with a knife, accompanied by his brother Haji Munna (appellant) and father Haji Rasheed (co-accused, since deceased). They entered the slaughter house and demanded delivery of slaughtered goods already purchased by the first informant's side. On being refused, Haji Rasheed and Haji Munna caught hold of the deceased Irshad (brother of the first informant), and Raeesh inflicted a knife blow on his chest with intent to kill him. Irshad was taken to Malkhan Singh Government Hospital, Aligarh, where he was declared dead. Raeesh was apprehended on the spot along with the knife. A first information report was lodged by the first informant Bahar Ahmad @ Chhotey (P.W. 1) at 1.00 P.M. on the same day. After investigation, charge-sheets were filed against the appellants.

The Sessions Court, Aligarh, by judgment and order dated 14.12.2010, convicted appellant Raesh under Section 302 I.P.C. and Section 25(1B)(b) of the Arms Act and convicted appellant Haji Munna under Section 302/34 I.P.C. and sentenced both to life imprisonment. Both the appellants challenged their conviction before this Court.

ISSUES:

- (i) Whether the prosecution witnesses, being close relatives of the deceased, are to be treated as interested witnesses and their testimony discarded on that ground alone.
- (ii) Whether the first information report was ante-timed.
- (iii) Whether non-collection of blood-stained earth from the spot and non-examination of fingerprints on the recovered knife vitiated the prosecution case.
- (iv) Whether the testimony of eye-witnesses P.W. 1 and P.W. 2 was reliable, consistent, and sufficient to sustain conviction.
- (v) Whether common intention under Section 34 I.P.C. was established against appellant Haji Munna.

HELD:

(i) Testimony of relative/interested witnesses — Mere relationship of witnesses with the deceased is not by itself a ground to discard their testimony. In many cases, only relatives are available to depose, particularly having regard to the prevailing trends in our society where persons other than relations are not ready to depose before the court. Such testimony, however, must be subjected to scrupulous and careful scrutiny and if, on such scrutiny, it inspires confidence, it cannot be rejected.

Relied on: Birender Poddar v. State of Bihar, 2011 Cri. L.J. 3120 (S.C.)

(ii) Prompt lodging of the FIR — The place of occurrence was the Government Slaughter House, situated at a distance of 2 kilometres from the police station. The occurrence took place at about 12.00 noon. The first information report was lodged at 1.00 P.M. on the same day. This constitutes a prompt report. The timeline stated in the FIR stands corroborated by: the inquest report commencing at 2.30 P.M. and concluding at 4.30 P.M.; despatch of the dead body for post-mortem after 4.30 P.M.; and its receipt at the mortuary at 5.20 P.M. The contention that the FIR was ante-timed is, therefore, unsustainable.

(iii) Non-collection of blood from spot — The occurrence took place in a government slaughter house where blood of slaughtered animals had spread all over the premises. It was, therefore, virtually impossible to segregate and collect blood attributable exclusively to the deceased. Non-collection of blood-stained earth under such peculiar facts creates no doubt about the place of occurrence. Footwear left behind at the scene by reason of the stampede that followed were, in fact, seized under a recovery memo by the Investigating Officer.

(iv) Reliability of ocular testimony — The two eye-witnesses, P.W. 1 (first informant and brother of deceased) and P.W. 2 (uncle of deceased), were naturally present at the slaughter house supervising slaughtering work. Their presence at the spot is wholly consistent with the nature of their work and the time of day. Their testimonies are consistent inter se and corroborate the contents of the first information report in all material particulars. The specific description that, after the knife blow, the deceased did not fall immediately but was caught by the witnesses while in the act of falling, is a detail that only persons actually present on the spot could furnish. Cross-examination did not elicit any material contradiction. The defence's own suggestion that the appellant Raeesh was caught by the first informant after a short chase amounts to an implicit admission of the witnesses' presence at the spot.

Medical evidence of Dr. S.K. Sharma (P.W. 3) corroborates the mode of assault — a single ante-mortem stab wound, 4 cm × 2 cm × chest cavity deep, on the front of the chest on the left side — sufficient in the ordinary course of nature to cause death. The doctor opined that death could have occurred between 12.00 noon and 12.15 P.M., which is consistent with the prosecution case and was not challenged in cross-examination.

(v) Common intention under Section 34 I.P.C. — The conjoint act of Haji Rasheed and appellant Haji Munna in catching hold of both hands of the deceased Irshad — thereby immobilising him — while the appellant Raeesh inflicted the knife blow establishes that all the accused persons were acting in furtherance of a common intention to commit the offence. The manner and participation of the accused persons in the incident leads to an inescapable inference of shared common intention.

RESULT:

Both the appeals lack merit and are accordingly dismissed. The judgment and order of conviction dated 14.12.2010 passed by the Sessions Judge, Aligarh, in Sessions Trial No. 395 of 2009 (under Sections 302 and 302/34 I.P.C.) and Sessions Trial No. 396 of 2009 (under Section 25(1B)(b) of the Arms Act) is upheld and confirmed. The bail of appellant Haji Munna stands cancelled and his sureties are discharged. He is directed to be taken into custody forthwith to serve out the remaining period of the sentence imposed upon him by the trial court.

Cases Referred:

Birender Poddar v. State of Bihar, 2011 Cri. L.J. 3120 (S.C.)

(Delivered by Hon'ble Bala Kirshna Narayana, J.)

1. Heard Sri Brijesh Sahai, learned counsel for the appellants, Sri Sagir Ahmad, learned A. G. A. assisted by Mrs. Manju Thakur Brief Hlder appearing for the State of U. P. and Sri Rajiv Lochan Shukla, learned counsel appearing on behalf of complainant.

2. This criminal appeal has been filed by A1 Ram Awadh Pandey, A2 Ravindra Pandey, A3 Awadh Narain alias Sawadh Narain Pandey, A4 Ram Darash Pandey and A5 Roshan Pandey against the judgement and order dated 5.12.2012 passed by the Additional Sessions Judge, (Temporary Ex-cadre Post) Court No. 2, Azamgarh in Sessions Trial No. 437 of 2009; State Versus Ram Awadh pandey and others arising out of Case Crime No. 285 of 2009 under Sections-147, 302/148, 323/149, 325/149 I. P. C. and Section-7 of Criminal Law Amendment Act, P. S.-Jahanaganj, district-Azamgarh convicting the appellants and sentencing them to six months' R. I. Under Section-147 I. P. C., life imprisonment and fine of Rs. 3000/- each and in default of payment of fine, one year's additional R. I., under Sections-302/149 I. P. C. one year's R. I., under Sections-323/149 I. P. C. one and half years' R. I. and fine of Rs. 1000/- each and in default of payment of fine six months' additional R. I. under Sections-325/149. The Additional Sessions Judge, (Temporary Ex-cadre Post) Court No. 2, Azamgarh had directed that all the sentences shall run concurrently.

3. Briefly stated, the prosecution case is that while Sri Subba Yadav, son of late Mangal Yadav, Gram Pradhan of Punarji Gram Sabha was supervising the work of digging soil on 5.5.2009 at about 8.00 p. m. on the chak road in the southern corner of the village, A1 Ram Awadh Pandey, A2 Ravindra Pandey, A3 Awadh Narain aliaas Sawah Narain Pandey, A4 Ram Darash Pandey, A5 Roshan Pandey and one Shiv Poojan Pandey armed with lathis and dandas reached the chak road, where the work of digging and laying soil was in progress and ordered to stop the work of digging and laying soil forthwith as the land from which the soil was being dug, was part of their chak, to which Subba Yadav agreed and said that the work will be resumed only after demarcation is done on the spot and started walking towards his house. At that point, the aforesaid persons suddenly surrounded the Pradhan and started beating him and when the complainant Arvind Kumar Singh and his cousin brother Pradeep Yadav, S/o Ram Nath Yadav tried to intercede, the accused beat them also inflicting severe injuries on them. As a result of beating given by the appellants to Pradhan Subba Yadav, he died on the spot. On the complainant's and his brother's making noise and raising cries for help, large number of villagers gathered at the place of occurrence whereafter the appellants ran away from the place of incident. On the basis of the written report of the aforesaid occurrence (Ext. Ka 1) lodged by the complainant Raj Kumar Yadav, P. W. 1, S/o Ram Janan Yadav on 5.5.2009 at about 9.20 a. M. at P. S.-Jahanaganj, district-Azamgarh, Case Crime No. 285 of 2009 under Sections- 147. 302 and 323 I. P. C. was registered against all the accused / appellants and one Shiv Poojan Pandey, who died during investigation. The check F. I. R. and the G. D. entry, carbon copy whereof has been brought on record as Ext. Ka 7 were prepared by P. W. 9 Constable Arvind Kumar Singh. After registration of Case Crime No. 285 of 2009, under Sections-147, 302/148, 323/149, 325/149 I. P. C. and Section-7 of Criminal Law Amendment Act at P. S.-Jahanaganj, district-Azamgarh, the investigation thereof was entrusted to P. W. 10 Sri

Atma Ram Yadav, the then S. H. O., P. S.-Jahana Ganj, district-Azamgarh, who after copying the check F. I. R. and the G. D. entry in the Case Diary recorded the statement of P. W. 1 Raj Kumar Yadav and reached the place of occurrence and after inspecting the same, prepared the site plan (Ext. Ka 9 and 10) and conducted the inquest of the dead body of the deceased, prepared the inquest report (Ext. Ka 11) and the other documents and after completing the necessary paper work, got the dead body of the deceased sealed and dispatched to the District Hospital, Azamgarh for post mortem. The post mortem of the dead body of the deceased was performed by Dr. A. K. Misra, P. W. 5 who prepared the post mortem report (Ext. Ka 3). P. W. 10. After completion of investigation charge-sheet was submitted by the investigating officer against all the accused under Sections-302, 147, 323 and 325 I. P. C. and Section-7 of Criminal Law Amendment Act before the concerned magistrate.

4. Since the offences enumerated in the charge-sheet were triable by the Court of Sessions, the magistrate concerned after summoning the accused and complying with the requirement of Section- 207 Cr. P. C. committed the case for trial of the accused to the Court of Sessions and after committal of the case to the Court of Sessions, the case was transferred to the Court of Additional Sessions Judge, Court No. 2, Azamgarh. Charges were framed against all the accused under Sections-147, 302/149, 323/149 and 325/149 I. P. C. and Section-7 of Criminal Law Amendment Act. All the accused denied the charges framed against them and claimed trial. It may be noted that the co-accused Shiv Poojan Yadav had died in the District Jail, Azamgarh during investigation.

5. The prosecution in order to prove its charges against the accused examined P. W. 1, complainant Raj Kumar Yadav, P. W. 2 Pradeep Yadav, P. W. 3 Smt. Prabhawati, P. W. 4 Dr. K. N. Pandey, P. W. 5 Dr. A. K. Misra, P. W. 6 Dr. Gayasuddin Khan, P. W. 7 Dr. R. K. Mahato, P. W. 8 Om Prakash Srivastava, P. W. 9 Arvind Kumar Singh, P. W. 10 S. I. Atma Ram Yadav. The documentary evidence adduced by the prosecution has been referred to and dealt with by the learned trial judge in the impugned judgement and order and the same need not be reproduced again. The accused-appellants in their statements recorded under Section 313 Cr. P. C. disputed the manner in which the occurrence had been narrated in the F. I. R. and stated that the F. I. R. has been lodged after due deliberation and consultation containing absolutely false and incorrect facts and the same was a result of undue pressure. They denied that they were responsible for the incident and wrong charge-sheet had been submitted due to enmity and pressure. They also stated that the witnesses had given false evidence against them under the influence of partisan witnesses.

6. The defence examined D. W. 1 Dr. Kumod Kumar Jha and Dr. Anoop Kumar Singh and also brought on record injury report (Ext. Ka 1) and post mortm report (Ext. Ka 2) of deceased Shiv Poojan Yadav, injury report of Roshan Kumar Pandey (Ext. Ka 3), injury report of Ram Awadh Pandey (Ext. Ka 4) and apart from the aforesaid, the defence also filed certified copy of the check F. I. R. of Case Crime No. 885 of 2010 vide list 106 Kha to 107 kha and order dated 2.7.2010 paper No. 108 Kha and application dated 28.7.2010 paper no. 110 Kha filed by Ram Awadh Pandey.

7. After considering the submissions made by leaned counsel for the parties before him and scrutinising the oral as well as documentary evidence on record adduced by both the parties, the

Additional Sessions Judge, (Temporary Ex-cadre Post) Court No. 2, Azamgarh by the impugned judgement and order convicted the appellants and awarded the aforesaid sentences to them.

8. Sri Brijesh Sahai, learned counsel for the appellants submitted that the prosecution having suppressed the real genesis of the incident and approached the Court with unclean hands having totally failed to explain the injuries received by A 1 Ram Awadh Pandey, A 5 Roshan Pandey and co-accused Shiv Poojan Pandey who on account of the injuries so sustained by him, had died in jail after about one month of the incident, as is evident from his post mortem report (Ext. Ka 2), it cannot be said that the appellants were the aggressors and hence their conviction under the different sections of the Indian Penal Code recorded by the trial judge, cannot be maintained. He next submitted that even for the sake of arguments, the prosecution case as spelt out in the F. I. R. and as testified by the prosecution witnesses is taken to be gospel truth, the offence if any, committed by the appellants, does not travel beyond Section 304 Para II I. P. C. He also submitted that the post mortem report of the deceased shows six injuries, of which five injuries have not caused any internal damage to the deceased. The only injury which can be termed as fatal, is the injury no. 6 and considering the number and nature of the injuries found on the dead body of the deceased and number of the accused, it cannot be said that the deceased was assaulted by the assailants with the intent of causing his death and the incident was either pre-planned or pre-meditated. The same was a result of sudden provocation as both the sides suffered mortalities and injuries, the appellants cannot be held to be aggressors. He next submitted that from the site plan and the evidence of the witnesses examined on behalf of the prosecution itself, it is proved beyond any reasonable doubt that at the behest of the deceased soil was being dug out from the chak of the appellants without their permission and the work of digging soil and levelling chak road was admittedly being got done by the deceased Pradhan as a private work and not as the work of Gram Sabha and at the time of incident, large number of persons including labourers employed by the deceased for digging the soil were present at the place of incident and when the appellants objected and exercised their right of private defence in relation to their property, altercations and scuffles followed between both the parties which ultimately led to the unfortunate incident. He further submitted that the presence of P. W. 1 and P. W. 2 at the place of incident is highly doubtful and no reliance can be placed on their evidence and as far as P. W. 3 Smt. Prabhawati is concerned, no credence can be attached to her evidence, as she has neither been nominated as an eye witness in the F. I. R. nor in chargesheet. She is also an interested and partisan witness, as she was employed by the deceased as labourer for the execution of the work of digging soil. He lastly submitted that the impugned judgement and order cannot be sustained and is liable to be set aside.

9. Sri Rajiv Lochan Shukla, learned counsel for the complainant refuting the submissions made by Sri Brijesh Sahai submitted that even if it is assumed for the sake of arguments that the accused had exercised their right of private defence in respect of their property, it is clear from the facts and circumstances of this case that they had clearly exceeded their right of private defence. Neither there is any evidence showing that the accused who had allegedly received injuries in the incident were sent for examination of their injuries by the police nor there is any link evidence showing that the accused Shiv Poojan Yadav died as a result of the injuries allegedly received by him in the incident. Moreover, the photostat copies of the injury reports of appellant nos. A1, A5

and deceased Shiv Poojan Pandey and his post mortem report, apart from being fabricated, are wholly inadmissible in evidence in view of non-compliance of Section 65 of Indian Evidence Act. He next submitted that even if it is assumed for the sake of argument, though without admitting that A 1 and A 5 had actually received any injury in the occurrence, the same according to their injury reports and the opinion of the doctor who had examined them, were found to be superficial in nature and the same would not confer any benefit on the accused and the same were rightly discarded by the trial court. He also submitted that there is absolutely no iota of evidence on record, even remotely indicating that either soil was being dug out from the chak of the appellants or there was any provocation from the side of the prosecution or anyone present on the spot from the side of the prosecution was armed with any deadly weapon and hence the theory that the incident was neither pre-planned nor pre-meditated but was a result of sudden provocation, has no legs to stand and submission made by learned counsel for the appellants that the prosecution has suppressed the genesis of the dispute, is per se baseless and the impugned judgement and order, which are based upon cogent evidence and supported by relevant considerations, do not warrant any interference by this Court and this appeal which is devoid of any merit, is liable to be dismissed.

10. Sri Sagir Ahmad, learned A. G. A. assisted by Mrs. Manju Thakur, Brief Holder appearing for the State of U. P. have adopted the submissions made by Sri Rajiv Lochan Shukla, learned counsel appearing on behalf of complainant.

11. We have very carefully considered the submissions made by learned counsel for the appellants and scanned the entire lower court record as well as the law reports cited by learned counsel for the parties before us in support of their respective submissions.

12. The three questions involved for our considerations in the instant criminal appeal interalia are

(1) whether the prosecution has been able to prove its case beyond reasonable doubt;

(2) whether the prosecution has not come with clean hands and has suppressed the true genesis of the incident; and

(3) Whether if it is held that the prosecution had suppressed the true facts, the conviction of the appellants under the offences mentioned in the impugned judgement and order and the sentence awarded to them can be maintained.

13. We now proceed to examine the aforesaid issues in the light of the evidence adduced by the parties in support of their respective cases.

14. Raj Kumar Yadav who is the grand son of the deceased and the complainant in the present case was examined as P. W. 1 during trial and he testified that while the work of levelling the chak road situated in the south of the village was in progress on 5.5.2009 at about 8.00 A. M.

under the supervision of his grand father Subba Yadav, who at the relevant point of time, was the Pradhan of the village, the appellants Ram Awadh Pandey, Ravindra Pandey, Awadh Narain alias Sawadh Narain Pandey, Ram Darash Pandey, Roshan Pandey and Shiv Poojan Pandey arrived at the place of incident armed with lathi and danda and asked his grand father Subba Yadav to stop the work on the chak road forthwith, to which deceased Subba Yadav immediately agreed and announced that the work on the chak road would resume only after demarcation is done. P. W. 1 Raj Kumar further testified that he had accompanied his grand father to the place of occurrence and was present there at the time of the incident. As soon as Subba Yadav after announcing that the work on chak road would be resumed after demarcation, started going back to his house with P. W. 1, the aforesaid accused surrounded the complainant's grand father and started beating him and when the P. W. 1 and his cousin brother Padeep Kumar tried to save their grand father, the accused beat P. W. 1 Raj Kumar Yadav and P. W. 2 Pradeep Kumar inflicted severe injuries on them also. As a result of the beating given by the accused, his grand father Subba Yadav died and on their raising hues and cries, Smt. Prabhawati, Harishankar and other villagers also arrived at the place of incident and saw the accused running away from the crime scene. Leaving the dead body of his grand father in the custody of the villagers and after getting the written report of the incident scribed by one Hari Krishan Chaubey, as he himself was seriously injured, he went to the police station for lodging the written report (Ext. Ka 1) of the incident at P. S.-Jahanaganj.

15. P. W. 1 Raj Kumar Yadav proved the written report (Ext. Ka 1).

16. P. W. 2, Pradeep Kumar Yadav in his evidence recorded during trial stated that the deceased Subba Yadav was his grand fathers brother and Pradhan of Punarji Gram Sabha. On 5.5.2009 at about 8.00 A. M. the work of digging soil by 30-32 persons on the chak road was going on under the supervision of the deceased when the accused armed with lathis and dandas reached the place of incident and ordered to stop the work as the land on which the work was being done, was part of their chak, to which deceased Subba Yadav agreed and after ordering stoppage of work, announced that the work would be resumed only after measurements were done on the spot and turned around to go home. In the meantime the accused surrounded him and assaulted him with lathis and dandas exhorting to each other not to let him escape alive. On hearing the hue and cries P. W. 2 and others rushed to the place of incident and tried to intercede but the accused beat him and his brother Raj Kumar Yadav also with lathis and dandas. P. W. 2 further stated that he had received injury on his head on account of being struck three or four times on his head by the accused with their lathis and the accused had also caused injury to P. W. 1 Raj Kumar Yadav. At the time of the occurrence about 30-32 labourers including Smt. Prabhawati, Ram Briksh Ram, Lalji Ram, Rampati Ram, Kalloo Yadav, Shobhnath Yadav and others were present at the place of occurrence. Due to the incident, stampede was caused. His grand father Subba Yadav had died on the spot. The injuries of P. W. 1 Raj Kumar and P. W. 2 Pradeep Kumar Yadav were examined in District Hospital, Azamgarh. X-ray of the injuries received by Raj Kumar was conducted by Dr. K. N. Pandey.

17. P. W. 3 Smt. Prabhawati in her examination-in-chief stated that the incident had taken place on 5.5.2009 at about 8.00 A. M. The work of digging the soil and levelling the chak road with

it was in progress for the last 2 or 4 days before the incident under the supervision of Pradhan Subba Yadav. About 35 labourers were employed for executing the work. While the work of digging and laying the soil was in progress, accused armed with lathis and dandas reached the place of incident and asked to stop the work of digging soil from their field although at that time, the soil was being dug from the field of Tribhuwan. Upon the intervention of the accused, Pradhan Subba Yadav immediately got the work of digging soil stopped and declared that the remaining work would be completed after demarcation and thereafter he turned back and started to leave whereupon the accused surrounded him and assaulted him with lathi and danda. She further stated that P. W. 1 Raj Kumar Yadav was nearby while P. W. 2 Pradeep Kumar Yadav who had gone to ease himself near Pokhra, also arrived at the place of incident and both P. W. 1 Raj Kumar Yadav and P. W. 2 Pradeep Kumar Yadav were also beaten by the accused. Subba Yadav died on the spot whereafter almost everyone had run away from the place of incident.

18. P. W. 4 Dr. K. N. Pandey who had conducted X-ray of the injuries of P. W. 1 Raj Kumar Yadav on 7.5.2009 proved the X-ray report (Ext. Ka 2) as well as X-ray plates as material Ext. Ka 1 to Ext. Ka 4. He testified that small finger of the right hand of P. W. 1 was fractured. P. W. 5 Dr. A. K. Mishra who conducted the post mortem of the dead body of the deceased Subba Yadav found the following injuries on his dead body: Post mortem report to be quoted

- (I) lacerated wound 2 cm. X 1 cm. muscle deep just above left ear;
- (ii) abraded contusion 2 cm. X 6 cm. extending from just above right forehead;
- (iii) linear abrasion 10 cm. Above the left nipple;
- (iv) contusion 32 cm X 2 cm below the left shoulder joint on the back;
- (v) contusion of 22 cm x 2 cm, 4 cm above from right ilius crust on back
- (vi) contusion of 10 cm x 2 cm above right side of chest 2 cm above right nipple.

19. He further found that the gall bladder of the deceased was lacerated while left chamber of his heart was empty and the second chamber contained blood. About two litres of blood was present in the stomach.

20. He proved the post mortem report of the deceased Subba Yadav as Ext. Ka 6 on 5.5.2009 and further testified that duration of the death was about 1 / 2 a day and the deceased had died due to excessive bleeding as a result of ante mortem injuries. He further opined that the ante mortem injuries found on the dead body of the deceased, could have been caused by lathis and dandas.

21. P. W. 6 Dr. Gayasuddin Khan who had examined injured P. W. Raj Kumar Yadav on 5.5.2009 proved his injury report Ext. Ka 4. The injury report of P. W. 1 Raj Kumar Yadav indicates following injuries:

1. कुचला हुआ घाव बायें अनामिका के ऊपरी भाग में 2 सी०एम० X 1 सी०एम० जो भारी भोथरा वस्तु द्वारा पहुँचाया गया था ताजा घाव था। एक्स-रे बायें हथेली का कराने का सलाह दिया था।।

2 फटा हुआ घाव सिर के ठीक ऊपर 3 सी०एम० X 1 सी०एम० मांस तक महारा भोथरा एवं भारी वस्तु द्वारा पहुँचाया गया। ताजा घाव चोट ताजी थी। खोपड़ी के एक्स-रे की सलाह दिया गया।

3. छिला हुआ घाव दांयी ओर चेहरे की उभार पर 3 सी०एम० लम्बा कड़ा खुरदुरा वस्तु द्वारा पहुँचाया हुआ ताजा घाव था।

4. खुला घाव चेहरे के दांयी ओर जबड़े के मोड़ पर 2 सी०एम० X 1 सी०एम० भारी कड़े वस्तु द्वारा एक्स-रे चेहरे की सलाह दी गयी।

5. फूला हुआ घाव जांघ पर दांयी ओर 3 X 1 सी०एम० कड़ा भारी वस्तु द्वारा पहुँचाया गया प्रतीत होता था। जांघ के एक्स-रे की सलाह दी गयी।

6. फूला हुआ घाव बाये पैर पर बीच में 3 सी०एम० X 1 सी०एम० कड़े भारी वस्तु से उत्पन्न प्रतीत होता था।

चोट नं० 6 साधारण प्रकृति की है। शेष चोटें चोटों की प्रकृति की राय एक्स-रे रिपोर्ट प्राप्त होने के उपरान्त देना सम्भव है। चोटहिल राजकुमार के पहचान चिन्ह और उसके नि०अ० मेरे द्वारा अंकित और प्रमाणित है। असल इजरी रिपोर्ट पत्रावली में संलग्न कागज सं० 6क/2 मेरे समक्ष मेरे लेख व हस्ताक्षर में है जिसकी तस्दीक करता हूँ जिस पर प्रदर्शक-4 डाला गया।

उपरोक्त चोटें लाठी डंडे से पहुँचायी गयी प्रतीत होती है। चोट नं० 1 गम्भीर प्रकृति की थी जो दाहिने अनामिका अंगुली में अस्थिया के रूप में है।

22. He opined that injury no. 6 was simple in nature and advised X-ray of his other injuries which was not done.

23. P. W. 7 Dr. R. K. Mahto who had examined the injuries of P. W. 2 Pradeep Kumar Yadav, proved his injury report Ext. Ka 5. He noted following injuries on the person of Pradeep Kumar Yadav:

1. lacerated wound of 2 c. m X 0.5 c. m. on the right side of the skull 8.00 c.m. above the right ear although he had advised X-ray of the aforesaid injury. There is no X-ray report of the injuries of P. W. 2, Pradeep Kumar Yadav on record.

24. S. I. Om Prakash Srivastava who was posted as S. H. O., P. S.-Jahanaganj on 2/3.6.2009 and to whom investigation of the case was transferred from S. I. Atma Ram, was examined as P. W. 8. He after completion of the investigation submitted charge-sheet against all the accused under Sections-302, 323 and 325 I. P. C. and Section-7 of Criminal Law Amendment Act and proved the same as Ext. Ka 6.

25. P. W. 9 Arvind Kumar Singh proved the check report and the G. D. entry as Ext. Ka 7 and Ext. Ka 8 respectively.

26. P. W. 10 S. I. Atmaram Yadav who had investigated the case initially testified that he had performed the inquest of the dead body of the deceased and the inquest report was prepared by S. I. Uma Shankar Yadav on the spot on his dictation and after completing necessary paper work he had got the cadaver of the deceased sealed and dispatched for the post mortem. He proved the inquest report as Ex Ka 9 and the site plan of the place of incident as Ext. Ka 10 which was prepared by him after inspecting the spot. He in is evidence further gave details of various steps taken by him during investigation including the arrest of the accused and the recovery of the crime weapons on the pointing out of the accused. P. W. 10 S. I. Atma Ram Yadav in his cross examination admitted that he had not recorded the statements of labourers present on the spot and that soil from an area 2-1/2-3 fit wide was dug out from the accused's chak on which wheat crop was standing. Thus, the witnesses of facts examined on behalf of the prosecution, proved the prosecution case as spelt out in the F. I. R., which stands further corroborated from the testimonies of P. W. 4 Dr. K. N. Pandey, P. W. 6 Dr. Gayasuddin Khan and P. W. 7 Dr. R. K. Mahto who had conducted X-ray of the injuries of P. W. 1 Raj Kumar Yadav and P. W. 2 Pradeep Kumar Yadav who had prepared their injury reports and Dr. A. K. Mishra P. W. 5 who had performed the post mortem of the dead body of the deceased except the evidence of P. W. 9 and P. W. 10 which partly corroborates the defence version also. The appellants' counsel has failed to convince us that the P. W. 1 Raj Kumar Yadav and P. W. 2 Pradeep Yadav were not present at the time of incident at the place of occurrence, as admittedly both of them had received injuries in the incident. The presence of P. W. 3 at the crime scene at the time of occurrence appears to be doubtful but exclusion of her evidence from consideration will not affect the present case in any manner.

27. The question which arises for our consideration, is whether the plea of self defence and the incident being a result of sudden provocation are available to the appellants under the facts and circumstances of the case and in view of the evidence on record.

28. Before proceeding to examine the aforesaid issues in the light of the evidence on record, we consider it proper to refer to the provisions of Indian Penal Code which confer right of private defence to an accused and the law on the issue.

29. For the convenience the relevant provisions of Indian Penal Code which provide right of private defence to an accused are being reproduced hereinbelow:

Section 96. Things done in private defence:

Nothing is an offence which is done in the exercise of the right of private defence.

Section 97. Right of private defence of the body and of property:

Every person has a right, subject to the restrictions contained in Section 99, to defend -

First. - His own body, and the body of any other person, against any offence affecting the human body;

Secondly. - The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

Section 98. Right of private defence against the act of a person of unsound mind, etc:

When an act, which would otherwise be a certain offence, is not that offence, by reason of the youth, the want of maturity of understanding, the unsoundness of mind or the intoxication of the person doing that act, or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence.

Section 99. Acts against which there is no right of private defence:

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.

There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

Extent to which the right may be exercised. - The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

Explanation 1. - A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant, as such, unless he knows or has reason to believe, that the person doing the act is such public servant.

Explanation 2. - A person is not deprived of the right of private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction, or unless such person states the authority under which he acts, or if he has authority in writing, unless he produces such authority, if demanded.

Section 100. When the right of private defence of the body extends to causing death:

The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely :-

First. - Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly. - Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly. - An assault with the intention of committing rape;

Fourthly. - An assault with the intention of gratifying unnatural lust;

Fifthly. - An assault with the intention of kidnapping or abducting;

Sixthly. - An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

Section 101. When such right extends to causing any harm other than death:

If the offence be not of any of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions mentioned in Section 99, to the voluntary causing to the assailant of any harm other than death.

Section 102. Commencement and continuance of the right of private defence of the body:

The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.

Section 103. When the right of private defence of property extends to causing death:

The right of private defence of property extends, under the restrictions mentioned in Section 99, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely :-

First. - Robbery;

Secondly. - House-breaking by night;

Thirdly. - Mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property;

Fourthly. - Theft, mischief or house-trespass, under such circumstances as may reasonable cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

Section 104. When such right extends to causing any harm other than death.—If the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right of private defence, be theft, mischief, or criminal trespass, not of any of the description enumerated in the last preceding section, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in section 99, to the voluntary causing to the wrong-doer of any harm other than death.

Section 105. Commencement and continuance of the right of private defence of property:

The right of private defence of property commences when a reasonable apprehension of danger to the property commences.

The right of private defence of property against theft continues till the offender has effected his retreat with the property or either the assistance of the public authorities is obtained, or the property has been recovered.

The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint or as long as fear of instant death or of instant hurt or of instant personal restraint continues.

The right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief.

The right of private defence of property against house-breaking by night continues as long as the house-trespass which has been begun by such house-breaking continues.

Section 106. Right of private defence against a deadly assault when there is risk of harm to innocent person:

If in the exercise of the right of private defence against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk.

30. Section 97 IPC deals with the subject matter of right of private defence. The plea of right of private defence comprises the body or property (I) of the person exercising right, or (ii) of any other person; and the right may be exercised in the case of any defence against the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation in relation to property. Section 99 and 98 give a right of private defence against certain offences and acts. The right given under Sections 96 to 98 and 100 to 106 is controlled by Section 99. Sections 102 and 105 IPC deal with commencement and continuance of the right or private defence of body and property respectively.

31. We will now have a glance at the law on the issue. The Hon'ble Supreme Court while examining the issue in hand in **Krishnan Versus State of Tamil Nadu (2006) 11 SCC 304** in paragraphs 15, 16 and 17 held as hereunder:

*15. It is now well settled that the onus is on the accused to establish that his action was in exercise of the right of private defence. The plea can be established either by letting in defence evidence or from the prosecution evidence itself, but cannot be based on speculation or mere surmises. The accused need not take the plea explicitly. He can succeed in his plea if he is able to bring out from the evidence of the prosecution witnesses or other evidence that the apparent criminal act was committed by him in exercise of his right of private defence. He should make out circumstances that would have reasonably caused an apprehension in his mind that he would suffer death or grievous hurt if he does not exercise his right of private defence. There is a clear distinction between the nature of burden that is cast on an accused under **section 105** of the Evidence Act (read with **section 96 to 106** of Indian Penal Code) to establish a plea of private defence and the burden that is cast on the prosecution under **section 101** of the Evidence Act to prove its case. The burden on the accused is not as onerous as that which lies on the prosecution. While the prosecution is required to prove its case beyond a reasonable doubt, the accused can discharge his onus by establishing a preponderance of probability (vide **Partap vs. State of U.P.** (1976 (1) SCC 757); **Salim Zia vs. State of UP** (1979 (2) SCC 648); and **Mohinder Pal Jolly vs. State of Punjab** (1979 (3) SCC 30).*

*16. In **Sekar vs. State [2002 (8) SCC 354]**, this Court observed : A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether right of private defence is available or not, the injuries received by the accused, the imminence of threat to his safety, the*

injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered. Whether in a particular set of circumstances, a person acted in the exercise of the right of private defence, is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the Court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the Court to consider such a plea. In a given case, the Court can consider it even if the accused has not taken it. If the same is available to be considered from the material on record. (emphasis supplied).

17. The above legal position was reiterated in *Rizan v. State of Chhattisgarh* [2003 (2) SCC 661]. After an exhaustive reference to several decisions of this Court, this Court summarized the nature of plea of private defence required to be put forth and the degree of proof in support of it, thus :

"Under Section 105 of the Indian Evidence Act, 1872, the burden of proof is on the accused, who sets off the plea of self- defence, and, in the absence of proof, it is not possible for the court to presume the truth of the plea of self-defence. The court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. When the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea."

32. In ***Katta Surendra Versus State of Andhra Pradesh (2008) 11 SCC 360*** the Hon'ble Supreme Court in paragraph 12 has observed as hereunder:

12. "10. A plea of right defence cannot be base on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict sever and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting. Section 97 IPC deals with the subject matter of right of private defence. The plea of right of private defence comprises the body or property (I)

of the person exercising right, or (ii) of any other person; and the right may be exercised in the case of any defence against the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation to property. Section 99 and 98 give a right of private defence against certain offences and acts. The right given under Sections 96 to 98 and 100 to 106 is controlled by Section 99. To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden is on the accused to show that he had a right of private defence which extended to causing of death. Sections 100 and 101 IPC define the limit and extent of right of private defence.

11. Sections 102 and 105 IPC deal with commencement and continuance of the right or private defence of body and property respectively. The right commences, as soon as a reasonable apprehension of danger to the body arises from an attempt, or threat to commit the offence, although the offence may not have been committed but not until there is that reasonable apprehension. The right lasts so long as the reasonable apprehension of the danger to the body continues. In Jai Dev Versus State of Punjab it was observed that as soon as the cause for reasonable apprehension disappears and the threat has either been destroyed or has been put to route, there can be no occasion to exercise the right or private defence."

33. Thus what follows from the reading of the aforesaid provisions of the I. P. C. and the various authoritative pronouncements on the issue is that a plea of right of private defence cannot be based on surmises and speculations. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea. The accused, whenever he invokes the plea of right of private defence must satisfy the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused.

34. Thus now when we examine the present case on the touch stone of the principles propounded hereinabove, we find that the appellant A 1 Ram Awadh Pandey in his statement recorded under Section 313 Cr. P. C. in reply to the question No. 19 put to him during his examination, stated that on the date of the incident at about 7.00 A. M. the work of digging soil from his chak was started by the labourers engaged by the deceased Subba Yadav under his supervision and when he objected, P. W. 1 Raj Kumar Yadav beat him causing head injuries to him and when A 5 Roshan Yadav and Shiv Poojan Yadav came to rescue him, deceased's men present at the place of incident indulged in brick batting causing injuries to Subba Yadav and his supporters also. P. W. 1 Raj Kumar Yadav had lodged an F. I. R. against him and his relatives containing absolutely false allegations under the pressure of his relatives.

35. In order to prove that the accused Shiv Poojan since deceased, A1 Ram Awadh Pandey and A 5 Roshan Padey had also received injuries in the incident, the appellants had examined Dr. Kumod Kumar Jha as D. W. 1. D. W. 1 Kumod Kumar Jha deposed before the trial court that he was posted as Child Specialist in District Hospital, Azmagarh on 5.5.2009 and he had examined the injuries of Shiv Poojan, aged about 75 years, Roshan pandey, aged about 18 years and Ram Awadh Pandey, aged about 52 years at 10.50 P. M., 11.00 P. M. and 11.10 P. M. respectively on 5.5.2009 and prepared their injury reports in his own hand writing. He proved certified copy of the injury report of Shiv Poojan, paper No. 100/2, photostat copies of the injury reports of Roshan Pandey and Ram Awadh Pandey paper Nos. 118Kha/2 and 118Kha/3 as Ext. Kha 1, Ext. Kha 3 and Ext. Kha 4. He also produced the original medico legal register of Sadar hospital and proved that the carbon copies of the original injury reports of Roshan Pandey and Ram Awadh Pandey were at serial Nos. 186 and 187 of medico legal register which had been prepared by him by copying from the original. He also deposed that the injuries received by the injured may have been inflicted after 6 A. M., 7 A. M. or 9 A. M.

36. D. W. 2 Dr. Anoop Kumar Singh proved the post mortem report of the accused Shiv Poojan as Ext. Kha-2. The defence case is that Shiv Poojan had died in jail on 26.6.2009 as result of the injuries received by him in the occurrence which had taken place on 5.5.2009. According to the Post mortem report, Shiv Poojan died due to coma as a result of cerebral haemorrhage. D. W. 2 Dr. Anoop Kumar Singh testified that Shiv Poojan had died as a result of excessive internal bleeding in his head.

37. Although it has been vehemently argued by Sri Rajiv Lochan Shukla, learned counsel appearing on behalf of complainant that there is no evidence on record showing that the accused had also received injuries in the same occurrence in which Subba Yadav had died. Further there is no evidence on record proving that their injuries were got examined either by the Investigating Officer of the case or on his orders and further there is no Majroobi Chitthi referring them for medical examination on record. It has also been submitted that although D. W. 1 Dr. Kumod Kumar Jha had deposed that the injured had been brought to him by the Inspector Atma Ram Yadav of P. S.-Jahanaganj but the defence has not been able to prove that there was any Inspector in P. S.-Jahanaganj at the relevant point of time of the name of Atma Ram Yadav and hence the injury reports which are apparently fabricated and originals whereof have not been brought on record, were rightly discarded by the trial court and the plea of self defence advanced by the accused correctly repelled.

38. However, the argument of learned counsel for the complainant falls flat on the ground when we refer to the evidence of P. W. 9 Constable Arvind Kumar Singh who in his cross examination (page 53 of the paper book) had deposed as hereunder:

"Ram Awadh wagarh us din giraftar muljimon ko suraksha ki drishti se kotwali behja gaya tha. Thana jahanaganj se inka doctory muyana nahi karaya gaya tha. Muljim ki choton ka vivran C. D. mein darj kiya tha. Muljiman ka doctory muyana karane heitu majroobi chhitthi ke sath thanadyakshya ke adesh par maine bhejwaya tha."

39. Thus from the evidence of P. W. 9 Arvind Kumar Singh it is established that several persons from the side of the accused had also received injuries and they were referred for medical examination of their injuries on the date of the incident itself while in police custody and their injuries were duly recorded in the C. D. One of the accused Shiv Poojan Pandey had received head injury in the incident as is evident from his injury report (Ext. Kha 1) and had later died in jail. Although it has been argued by Sri Rajiv Lochan Shukla, learned counsel for the complainant that the defence failed to lead any link evidence to prove that the injured Shiv Poojan Pandey had died on account of the head injury received by him in the occurrence as alleged by the defence, but the said argument is also without any merit.

40. D.W. 1 Kumod Kumar Jha who had examined the injuires of Shiv Poojan Pandey on 5.5.2009 at about 10.50 P. M. stated in his examination-in-chief that the injuries received by the injured Shiv Poojan on his head were on a vital part of his body and could have been dangerous to his life. The prosecution has not cross examined D. W. 1on the aforesaid aspect. Moreover, the D. W. 2 Dr. Anoop Kumar Singh who had conducted the post mortem of the dead body of the deceased Shiv Poojan had, apart from proving his post mortem report, testified that he had died due to coma as a result of internal bleeding in his head. It is true that the D. W. 2 in his cross examination has stated that internal bleeding could be caused by high blood pressure in an aged person sending him in coma even if he has not received any injury, however a conjoint reading of the evidence of D. W. 1 Kumod Kumar Jha and D. W. 2 Anoop Kumar Singh leads to an irresistible inference that Shiv Poojan had received two injuries on his vital parts of the body, one on his head, above the ear and the other which was skull deep on the left side of the head, below the first injury and he had died on 26.6.2009 as a result of excessive internal bleeding in his head. D. W. 2 in his cross examination has nowhere stated that the deceased could not have died as a result of the injuries received by him on 5.5.2009 nor any such suggestion was put by the prosecution to him during his cross examination.

41. The objection raised by Sri Rajiv Lochan Shukla, learned counsel appearing for the complainant to the admissibility of certified copies of the injury reports of Shiv Poojan Pandey (Ext. Kha 1), Roshan Pandey (Ext. Kha 3) Ram Awadh Pandey (Ext. Kha 4) and certified photostat copies of the post mortem report of deceased Shiv Poojan Pandey (Ext. Kha 2) in evidence on account of total non-compliance on the part of the defence with the provisions of Section 65 of the Evidence Act, is also without any force. It is settled law that the objection as to mode of proof has to be taken before the evidence is tendered. Once the document has been marked as Ext., the objection that it should not have been admitted in evidence or the mode adopted for proving document is irregular, cannot be allowed as admission of secondary evidence without proof of loss of original is not worse than irregularity and where the documents are admitted in a court of first instance, no objection to their admissibility can afterwards be taken in a court of appeal.

42. Since admittedly in the present case the prosecution had not objected to the certified photostat copies of the injury reports of Shiv Poojan Pandey (Ext. Kha 1), Roshan Pandey (Ext. Kha 3) Ram Awadh Pandey (Ext. Kha 4) and the post mortem report of the deceased Shiv Poojan Pandey (Ext. Kha 2) at the time when the aforesaid documents were admitted to the court of first

instance and exhibited, hence it is not open to the learned counsel for the complainant to object to the admissibility of the aforesaid documents before the appellate court on the ground that the defence has failed to prove loss of original.

43. Thus, from the evidence of P. W. 9, P. W. 10, D. W. 1 and D. W. 2 the defence / appellants have been able to establish that soil was being dug from their chak by about 30-35 labourers under the supervision of the deceased Subba Yadav without their consent and when they learnt about it, they reached the place of occurrence and objected. At this juncture, the prosecution case as spelt out in the F. I. R. and as testified by the prosecution witnesses appears to be that the deceased immediately stopped the work of digging soil and announced that the same would be resumed after the demarcation was done on the spot. But without any provocation the appellants surrounded the deceased Subba Yadav and started beating him with lathis and danndas and when his grand sons P. W. 1 and P. W. 2 tried to save him, although the facts and circumstances of the case tell an entirely different tale. The defence has discharged its burden of establishing the plea of self defence by showing preponderance of probabilities in favour of plea of self defence by demonstrating that the accused had exercised their right of private defence to prevent the prosecution from committing the offence of criminal trespass in relation to their property. The prosecution witnesses are absolutely silent about the injuries received from the side of the defence. It appears that when the labourers employed by Subba Yadav un-authorisedly started digging soil from the appellants' chak, they objected exercising their right of private defence of property in order to prevent the prosecution side from committing the offence of criminal trespass in relation to their property, altercations and scuffles followed leading to the unfortunate incident in which both sides had assaulted each other. The prosecution witnesses have failed to explain the injuries received by three persons from the side of the defence and have consistently denied that the accused had been assaulted by them although the defence has succeeded in establishing from the evidence of P. W. 10 that the soil was being unauthorizedly dug out from the chak of the appellants by the labourers employed by the deceased Subba Yadav resulting in commission of offence of criminal trespass in respect of their property by the deceased and his other companions and in the occurrence in which one person died from the side of the prosecution while two of them received injuries while three persons from the side of the defence also received injuries of whom one Shiv Poojan died later. Although it does appear to us that the appellants had slightly exceeded their right of private defence in relation to their property but it is obvious that the prosecution has deliberately tried to suppress the true genesis of the incident and has not approached the Court with clean hands and hence it is not possible for us to hold as to which of the two, defence or the prosecution was the aggressor.

44. In the facts and circumstances of the present case, we find that the plea raised by the appellants that the incident, in which both sides received casualties, was neither pre-planned nor pre-meditated but was a result of sudden provocation emanating from the unauthorized digging of the soil by the labourers from the chak of the appellants at the behest of deceased Subba, appears to be acceptable. It is further apparent that the appellants had not assaulted the deceased Subba Yadav, Raj Kumar Yadav and Pradeep Kumar Yadav either with the intention of causing death or with the

knowledge that the assaults made by them on the deceased and injured would cause death of Subba Yadav.

45. Thus, in view of the foregoing discussion, we are of the view that the conviction of the appellants under Sections-302/149 I. P. C. cannot be maintained and ends of justice will be met, if their conviction is converted to one Section-304 Para II and the sentence of life awarded by the trial Court under Sections-302/149 I. P. C. is reduced to three years' imprisonment and fine of Rs. 1000/- each and in case of default of payment of fine, six months' additional R. I.

46. Thus, while maintaining their conviction and sentences awarded under Sections-147, 323/149 and 325/149 IPC, the appellants' conviction under Sections-302/149 IPC is scored out and converted to one Section-304 Para II I. P. C. and sentence awarded to them is palliated to three years R. I. and fine of Rs. 1000/- each and in case of default, six months' additional R. I. The appellants who are on bail shall be taken into custody forthwith and sent to jail for serving out their remaining part of sentence. Their bail bonds stand cancelled and their sureties discharged.

47. The appeal stands allowed in part and decided accordingly.

48. Let copy of this order be sent to the court concerned for intimation and necessary follow up action.

(2016) 8 ILRA 569
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.08.2016

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Appeal No.- 6068 Of 2006
&
Connected With Other Cases

Ali Ahmad

...Appellant

Versus

State Of U.P

...Respondent

Counsel for Appellant:

Dilip Kumar, Bakhteyar Yusuf, Rajiv Gupta, S.V.Singh

Counsel for Respondent:

Govt. Advocate, A.K. Awasthi, Manish Tiwari, Manish Tiwary

Legislation referred to Indian Penal Code, 1860 — Ss. 302, 302/34, 504; Arms Act, 1959 — S. 25(1B)(b); Code of Criminal Procedure, 1973 — S. 313

FACTS:

On 15.02.2009 at about 12.00 noon, at the Government Slaughter House, Police Station Kotwali Nagar, District Aligarh, the appellant Raeesh arrived armed with a knife, accompanied by his brother Haji Munna (appellant) and father Haji Rasheed (co-accused, since deceased). They entered the slaughter house and demanded delivery of slaughtered goods already purchased by the first informant's side. On being refused, Haji Rasheed and Haji Munna caught hold of the deceased Irshad (brother of the first informant), and Raeesh inflicted a knife blow on his chest with intent to kill him. Irshad was taken to Malkhan Singh Government Hospital, Aligarh, where he was declared dead. Raeesh was apprehended on the spot along with the knife. A first information report was lodged by the first informant Bahar Ahmad @ Chhotey (P.W. 1) at 1.00 P.M. on the same day. After investigation, charge-sheets were filed against the appellants.

The Sessions Court, Aligarh, by judgment and order dated 14.12.2010, convicted appellant Raeesh under Section 302 I.P.C. and Section 25(1B)(b) of the Arms Act and convicted appellant Haji Munna under Section 302/34 I.P.C. and sentenced both to life imprisonment. Both the appellants challenged their conviction before this Court.

ISSUES:

- (i) Whether the prosecution witnesses, being close relatives of the deceased, are to be treated as interested witnesses and their testimony discarded on that ground alone.
- (ii) Whether the first information report was ante-timed.
- (iii) Whether non-collection of blood-stained earth from the spot and non-examination of fingerprints on the recovered knife vitiated the prosecution case.
- (iv) Whether the testimony of eye-witnesses P.W. 1 and P.W. 2 was reliable, consistent, and sufficient to sustain conviction.

(v) Whether common intention under Section 34 I.P.C. was established against appellant Haji Munna.

HELD:

(i) Testimony of relative/interested witnesses — Mere relationship of witnesses with the deceased is not by itself a ground to discard their testimony. In many cases, only relatives are available to depose, particularly having regard to the prevailing trends in our society where persons other than relations are not ready to depose before the court. Such testimony, however, must be subjected to scrupulous and careful scrutiny and if, on such scrutiny, it inspires confidence, it cannot be rejected.

Relied on: Birender Poddar v. State of Bihar, 2011 Cri. L.J. 3120 (S.C.)

(ii) Prompt lodging of the FIR — The place of occurrence was the Government Slaughter House, situated at a distance of 2 kilometres from the police station. The occurrence took place at about 12.00 noon. The first information report was lodged at 1.00 P.M. on the same day. This constitutes a prompt report. The timeline stated in the FIR stands corroborated by: the inquest report commencing at 2.30 P.M. and concluding at 4.30 P.M.; despatch of the dead body for post-mortem after 4.30 P.M.; and its receipt at the mortuary at 5.20 P.M. The contention that the FIR was ante-timed is, therefore, unsustainable.

(iii) Non-collection of blood from spot — The occurrence took place in a government slaughter house where blood of slaughtered animals had spread all over the premises. It was, therefore, virtually impossible to segregate and collect blood attributable exclusively to the deceased. Non-collection of blood-stained earth under such peculiar facts creates no doubt about the place of occurrence. Footwear left behind at the scene by reason of the stampede that followed were, in fact, seized under a recovery memo by the Investigating Officer.

(iv) Reliability of ocular testimony — The two eye-witnesses, P.W. 1 (first informant and brother of deceased) and P.W. 2 (uncle of deceased), were naturally present at the slaughter house supervising slaughtering work. Their presence at the spot is wholly consistent with the nature of their work and the time of day. Their testimonies are consistent inter se and corroborate the contents of the first information report in all material particulars. The specific description that, after the knife blow, the deceased did not fall immediately but was caught by the witnesses while in the act of falling, is a detail that only persons actually present on the spot could furnish. Cross-examination did not elicit any material contradiction. The defence's own suggestion that the appellant Raeesh was caught by the first informant after a short chase amounts to an implicit admission of the witnesses' presence at the spot.

Medical evidence of Dr. S.K. Sharma (P.W. 3) corroborates the mode of assault — a single ante-mortem stab wound, 4 cm × 2 cm × chest cavity deep, on the front of the chest on the left side — sufficient in the ordinary course of nature to cause death. The doctor opined that death could have occurred between 12.00 noon and 12.15 P.M., which is consistent with the prosecution case and was not challenged in cross-examination.

(v) Common intention under Section 34 I.P.C. — The conjoint act of Haji Rasheed and appellant Haji Munna in catching hold of both hands of the deceased Irshad — thereby immobilising him — while the appellant Raeesh inflicted the knife blow establishes that all the accused persons were acting in furtherance of a common intention to commit the offence. The manner and participation of the accused persons in the incident leads to an inescapable inference of shared common intention.

RESULT:

Both the appeals lack merit and are accordingly dismissed. The judgment and order of conviction dated 14.12.2010 passed by the Sessions Judge, Aligarh, in Sessions Trial No. 395 of 2009 (under Sections 302 and 302/34 I.P.C.) and Sessions Trial No. 396 of 2009 (under Section 25(1B)(b) of the Arms Act) is upheld and confirmed. The bail of appellant Haji Munna stands cancelled and his sureties are discharged. He is directed to be taken into custody forthwith to serve out the remaining period of the sentence imposed upon him by the trial court.

Cases Referred:

Birender Poddar v. State of Bihar, 2011 Cri. L.J. 3120 (S.C.)

(Delivered by Honble Arvind Kumar Mishra-1, J.)

1. The aforesaid criminal appeals have been preferred by the above mentioned appellants against the judgment and order of conviction dated 26.9.2006 passed by the Additional Sessions Judge, Court No. 2, Etawah in S.T. No. 20 of 2000-State of U.P. Vs. Ali Ahmad and others under section 302/34 I.P.C. arising out of case crime no. 337 of 1999, Police Station Kotwali, district Etawah whereby the appellants have been sentenced to life imprisonment under section 302 read with section 34 of I.P.C. coupled with fine of Rs. 5000/- each with default stipulation of one year additional R.I. to the concerned convict.

2. We have heard at length respective submissions of learned counsel for the appellants Shri S.V. Singh and learned A.G.As. Shri J.K. Upadhyaya as well as Ms. Manju Thakur and learned counsel for the complainant Ashwani Kumar Awasthi and perused the record.

3. The foundation of prosecution case is rooted in the first information report lodged by informant Mohd. Arif son of Israel resident of Chaukhar Kua, New Market, Police Station Kotwali district Etawah, wherein allegations of murder have been made against the aforesaid three appellants-Ali Ahmad, Zameel and Abdul Sattar to the extent that they killed his father by firing on him on 24.6.1999 at 8.30 A.M. in front of Nafees Hazi's shop- National Road Lines Transport. In order to commit the offence, the appellants laid-in ambush behind two trucks in company with one more person, suddenly appeared on the scene and got scooter of informant's father stopped, then Abdul Sattar kicked his scooter and exhorted to kill him; whereupon Ali Ahmad and Zameel by waving country made pistol in their hands caught informant's father and (the assailants) pumped pellets on him by their weapons due to which the informant's father fell down. Informant's uncle Afzaal and his friend Chand who were also following his father, challenged the assailants, whereupon, the assailants also fired in the air and secured their escape. It is gathered from report that bone of contention (behind this murder) was construction of some shops in graveyard situated near overhead water tank adjoining bye pass road. One Abdul Sattar, resident of Katara Sahab Khan, was earlier Mutwalli (Manager) of this graveyard and after him, Master Bashiruddin was made Mutawalli of this graveyard. Bashiruddin, relative of first informant, used to come to the Saw mill of the applicant. In this graveyard, Ali Mohd. son of Hussain Khan was constructing shop. He was being assisted by Zameel son of Bashiruddin and Abdul Sattar son of Alauddin. Construction of the shops in the graveyard came into knowledge of City Magistrate Etawah, who issued stay order on these shops. The appellants became apprehensive of this stay order and were under impression that it was obtained on account of persuasion made by the informant's father with Bashiruddin, who managed issuance of such stay order. Yesterday, on 23.6.1999 at about 10.30 A.M. Ali Ahmad and his aforesaid two friends came to the saw mill of the informant and asked informant's father that he got issued stay order against construction of shops, thus depriving them of their livelihood, now he (deceased-Israel) will have to bear the consequences for the same and they went away from there (saw mill). Today, i.e. on 24.6.1999, when the informant's father Mohd. Israel was going to his saw mill from his house on scooter, he was being followed by informant's

uncle Afzaal and his friend Chand son of Banne Khan on motor cycle when the aforesaid offence of murder was committed at 8.30 A.M.

4. It has further been alleged that at the time of incident, the first informant had gone to the saw mill of Ramjan for arranging labourers, which place is near the place of occurrence. The informant heard sound of firing and rushed to the spot when he saw his father lying on road seeped with blood. Informant's father while groaning told informant's uncle and his friend (Chand) about the incident. Thereafter informant's father was taken to hospital by Jeep where his father was declared dead. Blood oozing out from body of informant's father stained clothes of first informant. The dead body was kept in the hospital. The appellants committed offence in broad day light and they openly fired in the air due to which peace of the area was disturbed, panic prevailed and stampede followed giving way to likelihood of breach of peace. It was prayed that report be lodged and action be taken. This written report is Ext. Ka. 1.

5. The entry of contents of this first information report was taken in check FIR at 9.35 A.M. at Police Station Kotwali district Etawah at case crime no. 337 of 1999 under Section 302 I.P.C. Check FIR is Ext. Ka. 3 on record. On the basis of aforesaid entry made in the FIR, the case was registered against appellants at Rapat No. 22 in the G.D. on the same day and time which is Ext. Ka. 4 on record. Thereafter, the investigation followed and investigation was taken over by Harshvardhan P.W. 5 who conducted part of the investigation and prepared site plan of place of occurrence Exhibit Ka-5 and thereafter the investigation was handed over to S.S.I. Vikramjeet Singh P.W. 6 who also took various steps in completing the investigation. Certain relevant papers were prepared during the course of investigation a reference of these papers at this stage would be appropriate.

6. After investigation commenced, the Investigating officer got prepared the inquest report of deceased Modh. Israel and it was completed at 11.00 A.M. on 24.6.1994 which is Ext. Ka. 8 on record. In the opinion of inquest witnesses, it was suggested that the dead body of deceased be sent for postmortem examination for ascertaining real cause of death. The dead body was sent for postmortem examination. Relevant papers were also prepared, these papers are :- Photo Nash Ext. Ka. 9, Challan of dead body Ext. Ka. 10, letter to the Chief Medical Officer is Ext. Ka. 11 and letter to R.I. Police Line Etawah is Ext. Ka. 12. Investigating Officer also prepared various memos during the course of investigations viz. memo of simple and blood stained soil from the place of occurrence is Ext. 6, memo of blood stained clothes of first informant dated 31.8.1999 is Ext. Ka. 2 . It is further reflected from record that medical examination on the body of deceased was conducted at district Hospital Etawah on 24.6.1999 at 5 P.M. wherein following ante-mortem injuries were found on the body of the deceased:

1. Gun shot wound injuries 1.5 cm x 2 cm Thoresic Cavity Deep right side of back 19 cm away from nipple. Blackening and charring are present around wound in 3 cm area.
2. Gun shot wound of exit in front of chest left 3 cm below left nipple in 6.00 clock's position.

3. Fire arm wound measuring 5 cm x 2 cm under the skull deep 5 cm above right eye-brow lacerated. Blackening around wound is present in 1 cm area.

7. In the of opinion of doctor, the cause of death was due to shock and haemorrhage as a result of ante mortem fire arm injuries. Postmortem examination report is Ext. Ka. 2-A on record.

8. During the course of investigation, various statements of witnesses were also recorded and after completing investigation, two separate charge sheets were filed under section 302/34 I.P.C. against the appellants. The charge sheet against appellant Ali Ahmad and Zameel is Ext. Ka. 6 on record whereas the charge sheet against Abdul Sattar is Ka. 7 on record.

9. Thereafter, the case of the appellants was committed to the Session Court from where it was made over for trial to the concerned court of Additional Sessions Judge, Court No. 2 Etawah who after hearing the appellants, charged them under section 302/34 I.P.C. The charge was read over and explained to the accused who squarely denied the charge and claimed for trial. Thereafter, the prosecution was asked to adduce its testimony in support of aforesaid charge.

10. In turn, prosecution produced in all seven witnesses viz. Mohd. Arif is first informant and son of deceased. He is said to have arrived on the spot soon after the incident and took his father to the hospital. He has proved written report as Ext. Ka. 1. Dr. M.M. Arya P.W. 2 has conducted postmortem examination on the body of the deceased and has proved the same as Ext. Ka. 2-A . Mohd. Afzaal P.W. 3 is the brother of the deceased and uncle of first informant and star eye witness of the prosecution. He has described about the incident. Head constable Sobaran Singh is P.W. 4 and he has proved entries made in the check first information report and relevant G.D. relating to the case are Ext. Ka. 3 and 4, respectively. Harshwardhan P.W. 5 is the first investigating officer who has detailed about various steps taken during the course of investigation. He prepared site plan and proved the same as Ext. Ka. 5. Besides, he also took steps for ensuring the arrest of the accused. S.S.I. Vikramjeet Singh P.W.6, the second Investigating Officer of the case took over the investigation of this case on 21.7.1999 and after completing formalities filed charge sheets against aforesaid appellants Ext. Ka-6 and Ka-7, respectively. Constable Chiranji Lal P.W. 7 has proved preparation of inquest report and other relevant papers and has stated that inquest was prepared. by S.I. R.K. Pal, he was present at the time of preparation of the inquest report, he has identified his hand writing on this report., which is Ext. Ka-8. Relevant papers by the I.O. made for sending the dead body for postmortem examination are Ext. Ka-9, 10, 11 and 12.

11. Thereafter evidence for prosecution was closed and the statement of the appellants was recorded under section 313 Cr.P.C. wherein they claimed to have been falsely implicated in this case in consultation with Bashiruddin. The defence did not lead any evidence on its part. The trial court after hearing both the sides, passed the impugned judgment and order of conviction dated 26.9.2006 in S.T. No. 20 of 2000-State of U.P. Vs. Ali Ahmad and others under section 302/34 I.P.C. arising out of case crime no. 337 of 1999, Police Station Kotwali, district Etawah and imposed upon them aforesaid sentence.

12. Consequently these appeals.

13. It has been vehemently claimed on behalf of the appellant by the learned counsel Shri S.V. Singh that in fact none of the so called prosecution witnesses of fact has seen the occurrence. There is no independent witness whose testimony could be relied on in this case. All the witnesses of fact are either interested, partisan or close relatives of the deceased, so their testimony is wholly unreliable. It is surprising that these witnesses are not witnesses in inquest report. It has come in the statement of prosecution witnesses that when the injured was lying on the ground, he was taken to hospital. On way to hospital he told about the incident to the prosecution witnesses, particularly to first informant Mohd. Arif, and P.W. 3 Mohd. Afzaal that the accused persons caused injury to him. As per post mortem report and testimony of doctor, it is worth consideration that when a person who has been hit so badly on his chest, his lungs are ruptured then he would not be in a position to spell even a single word, therefore, narration of the incident by the deceased when the incident took place, to his son and brother is after thought and result of deliberation and consultation which establishes fact that the story of assault caused by the appellants was tried to be improved.

14. Learned counsel claimed that entire prosecution case does not inspire confidence. The investigation is full of laches, testimony of witness is full of contradictions and no conviction can be made on it and trial court overlooked these particular aspects and has erroneously recorded the finding of conviction.

15. Per contra, learned A.G.A. and learned counsel for the complainant in reply to the aforesaid arguments submitted that the testimony on record is true, worthy of credit, and is inspiring confidence. P.W. 3 Mohd. Afzaal is natural witness of fact of occurrence and was present on the spot, he is most natural witness of incident which was also witnessed by the first informant P.W. 1 and he was told by his father as to who opened fire on him. In this regard, clothes of first informant which bore blood stains oozing out from his father's body corroborates the presence of first informant at the relevant point of time on the spot.

16. There is no material contradiction in the testimony of the prosecution witnesses of fact P.W.1 and P.W.3. There is no laches in the investigation. The investigation is fair and upto the mark. Lodging of first information report is also prompt. The incident occurred in broad day light in the month of June at 8.30 A.M. and lastly it has been summed up that merely because the witnesses are close relatives of the deceased that by itself would not render their testimony wholly unreliable unless it is shown that these witnesses are highly inimical and biased to ensure conviction of the appellants and nothing such has surfaced against aforesaid witnesses that they are either biased or acting with malafidy intention to ensure conviction of the appellants. Prosecution witnesses of fact being natural witnesses, their testimony is to be believed as the same is clinching and inspiring confidence. Why these witnesses will spare the real culprits and falsely involve the appellants has also not been brought before this Court by the appellants.

17. The moot point involved for consideration in these appeals revolves around fact whether the prosecution has been able to prove its case against the appellants, beyond any reasonable doubt or not?

18. The very beginning of the incident has its seed, in the first information report which imputes the very motive for commission of the offence by the appellants. Precisely, first information report indicates that appellant-Ali Ahmad was constructing some shop in the graveyard and he was being aided by other appellants Zameel and Abdul Sattar. The City Magistrate, Etawah, passed some stay order on this construction which was interpreted by the appellants to be handy work and out come of mischief of first informant's father who intrigued with Bashiruddin in getting the stay order issued against such construction. The appellants being apprehensive of such mischievous activities on the part of informant's father and Bashiruddin came to the saw mill of first informant at 10.30 A.M. on 23.6.1999 and admonished informant's father that he got the construction stopped, thus, deprived them of their livelihood and now he would have to face consequences for his act. On the next following day on 24.6.1999 the first informant's father was going to saw mill on scooter from his house, being followed by informant's uncle Afzaal and his friend Chand on motor cycle at some distance, in the meanwhile, when the deceased reached in front of Nafis Haji's National Road Lines Transport, then the appellant who laid in ambush behind two trucks, appeared on the scene around 8.30 A.M., being accompanied by one unknown person, got the scooter of informant's father stopped. Abdul Sattar gave kick blow to the scooter and exhorted, Ali Ahmad, Zameel and one unknown person to kill him lest he should be saved whereupon, Ali Ahmad and Zameel waived country made pistol pumped bullets on the informant's father due to which he fell down on the ground. In the meanwhile, informant's uncle and friend of informant's uncle, challenged them, whereupon, they opened fire in the air and ensured their escape good.

19. In this case, eye witness account evidence of the incident has come forth from the uncle of first informant who has been examined as P.W. 3. As per testimony of P.W.3 Mohd. Afzaal, it is reflected from his cross examination Page 33 of the paper book, wherein, in the last paragraph of his testimony, he has stated that after the fire shot, which hit the deceased, his nephew arrived on the spot within a minute. Meaning thereby that the incident of shooting was not witnessed by P.W. 1 though he arrived in a short while on the spot and saw his father lying on the ground in pool of blood. Therefore, the testimony of P.W. 3 under the circumstances may be relevant for consideration of meritorial aspect of the incident. Although testimony of P.W.1, in so far as it relates to other aspects viz; motive and ancillary issues, will be helpful for arriving at just conclusion and the same will be discussed at relevant point of time.

20. It may also be observed that P.W. 3 in his examination in chief as noted on Paged 28 of the paper book has stated that after the incident, his nephew Mohd. Arif had arrived on the spot. As per description contained in the first information report, the incident has been narrated by Mohd. Afzaal P.W. 3. He has stated in examination in chief that he owned a saw mill and his brother-deceased Israel- also owned saw mill in front of Pani Ki Tanki at Bye-pass circular road. On 24.6.1999, he in company with his friend-Chand- were going to saw mill on his motor-cycle. It was

around 8.30 A.M. when he reached Nafees Hazi's National Road Lines Transport, he saw his brother Israel driving scooter at some distance ahead of him. In the meanwhile Abdul Sattar who was lying in ambush behind trucks appeared on the scene and gave kick blow to his scooter and exhorted "Goli Mar Do" whereupon Ali Ahmad and Zameel fired on him. One more unknown person was also accompanying them. This fire was shot by using country made pistol, which injured his brother. They challenged the assailants, whereupon they made their escape good after firing shots in the air. Thereafter, his nephew Mohd. Arif arrived on the spot, then this witness with the help of his nephew took injured Mohd. Israel in a Jeep to the hospital and on way to hospital deceased Israel told his nephew Mohd. Arif that Zameel and Ali Ahmad had fired on him after Abdul Sattar gave kick blow to his scooter after stopping it.

21. This witness P.W. 3 has also stated in his examination in chief that his brother remained alive upto and till they reached Kazi Petrol Pump thereafter he died. On reaching hospital, doctor declared his brother dead. He has been cross examined by the appellants on the point of occurrence. He has stated that after the shot hit the deceased Israel, he was unable to stand up and at that point of time, this witness was about 20-25 paces away from him. He has stated that at the relevant point of time, his brother was proceeding a little ahead of him on scooter. He has further stated that investigating officer recorded his statement the very same day on which the incident took place.

22. It has been specifically asked from this witness - P.W.3, as to what was identity of unknown culprit whereupon he said that he can not recollect his memory about the same. He has been confronted with specific question whether deceased Israel has been shot dead by Abdul Sattar, Ali Ahmad and Zameel and whether any such statement was ever given by him to any investigating Officer, whereupon he answered "Yes", he told about this to Darogaji. He has stated that Darogaji had prepared site plan on his own. He has also identified the place of occurrence near Tarkol Road, where blood dropped on the ground. This witness has further stated on interrogation regarding fact, as to what was the position (physical) of deceased when he was hit by shot, whereupon he replied that at the relevant point of time, Israel was prostrate with mouth down ward. This witness also demonstrated (by making gesture in trial court) that one leg (of deceased) was entangled in scooter, whereas, the other was extended (astride).

23. This particular piece of testimony by itself is self explanatory of fact of presence of this witness on the spot; thus he witnessed the incident. He has been asked question about distance from which shot was fired whereupon the distance has been disclosed by this witness as 2-3 feet. He has also stated in his testimony that after the shot hit the deceased, he was not rendered unconscious. The deceased was taken care of by this witness, his nephew and the another person Chand. He has stated that his nephew had just arrived on the spot within a minute (of the incident) some persons also arrived at the spot.

24. In the wake of aforesaid testimony it is obvious that the description of incident as narrated in the examination-in-chief stands corroborated in his cross examination. There is nothing adverse or anomalous in his testimony on point of occurrence and his presence on the spot. His testimony on the whole can be rated to be worthy of credit, consistent and inspiring confidence.

25. We have been persuaded, by learned counsel for appellants, to act on assumption that this witness is close relative of the deceased and he is in fact brother of the deceased, therefore, his testimony is

testimony of interested and biased witness and should not be normally believed, but on the other hand, we have specific reason not act upon such proposed hypothesis in view of the fact that merely because witness is a relative of victim of an offence will not by itself throw away the prosecution case in the face of consistent testimony of a witness of fact. No such piece of testimony or circumstance appears upon scrutiny which may give rise to fact that PW-3 being relative of deceased-Israel- is interested in conviction of the appellants. In this context legal dictum is settled that unless it is shown that the witness is directly interested in having conviction secured his being relative of victim alone will not be suffice to render his testimony wholly unreliable. In this way, relative who happens to be natural witness cannot altogether be regarded as an interested witness. There is nothing on record which may point out that this witness was having any grudge against the appellants or was malafide towards them. That way, he cannot be said to be interested witness and he has no grudge or bias for seeking conviction of the appellant. Therefore, the contention that the testimony of Mohd. Afzaal P.W. 3, is tainted for he being relative of the deceased is altogether rejected. Similar observations based on similar principles have been laid down by Hon. Apex Court in the case of ***Gurjit Singh Alias Gora and Anr. Vs. State of Haryana (2015)2 SCC(Cri 624 (Criminal Appeal No. 519 of 2010).***

26. Now It would be relevant appropriate to switch over to the ante mortem injuries found on the body of the deceased. The post mortem report is Ext. Ka. 2A which has been proved by Dr. M.M. Arya P.W. 2. Three ante mortem injuries were noted on examination upon the body of the deceased which are as follows:

1. Gun shot wound of entry of size 1.5 cm x 2 cm Thoresic Cavity Deep right side of back 19 cm away from nipple. Blackening and charring are present around wound in 3 cm area.
2. Gun shot wound of exit presence in front of chest left 3 cm below left nipple in 6.00 clock's position measuring 3cm x 1.5 cm.
3. Fire arm wound measuring 5 cm x 2 cm x skull deep 5 cm above right eye-brow lacerated. Blackening around wound is present in 1 cm area.

27. The very nature of the injuries so caused, in the opinion of the doctor could have been caused around 8.30 A.M. on 24.6.,1999 by fire arm. This specific piece of testimony regarding injury being caused at that point of time has not been challenged even in the least by the appellants. In cross examination of P.W. 2, this much has come that heart and lungs were lacerated and due to this excessive bleeding was possible and death may be caused instantly.

28. Contention has been raised to the ambit that theory of deceased telling his son (first informant-P.W. 1) about the incident being caused by the appellants cannot be sustained in view of the aforesaid condition of deceased's body at the time of assault. The contention does not hold good in view of the fact discussed above that the testimony of P.W. 3 has been found to be natural, consistent, clinching and inspiring confidence and he was present on the spot and has described every detail of the incident. This portion of the testimony that the deceased told his son about the incident as to who caused it, has got no relevance even if the same is excluded from the record because eye witness account of incident as given by P.W. 3 Mohd. Afzaal after careful scrutiny by us is found to be genuine one and the same cannot be brushed aside. May be, that some sort of the improvement was sought to be brought in, in the testimony of

witnesses would not thwart prosecution case under the facts and circumstances of the case already proved. The incident has been consistently proved by the testimony of P.W. 3 Mohd. Afzaal. Testimony of P.W. 2 Dr. M.M. Arya corroborates ocular testimony of eye witness. P.W. 5 Harshvardhan Nagaich has also proved preparation of site plan. He has stated in his testimony that he prepared site plan on the spot in the presence of first informant P.W. 1 and eye witness Mohd. Afzaal P.W. 3. He has proved site plan Ext. Ka. 5. He has also prepared memo of simple and blood stained soil taken from the spot and has proved the same. Obviously, all these things give certainty to place of occurrence. In this view of the matter, the fact that first informant handed over his blood stained clothes to the subsequent Investigating Officer Vikramjeet Singh P.W. 6 on 31.8.1999 will not make any dent in the prosecution case. Constable Chiranji Lal P.W.7 has proved certain papers of the prosecution. One of them is inquest report Ext. Ka. 8. Perusal of inquest report reflects that this inquest report is genuine, innocuous and it contains all the relevant details say case crime number, sections under which the case has been registered etc. It also contains description that inquest report was completed around 11.00 A.M. on 24.6.1999. There is no whisper from the prosecution witnesses nor the same is gathered from attendant circumstances that in this case first information report was ante timed. Therefore, entire prosecution case is coherently established. In the statement of all the accused persons recorded under section 313 Cr.P.C. they have stated that the entire prosecution case has been fastened upon them at the instance of and in consultation with Bashiruddin. In this way, it is beyond our comprehension as to why the prosecution witnesses and particularly P.W. 3 and 1 will be keenly interested in sparing the real culprit and instead naming the present appellants as accused. No such testimony or circumstance exist to act on such suggestion or supposition.

29. We are conscious of legal position that it is the quality of testimony of a witness that gets primacy and not quantity. Testimony of solitary witness (PW-3) in this case after cautious appraisal of facts and circumstances of this case is found to be based on solid rock of consistency, thus intensifying its creditworthiness and proving unambiguously the occurrence, which aspect renders his testimony clinching and wholly reliable. We may conclude that testimony of PW-3 Mohd. Afzaal carries ample weight.

30. In this view of the matter, we have every reason for holding that the prosecution has been able to prove its case beyond reasonable doubt against the appellants. We have also gone through the judgment and order of conviction dated 26.9.2006 passed by the Additional Sessions Judge, Court No. 2, Etawah in S.T. No. 20 of 2000-State of U.P. Vs. Ali Ahmad and others under section 302/34 I.P.C. arising out of case crime no. 337 of 1999, Police Station Kotwali, district Etawah, and we concur with the finding of fact which is based on material on record and is justified. We uphold finding of conviction in appeals. Consequently, all the aforesaid appeals being devoid of merit are dismissed.

31. In this case, the appellants Ali Ahmad and Zameel are in jail, whereas, appellant Abdul Sattar is on bail. His bail bond is cancelled and sureties are discharged. He shall be taken into custody forthwith. Appellants Ali Ahmad, Zameel and Abdul Sattar shall serve out their respective remaining sentence imposed upon them by the trial court.

32. Let a copy of this judgment/order be certified to the court concerned for necessary information and follow up action.

(2016) 8 ILRA 579
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.08.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail application No.- 24182 Of 2015
&
Criminal Misc. Bail application No.- 6712 Of 2016

Shyamdhhar Pandey

...Applicant

Versus

State Of U.P.

...Opposite Party

Counsel for Applicant:

Viveka Nand, RL.K. Shukla, Gopal S. Chaturvedi

Counsel for Opposite Party:

G.AGovt. Advocate, Prem Prakesh, V.P. Gupta

Legislation referred to:-

Indian Penal Code, 1860 — Sections 34, 147, 148, 149, 304, 308, 323, 325, 436, 452, 504, 506
Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 — Section 3(2)(5)
Code of Criminal Procedure, 1973 — Sections 437/439 (Bail)

FACTS :

Both bail applications, arising out of a common transaction and the same case crime, were heard together and decided by a common order at the joint request of counsel for both sides, as both case files were available in court on the same date.

The applicants Shyamdhhar Pandey and Vikash Kumar Pandey were implicated in Case Crime No. 118 of 2015, registered at P.S. Handia, District Allahabad, along with 22 other accused persons — a total of 24 — in connection with an incident involving a clash between two rival groups. The FIR alleged that the accused, belonging to the upper-caste community, attacked members of the scheduled caste community of the village, setting huts on fire and causing injuries to 14 alleged victims.

During the incident, one person received a single blow to the head. He did not suffer any fracture or grievous injury. However, the wound subsequently got infected, leading to development of septicaemia, which ultimately resulted in his death due to cardiorespiratory arrest, as recorded in the post-mortem report. The medical examination reports of the 14 alleged injured persons revealed injuries of a uniformly trivial nature — several victims had no visible external injury at all, while others had only single contusions, abrasions, or lacerated wounds, none of which was certified as grievous.

The applicants Shyamdhhar Pandey and Vikash Kumar Pandey had been in custody since 11 April 2015 and 24 June 2015 respectively. Neither applicant had any previous criminal history. The prosecution alleged use of lathi, danda, and ganasa, though none of the victims sustained any sharp-edged wound or bone fracture.

Questions Considered

(i) Whether, in a case of group clash where the death of the deceased was caused not by a grievous injury but by septicaemia developing from a single simple wound — with no fracture found on any victim — a criminal intention to cause death or grievous hurt can be attributed to all the accused so as to disentitle them from bail?

(ii) Whether vicarious liability under Sections 149/34 IPC can be fastened upon all accused in a mass-melee situation when there is no specific attribution of any weapon or blow to any individual accused and the total number of injuries inflicted is substantially less than the total number of alleged assailants?

(iii) What considerations govern the exercise of discretion to grant bail where the trial is unlikely to conclude in the near future and the accused have already undergone substantial pre-trial detention?

Held

(i) Nature of injuries and criminal intention: The medical examination reports of all 14 alleged victims and the post-mortem report of the deceased collectively demonstrate the trivial nature of the injuries inflicted. No victim sustained a fracture or grievous injury. The deceased had only a single healed wound on the head with no corresponding fracture in any underlying skull bone — a simple injury which unfortunately became infected leading to death by septicaemia and cardiorespiratory arrest. In such circumstances, attribution of an intention to cause death or serious bodily harm to any of the accused is not supported by the medical evidence. The absence of repeated blows and the absence of any fracture indicate that the blows, if any, were not delivered with force or deliberation.

(ii) Vicarious liability in mass-melee cases — specification of role essential: Where blunt weapons such as lathi or danda have been used so lightly as to produce no fracture or grievous injury on any of the 14 alleged victims, it would be unreasonable to saddle all 24 accused with a common murderous intention or object. The prosecution evidence was wholly lacking in specification as to which accused wielded which weapon and which accused struck which victim. The total number of injuries inflicted was significantly less than the number of alleged assailants — a circumstance indicating that many of the accused did not participate in the occurrence at all. The mere fact that the incident took the form of a group melee does not, by itself, suffice to fasten vicarious liability for culpable homicide upon every named accused in the absence of specific attribution.

(iii) Bail — factors considered: Taking an overall view of the nature of the evidence, the trivial character of the injuries sustained, the period of pre-trial detention already undergone by the applicants (since April 2015 and June 2015 respectively), the absence of any previous criminal history, the unlikelihood of early conclusion of trial in view of heavy pendency of cases, and the absence of any convincing material to indicate the possibility of tampering with the prosecution evidence, the applicants were found entitled to bail.

Result: Both bail applications allowed. Applicants Shyamdhara Pandey and Vikash Kumar Pandey directed to be released on bail upon executing a personal bond and furnishing two sureties each in the like amount to the satisfaction of the court concerned, subject to the following conditions: (1) the applicants shall not tamper with the prosecution evidence in any manner; (2) the applicants shall personally appear on each and every date fixed in the trial court, unless the court itself grants exemption in the interest of justice. The trial court shall be at liberty to proceed for cancellation of bail in the event of breach of any condition. The observations in the order are confined strictly to the disposal of the bail applications and shall not be construed to reflect upon the ultimate merits of the case.

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. These are two bail applications numbering as Criminal Misc. Bail Application No. 24182 of 2015 and Criminal Misc. Bail Application No. 6712 of 2016 which are connected with

each other and arise out of common transaction. Counsels for both sides are present, who have requested the Court to take up both the matters today itself as the files of both the cases have been sent by the office and are available in the Court. This request was made in the background of the fact that the Criminal Misc. Bail Application No. 24182 of 2015 was sent to the Court earlier on 20.8.2016 but the matter was posted for some other date after four weeks. Submission of counsels appearing for both sides is that as both the files are available in the Court and the rival counsels are also present then there is no point of not hearing the other bail application. In view of common request made by the counsels for both sides, both these bail applications are being heard together today and are being decided by common order.

2. By way of these bail applications moved on behalf of applicants Shyamdhhar Pandey and Vikash Kumar Pandey, the release on bail has been sought in connection with Case Crime No.118 of 2015, u/s 147, 148, 149, 323, 325, 504, 506, 436, 304, 452, 308, 34 I.P.C. and Section-3(2)(5) of SC/ST Act, Police Station-Handia, District-Allahabad.

3. Counter affidavits filed today by learned A.G.A. in both cases are taken on record.

4. Heard Shri Gopal Swroop Chaturvedi, Senior Advocate assisted by Shri L.K. Shukla and Shri R.S. Shukla, learned counsels for the applicant and Shri Prem Prakash, learned counsel for opposite party and learned A.G.A. for the State.

5. Submission of counsels for the applicants is that in this matter there has been a background of an unusual highhandedness and misconduct displayed by some persons belonging to the scheduled caste community of the village in question. In that connection applications had also been moved before this incident and as a result of which the administrative authorities had intervened and the anti-social elements were successfully managed but even thereafter miscreants of that community kept displaying their misdemeanor and misbehaviour. Counsels have also drawn the attention of the Court to Annexure No.27 and 28 in order to indicate the legal protest that was made against the miscreants and the eventual compromise that had taken place in that regard. Submission is that on the day of incident the situation worsened and there was a mutual clash between two rival groups. During this clash none of the accused persons displayed or had any criminal intention to cause anybody's death or to cause any serious injury to anybody of the other side but unfortunately one person who received a single injury on the head eventually died as a result of infection which he caught. The other persons said to have incurred injuries also received only trifling minor injuries. But the other side has tried to exaggerate the nature of offence and has resorted to a blanket implication of 24 persons in the incident by making omnibus allegations against all of them. Counsel has taken the Court to the medical examination reports of all the alleged 14 injured persons the perusal of which is sufficient to demonstrate the trivial nature of the injuries incurred by all of them. Medical reports show that the alleged victims namely Manju Nisha, Sukhdei and Beliram did not have any visible injury and only complained of pain; the alleged victims namely Komal, Sushila, Nandini and Chintamani are said to have incurred just a single contusion each on their persons; the alleged victims namely Nyasa and Lalchand had incurred a single lacerated wound each on their persons, the alleged victim namely Pooja had

received only a single abrasion and the alleged victims Manoj Kumar and Ram Raj had incurred one lacerated wound and one contusion each on their persons. It was also pointed out that all these alleged injuries were obviously simple in nature and none of them was found to be grievous. Attention has been further drawn to the post-mortem report of the deceased which also indicates the presence of just a single healed wound on the head. Much emphasis has been laid by the counsel on the fact that during autopsy no grievous injury was found on the body of the deceased and even the healed wound on the head did not have any corresponding fracture in any of the underlying skull bones and was in fact an injury of simple nature. Submission is that it was so unfortunate that the otherwise simple wound appears to have caught some infection and septicaemia developed, as a result of which the deceased eventually died. It has been emphasized by counsel that the death of the deceased was reported by the doctor to have been caused as a result of cardiorespiratory arrest due to septicaemia. Argument is that the medical examinations of the victims and the post-mortem report of the deceased are sufficient to demonstrate that it is not a case in which either the victim or the deceased may be said to have been made the target by any of the accused persons with the intention to cause any serious harm to them. There was hardly any repetition of blows and the absence of any fracture caused to any of the victims is also a conclusive proof of the fact that whosoever hit them, hit them lightly and not with force. Further argument is that there is generalized vague allegation about the accused having been armed with lathi, danda and ganasa, but this is also so clear from the medical examination reports that neither the deceased nor any of the alleged victims received any sharp-edged wound. In fact the number of assailants is said to be 24 but total number of injuries incurred by the victims is much less than the number of accused which sufficiently demonstrates that many of the accused did not participate in the occurrence at all. The prosecution evidence is woefully lacking with regard to any specification about the weapons and it is not known at all as to which accused was having which weapon or as to which accused hit which victim. Even the single blow caused to the deceased which unfortunately caught the infection and proved fatal cannot be attributed to any particular accused. Submission is that in a case of this nature where blunt weapons like lathi or danda has been used so lightly that not even a single fracture or grievous injury has been caused to any of the victims, it will be unjust to attribute any intention of causing death to any of the accused. Further submission is that it will also be very unreasonable to saddle all the accused persons with vicarious liability of having shared any common murderous intention or object. Even the death of the deceased was also an unfortunate outcome or development which most probably took place because of lack of adequate medical care or because of medical negligence. It is further submitted that the allegations of setting the huts on fire is only a malicious attempt on the part of prosecution to exaggerate the offence and deliberately lend a complexion of caste and communal clash to the incident. Submission is that had there been any pre-planned deliberate serious intention to cause any serious harm then the nature of injuries caused to the alleged victims would have been wholly different. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the applicants that they are ready to cooperate with the process of law and shall faithfully make themselves available before the court whenever required. It has also been submitted that the applicants Shyamdhara Pandey and Vikash Kumar Pandey are languishing in jail since 11.4.2015 and

24.6.2015 respectively and in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial. It has also been pointed out that the applicants do not have any previous criminal history.

6. Learned A.G.A. and Shri Prem Prakash, learned counsel for the informant have opposed the prayer for bail and have tried to submit that the incident was in the nature of a melee and therefore it was not possible for the prosecution witnesses to specifically know as to which accused wielded which specific weapon and as the aggression was made by the accused persons together, therefore, the only logical inference to draw in such circumstances is that all of them had common intention and object, and therefore all the accused must be held liable vicariously for causing the death of the deceased. But both the learned A.G.A. and the counsel for the informant have been fair enough to concede that neither the deceased nor any of the victims incurred any fracture on their persons and the deceased died as a result of septicaemia that developed because of some infection.

7. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, this Court is of the view that the applicants may be enlarged on bail.

8. Let the applicants-Shyamdhhar Pandey and Vikash Kumar Pandey, involved in Case Crime No.118 of 2015, u/s 147, 148, 149, 323, 504, 506, 436, 452, 304, 308, 325, 34 I.P.C. and 3(2)(5) of SC/ST Act, P.S.-Handia, District-Allahabad be released on bail on their executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(1) The applicants shall not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicants shall personally appear on each and every date in the court and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

9. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

10. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merits of the case.

(2016) 8 ILRA 584
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.08.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Income Tax Appeal No.- 657 Of 2007
 &
 Connected With Other Cases

Commissioner Of Income Tax Ghaziabad & Anr.	...Appellant
Versus	
Hapur Pilkhuwa Development Authority Preet Vihar	...Respondent

Counsel for Appellant:
 Manish Goyal

Counsel for Respondent:
 Ashish Bansal

Legislation referred to : Income Tax Act, 1961 – Ss. 2(15), 2(24), 10(20A), 10(29), 11, 12, 12A, 12AA, 12AA(3), 60–63; Income Tax Rules, 1962 – Rr. 17A, 17A(a); Finance Act, 2002; Finance Act, 2008; U.P. Urban Planning and Development Act, 1973; Indian Trusts Act, 1882; Societies Registration Act, 1860; U.P. Krishi Utpadan Mandi Adhiniyam, 1964; CBDT Circular No. 11 of 2008 dated 19.12.2008; CBDT Instruction No. 1024 dated 09.11.1976.

SUBSTANTIAL QUESTION OF LAW :

Whether on the given facts and circumstances of the case, the Income Tax Appellate Tribunal was justified in law in holding that Hapur Pilkhuwa Development Authority (HPDA), a local authority constituted under the U.P. Urban Planning and Development Act, 1973, was eligible for grant of registration under Section 12AA of the Income Tax Act, 1961?

APPEALS — DETAILS :

S.No.	IT Appeal No.	Assessment Year	Judgment and Order Dated / ITA No.
1	657/2007	2003-04	15.05.2007 passed in ITA No. 2735/Del/2006
2	717/2007	2003-04	31.01.2007 passed in ITA No. 2903/Del/2006
3	533/2011	2003-04	25.07.2005 passed in ITA No. 690/Luc/2003
4	320/2007	1992-93	10.11.2006 passed in ITA No. 390 (Alld.)/2006
5	96/2009	2004-05, 2005-	30.05.2008 passed in ITA Nos. 4815 & 4816/Del/2007; and

		06, 2003-04	30.05.2008 passed in ITA No. 168 (Ag.)/2007
6	274/2009	2003-04	05.12.2008 passed in ITA No. 459/Agr/2007
7	263/2008	2003-04	07.08.2007 passed in ITA No. 107/Alld/2007
8	349/2008	—	14.03.2008 passed in ITA No. 32/Luc/2008

FACTS :

The respondent, Hapur Pilkhuwa Development Authority (HPDA), is a statutory body constituted under the U.P. Urban Planning and Development Act, 1973. Prior to 01.04.2003, HPDA was exempt from income tax under Section 10(20A) of the Income Tax Act, 1961. Upon omission of Section 10(20A) by the Finance Act, 2002 with effect from 01.04.2003, HPDA applied for registration under Section 12AA of the Act, 1961 by submitting Form 10A under Rule 17A of the Income Tax Rules, 1962 on 27.12.2005.

The Commissioner of Income Tax, Ghaziabad (CIT), vide order dated 21.06.2006, rejected the application on two grounds: (i) that HPDA was not registered under the Indian Trusts Act, 1882 or the Societies Registration Act, 1860; and (ii) that its activities were not charitable per se as it sold land at commercial rates and did not follow commercial accounting principles. HPDA preferred appeal before the Income Tax Appellate Tribunal, New Delhi, which was allowed by the Tribunal following its earlier decision in respect of Ghaziabad Development Authority (also constituted under the U.P. Act, 1973). The present batch of eight Income Tax Appeals was preferred by the Revenue before this Court against the orders of the Tribunal.

The leading appeal is IT Appeal No. 657 of 2007 relating to Assessment Year 2003-04. All appeals raise identical questions of law and were heard together and decided by a common judgment.

HELD :

(i) Registration under S. 12AA — Condition of registration under Trusts Act or Societies Act not required — Section 12A or Section 12AA of the Income Tax Act, 1961 does not stipulate as a pre-condition that an institution seeking registration must be registered under the Indian Trusts Act, 1882 or the Societies Registration Act, 1860. The Commissioner of Income Tax erred in importing a condition not found in the statute. The sole requirement for registration under Section 12AA is that the institution must be created wholly for charitable or religious purposes, and the CIT is required to satisfy himself about the genuineness of the activities and the objects of the trust or institution.

(ii) Statutory development authority as 'Institution' for charitable purpose — S. 2(15) I.T. Act — HPDA, being a statutory body constituted under the U.P. Urban Planning and Development Act, 1973 with the object of planning, development and improvement of the area under its jurisdiction and providing shelter to the homeless, falls within the definition of 'charitable purpose' under Section 2(15) of the Income Tax Act, 1961, specifically under the category of 'advancement of any other object of general public utility.' The acquisition of land by HPDA is for a public purpose and not a private or personal one. There is no legal requirement that such a statutory authority must be a trust or society to qualify as an 'Institution' under Section 12A.

(iii) Selling land at profit — Not ipso facto disqualifying under proviso to S. 2(15) — Mere sale of land at a profit does not by itself attract the proviso to Section 2(15) of the Income Tax Act so as to deprive an institution of the benefit of registration under Section 12AA. For the proviso to apply, the activities of the institution must be conducted on commercial lines with an intention to earn profit. Where the institution carries out its activities in furtherance of its charitable objects without a profit motive and any profit is merely incidental, the proviso has no application. It is the intention of the governing body and the manner in which activities are conducted that are determinative. The Revenue had not placed any material on record to demonstrate that HPDA was conducting its affairs on commercial lines with a motive to earn profit or had deviated from its stated objects. [Relied upon: CIT v. Lucknow Development Authority, (2014) 98 DTR (All) 183; CBDT Circular No. 11 of 2008]

(iv) Registration under S. 12AA — Not conclusive; Revenue always at liberty to examine claims under Ss. 11 & 13 — Grant of registration under Section 12AA does not confer an absolute or conclusive right to exemption under Section 11. Registration only evidences the genuineness of activities and objects of the institution. Revenue authorities retain full liberty at the stage of processing returns of income to examine the claims of the assessee under Sections 11 and 13 and to give appropriate treatment to the income of the institution consistent with the facts of each case. Registration can also be cancelled under Section 12AA(3). The benefit under Section 11 is further subject to the control of Sections 60 to 63. Thus, registration and exemption operate at two distinct levels and the grant of registration does not preclude future scrutiny. [Relied upon: CIT v. Lucknow Development Authority, (2014) 98 DTR (All) 183]

(v) Precedents affirming registration of statutory bodies — Binding on the Court — This Court in CIT v. Lucknow Development Authority, (2014) 98 DTR (All) 183 had held that a statutory authority constituted under the U.P. Urban Planning and Development Act, 1973 is entitled to registration under Section 12A of the Income Tax Act, 1961 since its objects are charitable in nature. Similarly, the Supreme Court in CIT-II v. Krishi Utpadan Mandi Samiti, (2012) 12 SCC 267 had affirmed the charitable status of a statutory body for the purpose of registration under Section 12AA. This Court had also held in CIT v. M/s. U.P. Forest Corporation Ltd. (ITA No. 70 of 2009) that a statutory entity is entitled to registration under Section 12A, and that view was upheld by the Supreme Court. HPDA being a statutory authority constituted under the same U.P. Act, 1973, the findings and ratio in CIT v. Lucknow Development Authority are squarely applicable to the present case.

RESULT :

The substantial question of law is answered against the Revenue. The orders of the Income Tax Appellate Tribunal granting registration under Section 12AA of the Income Tax Act, 1961 to Hapur Pilkhuwa Development Authority are confirmed. All eight Income Tax Appeals are accordingly dismissed.

Cases Referred:

CIT-II v. Krishi Utpadan Mandi Samiti, (2012) 12 SCC 267 (SC)

CIT v. Lucknow Development Authority, (2014) 98 DTR (All) 183 (All HC)

CIT v. M/s. U.P. Forest Corporation Ltd., ITA No. 70 of 2009 (All HC), upheld in SLP (Civil) No. 2590 of 2011 (SC)

U.P. State Industrial Development Corporation Ltd. v. CIT-II, Kanpur, ITA No. 231/2006 (All HC)
Gestetner Duplicators P. Ltd. v. CIT, (1979) 117 ITR 1 (SC).

(Delivered by Hon'ble Sudhir Agarwal, J.

&

Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Manish Goyal, learned Counsel for appellant and Sri Ashish Bansal for respondents.

2. These appeals raise identical questions of law and relate to different assessment years concerning Hapur Pilkhuwa Development Authority (hereinafter referred to as 'HPDA') passed by Income Tax Appellate Tribunal, New Delhi "G", New Delhi (hereinafter referred to as 'Tribunal'), are heard together and decided by this common judgment.

3. The appeal number, assessment year and dates of order are tabulated as below:

S.No	IT Appeal No.	Assess.year	Judgment and order dated
1	657/2007	2003-04	15.5.2007 passed in ITA No.2735/Del/2006
2	717/2007	2003-04	31.1.2007 passed in ITA No.2903/Del/2006
3	533/2011	2003-04	25.7.2005 passed in ITA No.690/Luc/2003
4	320/2007	1992-93	10.11.2006 passed in ITA No.390 (Alld.)/2006
5	96/2009	2004-05 2005-06 2003-04	30.5.2008 passed in ITA Nos. 4815 & 4816/Del/2007; and 30.5.2008 passed in ITA No.168 (Ag.)/2007
6	274/2009	2003-04	5.12.2008 passed in ITA No.459/Agr/2007
7	263/2008	2003-04	7.8.2007 passed in ITA No.107/Alld/2007
8	349/2008	—	14.3.2008 passed in ITA No.32/Luc/2008

4. These appeals were admitted on the following substantial question of law:-

“Whether on given facts and circumstances of case, Hon’ble Tribunal was justified in law in holding that local authority (Hapur Pilkhuwa Development Authority) was eligible for grant of registration under Section 12AA of IT Act, 1961.”

5. The leading appeal is numbered as 657 of 2007. Since facts are common in all appeals, they are taken from said appeal.

6. Parties are referred to as appellant and respondent respectively.

7. The facts in brief giving rise to present dispute, necessary for adjudication, are as under.

8. Respondents HPDA is a body constituted under U.P. Urban Planning and Development Act, 1973 (hereinafter referred to as 'U.P. Act, 1973'). It applied for granting registration under Section 12AA of Income Tax Act, 1961 (hereinafter referred to as "Act, 1961") by submitting an application in Form 10A under Rule 17A of Income Tax Rules, 1962 (hereinafter referred to as "Rules, 1962") on 27.12.2005.

9. Commissioner of Income Tax, Ghaziabad (hereinafter referred to as "CIT") vide order dated 21.06.2006 rejected application observing that HPDA is not an Institution working for charitable purposes since it was not registered under Indian Trusts Act, 1882 (hereinafter referred to as "Act, 1882") or Societies Registration Act, 1860 (hereinafter referred to as "Act, 1860"). Further its activities are also not charitable, per se as it sells land on commercial rates and to fudge profit it does not follow commercial accounting principles. HPDA preferred appeal i.e. ITA No. 2735 (Del) of 2006 which has been allowed by Tribunal vide orders impugned in these appeals.

10. Tribunal has followed its earlier decision dated 31.07.2007 passed in ITA No. 2903 (Del) of 2006 in respect to Ghaziabad Development Authority which is also a body constituted under U.P. Act, 1973 and held that it was also entitled for registration under Section 12A. Tribunal has also referred to an earlier judgment dated 25.07.2005 in ITA No. 690 (Luc) of 2003 wherein registration for similar body was directed to be allowed. This appeal is also before us.

11. It is not in dispute that HPDA is an authority constituted in India by or under any law enacted either for the purpose of dealing with and satisfying the need for housing accommodation or for the purpose of planning development or improvement of cities, towns and villages or for both and was exempted from Tax under Section 10(20A) of Act, 1961. The said Section 10(20A) has been omitted by Finance Act, 2002 with effect from 01.04.2003. However, that fact is not relevant to answer the question of registration under Section 12A.

12. Registration Under Section 12A is permissible to a Trust or a Institution so as to exclude provisions of Section 11 and 12 of Act, 1961. Section 11 and 12 talks of a Trust or Institution created wholly for charitable or religious purpose. We have to examine whether HPDA can be said to be an "Institution" created wholly for charitable purpose.

13. The term "charitable purpose" is defined in Section 2(15) of Act, 1961 and before Finance Act, 2008 whereby it was substituted with effect from 01.04.2009 and has been made much detailed, it read as under:

*"(15) "charitable purpose" includes relief of the poor, education, medical relief, and the advancement of **any other object of general public utility**;"*

(emphasis added)

14. Now it has been substituted with effect from 01.04.2009 and reads as under:

"(15) "charitable purpose" includes relief of the poor, education, medical relief, preservation of environment (including watersheds, forests and wildlife) and

preservation of monuments or places or objects of artistic or historical interest and the advancement of any other object of general public utility:

Provided that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention, of the income from such activity;

Provided further that first proviso shall not apply if the aggregate value of the receipts from the activities referred to therein is twenty five lakh rupees or less in the previous year."

(emphasis added)

15. "Advancement of any other object of general public utility" is a term of very wide connotation. There is no requirement for the purpose of Section 12 that Institution must be registered under Act, 1882 or Act, 1860. CIT added this condition on his own though we do not find any such condition provided under Section 12A or 12AA of Act, 1961. In order to consider whether creation of HPDA is for advancement of general public utility. Tribunal has looked into objects and purposes of U.P. Act, 1973 and also the purpose of acquisition of land by HPDA, which is only for public purpose and not personal one.

16. Learned Counsel for appellant has submitted that Tribunal has ignored the fact that authority was engaged in activities other than those mentioned in its main object. It is further submitted that Tribunal has erred in coming to conclusion that authority carries on charitable work. It is submitted that Tribunal erred in considering definition of "charitable purpose" as defined under Section 2 (15) and definition of 'income' as given under Section 2 (24) read with Rule 17-A (a) and 1962 CBDT instruction No.1024 dated 9.11.1976. Learned Counsel has relied on judgment of this Court in ***ITA No.231/2006, U.P. State Industrial Development Corporation Ltd. Vs. Commissioner of Income Tax-II, Kanpur, decided on 5.7.20016.***

17. Learned Counsel appearing for respondent has submitted that Tribunal has committed no error as it is duty of authority to formulate scheme in an area which is not developed and, therefore, application for such registration was sought for. He has relied on the decision of Apex Court in ***Commissioner of Income Tax-II Vs. Krishi Utpadan Mandi Samiti, (2012) 12 SCC 267***, and on judgment in ***Commissioner of Income Tax Vs. Lucknow Development Authority, (2014) 98 DTR 183***, and contended that respondent had fulfilled the criterion for registration under Section 12-A of the Act.

18. We find it unnecessary to go for much research work and debate issue further for the reason that in respect to a similar authority, namely, "Lucknow Development Authority",

which is also constituted under U.P. Act, 1973, a similar question, whether activities of Development Authority can be said to be 'charitable' as defined under Section 2(15) came up for consideration before a Division Bench in **CIT Vs. Lucknow Development Authority 2014 (98) DTR (All) 183** and Court held as under:

"21. We have heard learned counsel for the parties and gone through the material available on record.

It is undisputed fact that the assessee is a "statutory authority" which was established under the provisions of the Uttar Pradesh Planning and Development Act, 1973. In the instant case, prior to 1st April, 2003, the assessee was enjoying exemption under Section 10(20A) and Section 10(29). When these provisions were amended w.e.f. 1st April, 2003, then the necessity arose to register these institutions under Section 12A. In view of the objects, there is no good reason for holding that statutory bodies could not be treated as "charitable" within the meaning of Section 2(15). The object of the "Authority" is to provide shelter to the homeless people, therefore, there is no objectionable material to treat these institutions as non-charitable. The registration under Section 12A is mandatory to claim exemption under Sections 11 & 13, but registration alone cannot be treated as conclusive. It is always open to Revenue Authorities, while processing return of income of these assesseees, to examine the claim of the assesseees under Sections 11 & 13 and give such treatment to these institutions as is warranted by the facts of the case. Revenue Authorities are always at liberty to cancel the registration under Section 12AA(3). Moreover, it may be mentioned that the benefit of Section 11 is not absolute or conclusive. It is subject to control of Sections 60 to 63. If it is found by keeping in view the provisions of Sections 60 to 63 that it is not so includible then such income does not qualify for any relief."

"25. Further, it may be mentioned that Section 12AA of the Act lays down the procedure for registration in relation to the conditions for applicability of Sections 11 & 12 as provided in Section 12A. Therefore, once the procedure is complete as provided in sub-section (1) of Section 12AA and a certificate is issued granting registration to the trust or institution the certificate is a document evidencing satisfaction about (i) the genuineness of the activities of the trust or institution, and (ii) about the objects of the trust or institution. Section 12A stipulates that the provisions of Sections 11 & 12 shall not apply in relation to income of a trust or an institution unless the conditions stipulated therein are fulfilled. Thus, granting of registration under Section 12AA denotes that the conditions laid down in Section 12A stand fulfilled.

26. The effect of such a certificate of registration under Section 12AAA, therefore, cannot be ignored or wished away by the Assessing Officer by adopting a stand that the trust or institution is not fulfilling the conditions for applicability of Sections 11 & 12. In the case of Gestetner Duplicators P. Ltd. vs. CIT (1979) 8 CTR (SC) 371 : (1979) 117 ITR 1 (SC), the Apex Court was called upon to determine as to whether the contribution

made by the employer should be treated as a business expenditure, the requirement being contribution should be made to a recognized provident fund.

27. Needless to mention that this Hon'ble Court in the case of CIT vs. M/s. U.P. Forest Corporation Ltd., in Income Tax Appeal No. 70 of 2009 observed that the Forest Corporation being an statutory entity is entitled for the registration under Section 12A of the Act. The said observations was upheld by the Hon'ble Apex Court vide its order dated 12th May, 2011 in Special Leave Petition (Civil) No. 2590 of 2011.

28. We may also like to refer a C.B.D.T. Circular No. 11 of 2008 dated 19th December, 2008 [(2009) 221 CTR (St) 1 : (2009) 17 DTR (St) 1] wherein the applicability of the commercial activities in respect of charitable purpose has been clarified. The said circular is reproduced as below:

"2.2. 'Relief of the poor' encompasses a wide range of objects for the welfare of the economically and socially disadvantaged or needy. It will, therefore, include within its ambit purposes such as relief to destitute, orphans or the handicapped, disadvantaged women or children, small and marginal farmers, indigent artisans or senior citizens in need of aid. Entities who have these objects will continue to be eligible for exemption even if they incidentally carry on a commercial activity, subject, however, to the conditions stipulated under Section 11(4A) or the seventh proviso to Section 10(23C), which are that-

(i) the business should be incidental to the attainment of the objectives of the entity, and

(ii) separate books of accounts should be maintained in respect of such business."

29. For the applicability of proviso to Section 2(15), the activities of the trust should be carried out on commercial lines with intention to make profit. Where the trust is carrying out its activities on non-commercial lines with no motive to earn profits, for fulfillment of its aims and objectives, which are charitable in nature and in the process earn some profits, the same would not be hit by proviso to section 2(15). The aims and objects of the assessee-trust are admittedly charitable in nature.

30. Mere selling some product at a profit will not ipso facto hit assessee by applying proviso to Section 2(15) and deny exemption available under Section 11. The intention of the trustees and the manner in which the activities of the charitable trust institution are undertaken are highly relevant to decide the issue of applicability of proviso to Section 2(15).

31. There is no material/evidence brought on record by the revenue which may suggest that the assessee was conducting its affairs on commercial lines with motive to earn

profit or has deviated from its objects as detailed in the trust deed of the assessee. In these facts and circumstances of the case, the proviso to Section 2(15) is not applicable to the facts and circumstances of the case, and the assessee was entitled to exemption provided under Section 11 for the relevant assessment year.

32. From the record, it also appears that the "authority" had been maintaining infrastructure, development and reserve fund IDRF as per the notification dated 15th January, 1998, the money transferred to this funds is to be utilized for the purpose of project as specified by the committed having constituted by the State Government under the said notification and the same could not be treated to be belonging to the "authority" or the receipt of taxable nature in its hands. For this reason also, it appears that the funds are utilized for general utility."

19. The findings and observations in the aforesaid judgment are squarely applicable in the case in hand also.

20. We also find that another statutory body, namely, Krishi Utpadan Mandi Samiti constituted under U.P. Krishi Utpadan Mandi Adhiniyam, 1964 (hereinafter referred to as "Act, 1964") was also registered under Section 12AA of Act, 1961 and the question whether amount transferred to Mandi Parishad would constitute application of income for 'charitable purpose' under Section 11(1)(a) of Act, 1961 has been decided against Revenue by Supreme Court in ***Commissioner of Income Tax Vs. Krishi Utpadan Mandi Samiti 2012 (12) SCC 267*** wherein Court has also confirmed this Court's judgment dated 04.12.2009 passed by this Court at Lucknow in I.T.A. No. 102 of 2009.

21. In view of above, we answer above question against Revenue and confirm judgment of Tribunal impugned in all these appeals.

22. All the appeals are, accordingly, dismissed.

(2016) 8 ILRA 593
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.08.2016

BEFORE

THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE DR. VIJAY LAXMI, J.

Misc. Bench No.- 9910 Of 2016

Bennet Castelino ...Petitioner
State Of U.P. & Ors. Versus
 ...Respondents

Counsel for Petitioner:
Bennet Castelino(In Person)

Counsel for Respondents:
Govt. Advocate, Gyan Prakash, Rishad Murtaza

Legislation referred to : Code of Criminal Procedure, 1973 – S. 161; Indian Penal Code, 1860 – S. 364; Constitution of India – Art. 226.

NATURE OF PROCEEDINGS :

Public Interest Litigation filed under Article 226 of the Constitution of India praying for issuance of a writ of mandamus directing the Central Bureau of Investigation (CBI) to investigate the mysterious disappearance of Dr. Rahul K. Sachan, a key prosecution witness in the criminal cases pending against Asumal Harpalani alias Asaram Babu and his son Narayan Sai in the States of Rajasthan and Gujarat, who went missing on 25.11.2015 while under State police protection.

FACTS :

Dr. Rahul K. Sachan (son of Ram Kumar Sachan of Kanpur) was a key prosecution witness in criminal cases pending against Asumal Harpalani alias Asaram Babu and his son Narayan Sai at Jodhpur (Rajasthan) and at Surat and Ahmedabad (Gujarat). He had described himself as the Personal Assistant of Asaram Babu from 2009 to 2013 with personal knowledge of the accused's activities. Apprehending threat to his life, he had filed an affidavit in Writ Petition (Criminal) No. 156 of 2015 before the Supreme Court of India seeking protection. The Supreme Court, vide order dated 14.09.2015, directed the Trial Court to provide adequate protection to witnesses apprehending genuine threats. Pursuant thereto, Dr. Sachan was granted State protection in the form of a police Gunner.

Constable Vijay Bahadur, the regular Gunner assigned to Dr. Sachan, proceeded on leave for one week w.e.f. 21.11.2015, during which Constable Amit Kumar Singh from the Reserve Police Lines was deputed in his place. On 25.11.2015, Constable Amit Kumar Singh, at the request of Dr. Sachan, took him on a motorcycle from his residence at Mari Mata Mandir, Campbell Road, Balaganj, Lucknow to the Kaiserbagh Bus Station, Lucknow at 9.00 a.m. and left him there. Dr. Sachan stated he would return the next day and would telephone. No such call was received and his mobile phone was found switched off thereafter. Despite this, the FIR was lodged only on 20.12.2015 — approximately one month after the disappearance — as Case Crime No. 1071 of 2015 under Section 364 IPC, P.S. Thakurganj, District Lucknow.

The petitioner Bennet Castelino, a practising Advocate and Barrister enrolled with the Bar Council of Maharashtra and Goa, had earlier filed Writ Petition (Criminal) No. 156 of 2015 before the Supreme Court seeking protection for Dr. Sachan and thereafter filed Writ Petition No. 14 of 2016 before the Supreme Court for transfer of investigation to CBI. The Supreme Court, by order dated 04.03.2016, granted liberty to the petitioner to approach the High Court of Allahabad with a similar prayer. The present PIL was accordingly filed.

The case diary was produced before the Court. The call data record of Dr. Sachan's mobile phone, obtained by the then Investigating Officer in December 2015 itself, disclosed that his last location on 25.11.2015 was at Mohalla Mallawan, District Hardoi. Despite this information, the subsequent Investigating Officer who took charge on 09.04.2016 proceeded to investigate at Hardoi only after six months, on 03.06.2016. The Gunners and security personnel provided to Dr. Sachan were not subjected to any meaningful interrogation. The entire investigation was confined to paper formality — trips to New Delhi to a female friend's residence, to Kanpur to his father's residence, and publication of a missing report in newspapers on the basis of a Panchkula ration card. No action was taken against any of the investigating officers.

After the PIL came up before the Court, the State responded by awarding censure entries to the two Gunners (Constable Vijay Bahadur and Constable Amit Kumar Singh) vide orders dated 18.08.2016, constituting a Special Investigation Team (SIT) vide letter dated 21.08.2016 of the Additional Director General of Police (Law & Order), Lucknow, and ordering a preliminary enquiry by the Additional Superintendent of Police (City) (West), Lucknow. The learned Additional Advocate General urged that these steps demonstrated genuine intent to investigate and that the SIT should be permitted to continue. However, the Court noted that all these steps were taken only after and owing to the pendency of the present PIL before the Court.

QUESTIONS OF LAW :

(i) What are the principles governing transfer of investigation from the State Police to the Central Bureau of Investigation (CBI) under the writ jurisdiction of the High Court under Article 226 of the Constitution of India, and whether a last-minute constitution of a Special Investigation Team (SIT) by the State, taken only after the matter comes to court and found to be lacking in credible investigation, would be sufficient to decline such transfer?

(ii) Whether the slipshod, dilatory and non-diligent investigation conducted by the State Police into the mysterious disappearance of a protected prosecution witness in a high-profile criminal case, compounded by delayed FIR registration, non-interrogation of assigned security personnel, and failure to pursue leads from call data records for months, warrants transfer of investigation to the CBI to preserve public confidence in the criminal justice system?

HELD :

(i) **Principles governing transfer of investigation to CBI —** The power of the High Court under Article 226 of the Constitution to direct transfer of a police investigation to the CBI is well-settled. Such transfer is warranted where the investigation conducted by the State Police has been found to be unfair, non-diligent, slipshod or lacking in credibility, and where continued investigation by the State Police would fail to inspire public confidence in the criminal justice system. The power is to be exercised sparingly and with great caution, but it is available where the peculiar facts and circumstances of the case so demand. The nature of the crime, the identity of the missing person as a key prosecution witness in a high-profile criminal case, and the manner in which the investigation has been conducted are all relevant considerations. [Relied upon: Secretary, Minor Irrigation v. Sahngoo Ram Arya, (2002) 5 SCC 521; State of West Bengal v. Committee for Protection of Democratic Rights, (2010) 3 SCC 571; Pooja Pal v. Union of India, (2016) 1 Crimes 626]

(ii) **Failure to investigate diligently — Flawed investigation established from case diary —** A perusal of the case diary placed before the Court prima facie establishes a complete lack of diligence in the investigation. Despite the call data record of the missing person's mobile phone disclosing his last location at District Hardoi on 25.11.2015, the Investigating Officer who took charge on 09.04.2016 visited Hardoi for investigation only on 03.06.2016, i.e., more than six months after the disappearance. The two Constables who

were assigned as Gunners to Dr. Sachan on and immediately before the date of his disappearance were not subjected to any meaningful interrogation. The FIR itself was lodged after a delay of approximately one month. The sum and substance of the investigation is a paper formality. There is not a single piece of credible investigative work disclosed in the case diary that could inspire confidence. The possibility of involvement of police personnel in the disappearance has not been examined at all.

(iii) Last-minute constitution of SIT — Insufficient to decline transfer of investigation — The constitution of a Special Investigation Team (SIT) by the State, and the issuance of censure entries to the two Gunners, almost simultaneously with and after the pendency of the present PIL and the Court's orders, cannot be regarded as a genuine and independent step to remedy the investigation. These steps came too late in the day and do not inspire confidence that the investigation will be conducted fairly and diligently by the State machinery. The request of the learned Additional Advocate General to allow the SIT to continue the investigation is accordingly declined. The principles laid down in all the judgments relied upon by the learned Additional Advocate General are consistent with the approach adopted herein and do not lead to a different conclusion on the peculiar facts of the present case.

(iv) Protected prosecution witness — Disappearance under State guard — Public confidence in justice system — The missing person Dr. Rahul K. Sachan was not an ordinary citizen but a prosecution witness who had specifically apprehended threats to his life, who had approached the Supreme Court of India for protection, and who had thereafter been provided with a State police Gunner. The fact that he went missing precisely during the period of State protection, and that the investigation into his disappearance was thereafter conducted in the slipshod manner disclosed in the case diary, completely undermines public confidence in the criminal justice system. It is imperative in cases of this nature that investigation be entrusted to an independent agency unconnected with the State police whose personnel may themselves be required to be interrogated.

DIRECTIONS :

- (i) The Central Bureau of Investigation (CBI) is directed to take over the investigation of Case Crime No. 1071 of 2015 under Section 364 IPC, P.S. Thakurganj, District Lucknow, forthwith.
- (ii) The State Police is directed to hand over all original records and documents collected during the investigation to the CBI immediately.
- (iii) Sri Rishad Murtaza, Advocate for the CBI, is directed to communicate this order to the CBI and bring it to the notice of the learned Assistant Solicitor General of India for appropriate action.
- (iv) The CBI is expected to conclude the investigation and file its police report expeditiously, preferably within six months from the date of the order.

RESULT :

PIL disposed of with the aforesaid directions. Investigation of Case Crime No. 1071 of 2015 under Section 364 IPC, P.S. Thakurganj, District Lucknow transferred from the State Police to the Central Bureau of Investigation (CBI). Liberty reserved to any aggrieved person to approach this Court in the event further directions are required.

Cases Referred:

Secretary, Minor Irrigation & Rural Engineering Services v. Sahngoo Ram Arya, (2002) 5 SCC 521 (SC)

State of West Bengal v. Committee for Protection of Democratic Rights, West Bengal, (2010) 3 SCC 571 (SC)

Pooja Pal v. Union of India, (2016) 1 Crimes 626 (SC);

Subrata Chattoraj v. Union of India, (2014) 8 SCC 768 (SC)

Sudipta Lenka v. State of Odisha, (2014) 11 SCC 527 (SC)

K. Saravanan Karuppasamy v. State of Tamil Nadu, (2014) 10 SCC 406 (SC)

Bharati Tamang v. Union of India, (2013) 15 SCC 578 (SC)

K.V. Rajendran v. Superintendent of Police, CBCID, (2013) 12 SCC 480 (SC)
Sukiri Vasu v. State of U.P., (2008) 2 SCC 409 (SC)
W.P. No. 18005 of 2016 (PIL) – Rape with Mother and Daughter at NH91 (All HC – DB).

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.
&
Hon'ble Dr. Vijay Laxmi, J.)

1. This P.I.L. was entertained on 6.5.2016 and the following order was passed:-

"Notices on behalf of respondent Nos.1 and 2 have been accepted by learned Government Advocate and for the respondent No.3 notice has been accepted by Mr.Alok Singh, learned Advocate holding brief of Mr.Rishad Murtaza, learned Advocate.

The petitioner has prayed for issuing a mandamus to the Central Bureau of Investigation, New Delhi to investigate the disappearance of Mr.Rahul Sachan, prime prosecution witness in the case of death and assault of Asumal Harpalani aka Asaram Bapu.

Mrs.Ruhi Siddiqui, learned Government Advocate, on the basis of instructions, has submitted that in the matter an First Information Report has been lodged and the matter is under police investigation. She has sought two months time to bring on record the investigation.

Time as prayed for is allowed.

List in the 1st week of August 2016."

2. The matter was again heard on 20.8.2016 when this Court had passed the following order:-

"Heard learned counsel for the petitioner in person and Ms. Bulbul Godiyal, learned Additional Advocate General for the State.

This petition involves the missing of a prosecution witness in one of the most high profile cases where the missing person is none else than one of the prosecution witness who had not only apprehended threats but had also approached the Apex Court seeking an appropriate protection as a witness in Writ Petition (Criminal) No.156 of 2015 that was disposed of by the Apex Court on 14.9.2015.

The said prosecution witness who has been described in the investigation document as Dr. Rahul K. Sachan (described as 'Rahul Sachan' in the petition), and is stated to be the son of Ram Kumar Sachan of Kanpur, unfortunately went missing according to the First Information Report on 25.11.2015.

Prior to this, he had been granted State Protection of a police guard. One Mr. Vijay Bahadur was posted with him. It appears that Vijay Bahadur went on leave for a period of one week on 21.11.2015 and in between Constable Amit Kumar Singh from the Reserve Police Lines was pressed into service for his protection. It was during his protection that it is alleged that Dr. Rahul K. Sachan went missing but the First Information Report was lodged almost after a month on 20.12.2015. The investigation proceeded under one Sub-Inspector Shri Vijay Pandey, P.S. Thakurganj, Lucknow and it is alleged that he had obtained the call details record of the mobile phone of the said Dr. Rahul K. Sachan which indicated his last location on 25.11.2015 at Mohalla Mallawan, District Hardoi. Thereafter, the investigation appears to have proceeded but with a pace that discloses that in spite of this information of his last location at Hardoi, the Investigating Officer who subsequently took charge on 9.4.2016 went to Hardoi for investigating the matter after six months on 3.6.2016. The case diary has been produced before us. Without commenting anything further on the materials so collected during investigation, we are, prima facie, satisfied that this sort of investigation in such a high profile case completely lacks diligence as well as it dilutes the confidence of the public at large in such high profile cases. We are, prima facie, satisfied that the investigation has not been diligently carried out and therefore, this Court may consider grant of relief in the present writ petition for handing over the investigation to the Central Bureau of Investigation.

Shri Rishad Murtaza is present for the respondent no. 3. He may also obtain instructions by Monday, i.e.22.8.2016.

In this matter, the entire case diary and the file produced by the Advocate General are hereby directed to be sealed by the Senior Registrar today itself.

The Bench Secretary shall hand over the said file along with the sealed record to the Senior Registrar and the same shall be produced before us on Monday.

Put up on Monday, i.e.22.8.2016."

3. Arguments were advanced on 22.8.2016 and the Court summoned the case diary that was retained in sealed cover in the Court itself. The same was again perused with the help of the learned Additional Advocate General who also handed down the orders passed by the present Senior Superintendent of Police, Lucknow dated 18.8.2016, whereby censure entries were awarded to Constable Vijay Bahadur and Constable Amit Kumar Singh, the two Constables who were on duty as Gunners for the protection of Dr. Rahul K. Sachan recording that there was a dereliction of duty and negligence on their part. The two orders have been placed before the Court.

4. The Senior Superintendent of Police also handed over a letter dated 21.8.2016 whereby the Senior Superintendent of Police has called upon the Additional Superintendent of Police (City) (West), Lucknow to undertake a preliminary enquiry in the case in question as it appeared that the investigation had not been carried out in depth nor any sufficient interest had been shown in the

investigation indicating negligence and slackness on the part of the Station House Officer or the officials involved in the investigation. The same is also taken on record.

5. The fourth letter placed before the Court dated 21.8.2016 has been issued by the Additional Director General of Police (Law & Order), Lucknow Sri Daljeet Singh Chaudhary calling upon the Inspector General of Police (STF) and the Senior Superintendent of Police (STF), Lucknow to take over the investigation to be conducted by a Special Investigation Team in view of the special circumstances of the case. The Senior Superintendent of Police had also passed the order to that effect constituting a Special Investigation Team (SIT) and a copy of the said letter has also been placed on record.

6. All these letters emanated almost simultaneously after the present petition remained pending before the Court and after the Court had passed the orders quoted here-in-above.

7. The petitioner-Mr.Bennet Castelino while disclosing his credentials has described himself as an Overseas Indian Citizen presently residing at 60, Castlefinn Drive, Auckland, New Zealand 2103 and being a Lawyer practicing at Mumbai has also given his Indian Address as 15, DG Chambers, Nagindas Master Road, Fort, Mumbai - 400 001. He had earlier filed a Writ Petition (Criminal) No. 156 of 2015, Bennet Castelino versus Union of India and others, before the Supreme Court of India for securing adequate protection to the witness Rahul K. Sachan in the criminal case that has given rise to this P.I.L. and the same was disposed of at the instance of the petitioner on 14.9.2015 by the following order:-

"Looking at the peculiar facts of the case, we direct that the Trial Court shall give adequate protection to the witnesses who approach the Trial Court apprehending some threat, if, according to the Trial Court, the threat is genuine.

The Trial Court shall give protection to the witnesses by passing an appropriate order, wherever it is necessary.

With the above directions, the Writ Petition is disposed of."

8. It appears that a Gunner was provided by the State Government thereafter.

9. He filed another petition before the Apex Court being Writ Petition No.14 of 2016 that was taken up on 4.3.2016 submitting that the person for whom the protection had been earlier sought had gone missing and an F.I.R. has been lodged. The petitioner appears to have prayed for transfer of the investigation to the C.B.I. but the writ petition was disposed of by the same Bench that had heard the earlier writ petition on 4.3.2016 by the following judgment giving liberty to the petitioner to file the present writ petition before the High Court:-

"It has been submitted by the petitioner, who appears in person that Rahul Sachan, who was one of the witnesses is now missing. A complaint with regard to the incident has already been lodged in the State of Uttar Pradesh.

In the circumstances, it will be appropriate if the petitioner approaches the High Court of Allahabad by filing a petition with a similar prayer. If such a petition is filed, the High Court is requested to look into it and dispose of the same on merits.

In view of the above, the petitioner seeks permission to withdraw this writ petition so as to approach the High Court of Allahabad.

Permission is granted.

The writ petition is, accordingly, disposed of as withdrawn."

10. The petitioner has described himself as a practicing Advocate and the Member of the Bar Council of Maharashtra and Goa enrolled on 27.2.1985 and also a member of The Institute of Company Secretaries of India as well as a qualified Chartered Secretary holding qualifications in Commerce, Law, Finance and Management. He has also stated that he is a Barrister and Solicitor as well of the High Court of New Zealand with eligibility to practice Law in Australia. Disclosing his financial status, he has stated that he is a Tax Payer Overseas and is also filing Income Tax Returns in India. To explain his bona fides, the petitioner has disclosed his social activities and has stated that he has filed numerous P.I.Ls especially for protecting the rights of Christian beneficiaries and Christian trust properties. Several other pursuits have been disclosed by him indicating that he has no private motive, personal gain or oblique reason for filing this P.I.L.

11. The petitioner has disclosed that since he was keenly following the arrest of one Asumal Harpalani aka Bapu Asaram, he came across Dr. Rahul K. Sachan on whose behalf he filed the earlier writ petition. He also disclosed that he was in constant touch with Dr. Rahul K. Sachan but he lost contact since 21.11.2015. This sudden disappearance and absence of any trace inspite of an F.I.R. having been lodged led to the filing of this P.I.L. for transferring the investigation.

12. The criminal case giving rise to this controversy appears to have its genesis in the trial against Asumal Harpalani aka Asaram Bapu and his son Narayan Sai as well as other associates with regard to which criminal cases are going on in the State of Rajasthan at Jodhpur and in the State of Gujarat at Surat and Ahmedabad. Dr. Rahul K. Sachan is stated to be one of the witnesses. Apprehending threat of his life Dr. Rahul K. Sachan describing himself as the Personal Assistant of Asumal Harpalani aka Asaram Bapu since 2009 to 2013 and having personal knowledge of the activities of the accused, he filed an affidavit to that effect in Criminal Writ Petition No.156 of 2015 that had been earlier filed by the petitioner seeking adequate protection, the order whereof has been extracted here-in-above. A copy of the affidavit of the said Dr. Rahul K. Sachan and also one of Mahender Chawla who is also a prosecution witness in the case registered at Jodhpur alongwith Dr. Rahul K. Sachan is on record of this petition. It is in this background that this prosecution

witness Dr. Rahul K. Sachan who was having the protection of a Gunner from the said police went mysteriously missing and this disappearance is stated to have occurred on 25.11.2015.

13. We had called upon the State to produce the case diary that has been placed before us and we find from the narration in the information registered on 20.12.2015 that Constable Vijay Bahadur who was on duty with Dr. Rahul K. Sachan went on leave for a week w.e.f. 21.11.2015 for seven days that had been sanctioned. During his leave, Constable Amit Kumar Singh was posted in his place as a Gunner with Dr. Rahul K. Sachan. The said Amit Kumar Singh while giving his statement under Section 161 Cr.P.C. during investigation has stated that on 25.11.2015, on the asking of Dr. Rahul K. Sachan, he took him on a motorcycle from his residence at Mari Mata Mandir, Campbell Road, Balaganj, Lucknow at 9 A.M. to the Kaiserbagh Bus Station, Lucknow where he left him. According to Amit Kumar Singh, Dr. Rahul K. Sachan had stated that he is going somewhere and he would be coming the next day whereupon he shall call on phone. However, no such phone call was received on the next day and when the said Constable tried to contact him on his mobile phone the same appeared to be switched off. He then informed the Shadow/Gunner In-charge orally in the Police Lines at Lucknow but he did not remember the day and time about such information. The case diary also discloses that the Original Gunner Sri Vijay Bahadur who had been posted along with Dr. Rahul K. Sachan after returning from a week's leave was informed by Mr. Afzal Hasan Mehandi, Shadow/Gunner In-charge in the Police Lines on 30.11.2015 that Dr. Rahul K. Sachan had gone to some unknown destination who can return back any time, and believing this, the said Constable Vijay Bahadur reached the residence of Dr. Rahul K. Sachan where he did not find him. He tried to contact him on his mobile but the same was switched off. This information was again conveyed to Shadow/Gunner In-charge Mr. Afzal Hasan Mehandi. The date mentioned in the case diary is 1.11.2015 which is being explained by the Additional Advocate General that it may be an error as it can be 1.12.2015. The said Constable Vijay Bahadur was asked by the Shadow/Gunner In-charge that until further orders, he should station himself at the residence of Dr. Rahul K. Sachan. The absence of Dr. Sachan according to Constable Vijay Bahadur was being reportedly given orally but on 17.11.2015 this was done in writing and he was again asked to continue at the residence of Dr. Sachan. The F.I.R. was lodged almost after a month on 20.12.2015 and was registered as Case Crime No.1071 of 2015 under Section 364 I.P.C., P.S. Thakurganj, District Lucknow.

14. The case also reveals that after lodging of the F.I.R., the then Investigating Officer had obtained the call data record of the mobile phone of Dr. Rahul K. Sachan in December itself and his last location according to the said call data on 25.11.2015 was at Hardoi nearby a town of Lucknow. The case diary does not indicate any such effort on the part of the then Investigating Officer, except for the fact that trips were made to New Delhi at the residence of a female friend of the missing person and then also to Kanpur where his father resided.

15. The surprising part is that there is hardly any investigation or interrogation of the two Gunners, the Shadow/Gunner In-charge of the Police Lines or those connected with the security of the missing person in order to have a clue as to why they did not possess any information about his whereabouts after having left Lucknow on 25.11.2015. The case diary does not indicate any

interrogation further worth the name from Constable Amit Kumar Singh who was in his security as a Gunner with Dr. Rahul K. Sachan on the date when he went missing. The Investigating Officer who was then conducting the investigation has maintained the case diary in a manner, which is not proper to be discussed at this stage, except for the fact that some documents were collected and a missing report was published in the newspapers on a ration card of Panchkula in Haryana and about the information at Delhi in Govind Ganj near Kalkaji Mandir, New Delhi where a visit appears to have been made but with no clue in the case diary at all. The subsequent Sub-Inspector who took over the investigation in April, 2016 his memos do not indicate any information worth the name or investigation having been conducted so as to inspire confidence. The sum and substance of the case diary that has been placed before the Court is that a paper formality appears to have been concluded in a crime of this nature.

16. The learned Additional Advocate General has filed an affidavit of Mr. Ram Bahadur Pal, the current Investigating Officer who is a Sub-Inspector at P.S. Thakurganj, District Lucknow wherein it is stated that in January, 2016, the then Investigating Officer had gone to the residence of one Ekta Verma in Delhi and few other persons were also contacted but the gap thereafter in the case diary has nowhere been explained. There is nothing on record to indicate that any serious effort was made at all in this regard.

17. It is in this background that the respondent-State appears to have now tried to give a hope of investigation by constituting a Special Investigation Team (SIT) and giving censure entries to the two Constables who were on duty as Gunners. No explanation was called for from the investigating officers nor any action has been taken against them. The learned Additional Advocate General vehemently urged that serious steps are being taken and there is a genuine effort now to conduct the investigation and therefore, this Court may consider this aspect of the matter as well before directing any change of investigation. The learned Additional Advocate General has placed before the Court the following judgments to urge that applying the principles laid down by the Supreme Court in the said cases, it would be appropriate to allow the Special Investigation Team (SIT) to continue the investigation that is likely to bring about results.

(i) Pooja Pal v. Union of India and others [(2016) 1 Crimes 626 (SC) 45]

(ii) Subrata Chatteraj v. Union of India and others [(2014) 8 SCC 768]

(iii) Sudipta Lenka v. State of Odisha and others [(2014) 11 SCC 527]

(iv) K. Saravanan Karuppasamy and another v. State of Tamil Nadu and others [(2014) 10 SCC 406]

(v) Bharati Tamang v. Union of India and others [(2013) 15 SCC 578]

(vi) K. V. Rajendran v. Superintendent of Police, CBCID, South Zone, Chennai and others [(2013) 12 SCC 480]

(vii) *State of West Bengal and others v. Committee for Protection of Democratic Rights, West Bengal and others* [(2010) 3 SCC 571]

(viii) *Sukiri Vasu v. State of Uttar Pradesh and others* [(2008) 2 SCC 409]

18. Having considered the aforesaid aspects, it is not possible for us to gather as to the circumstances of the missing person conclusively, inasmuch as the missing person Dr. Rahul K. Sachan may have been quite possibly a victim keeping in view the nature of the crime or alternatively he could have gone underground voluntarily which is yet a matter of investigation, but the fact remains that the flaw in the investigation is clearly reflected while interrogating the Gunners and the security personnel who were provided as Guards for the person of Dr. Rahul K. Sachan. To proceed to investigate at Hardoi after six months remains unexplained. It is this surprising part which impels this Court to prima facie believe that the police has failed to carryout the investigation fairly and diligently. No effort worth the name has been made towards the possibility of involvement of the police itself that could have revealed something further. The investigation therefore far from being credible does not inspire confidence. These aspects have been clearly dealt with and the principles on which an investigation can be transferred has also been explained in the decision of ***Secretary, Minor Irrigation & Rural Engineering Services v. Sahngoo Ram Arya and another* [(2002) 5 SCC Page 521]**. It has further been followed in the case of ***State of West Bengal and others v. Committee for Protection of Democratic Rights* [(2010) 3 SCC Page 571]**. The judgments that have been relied on by the learned Additional Advocate General are almost on the same lines, the latest being that of in the case of ***Pooja Pal*** (supra). These aspects were considered by a Division Bench of our Court very lately in an another case of prime importance where the investigation was not found to be fairly going in the right direction in ***Writ Petition No.18005 of 2016 (PIL) in the Matter of Rape with Mother and Daughter at NH91***.

19. The nature of the crime, the mysterious circumstances in which Dr. Rahul K. Sachan has gone missing and the slipshod manner of investigation therefore compel us not to believe the hope expressed for some better investigation by the State which has come too late in the day as indicated above. We, therefore, decline the request of the learned Additional Advocate General to get the investigation carried out by the Special Investigation Team (SIT).

20. Consequently, we direct the Central Bureau of Investigation (CBI) to take over the investigation of Case Crime No.1071 of 2015 under Section 364 IPC, P.S. Thakurganj, District Lucknow forthwith.

21. The case diary that was placed before the Court is being returned to the learned Additional Advocate General and the concerned Police Station is directed to handover the original records/documents relating to the investigation collected uptil now immediately to the Central Bureau of Investigation (CBI), which shall proceed with the investigation.

22. Since Sri Rishad Murtaza, learned Counsel for the CBI has already assisted the Court, we direct him to communicate this order to the CBI immediately for appropriate action and also bring it to the notice of the learned Assistant Solicitor General of India for communicating it to the concerned officials for appropriate action.

23. Since we have issued these directions, we do not find it necessary to keep the matter pending without prejudice to the rights of an aggrieved person to approach this Court in the event any further directions are required in this regard.

24. It is expected that the CBI shall conclude the investigation and file the police report expeditiously, preferably not later than six months from today and if possible earlier.

25. ***Disposed off*** with the said directions.

BEFORE

Misc. Bench No.- 10724 Of 2016

...Respondents

Govt. Advocate.

(ii) Whether the ingredients of Section 363 I.P.C. read with Section 361 I.P.C. and Section 366 I.P.C. are satisfied on the facts and circumstances of the case, particularly when the prosecutrix herself states that she was neither kidnapped nor abducted but had voluntarily accompanied and married the petitioner.

(iii) Whether a girl who has attained the age of discretion (though not yet the age of majority) and who, of her own volition, abandons the guardianship of her parents and joins/marries a boy without any inducement, enticement, coercion or active participation on the part of the boy, can be said to have been 'taken or enticed' within the meaning of Section 361 I.P.C.

(iv) Whether the medical/radiological age (19 years approximately) of the prosecutrix, contradicting the testimonial age relied upon by the prosecution to allege minority, satisfies the bar of age contemplated under Section 361 I.P.C.

(v) Whether, in the facts and circumstances, the impugned F.I.R. was lodged mala fide with intent to wreak vengeance on the petitioners on account of the complainant's personal grudge against the marriage, and whether continuation of proceedings would amount to abuse of process of the Court.

HELD:

(i) Power of High Court to quash criminal proceedings — Parameters — The High Court, in exercise of its extraordinary power under Article 226 of the Constitution of India and inherent powers under Section 482 Cr.P.C., may quash criminal proceedings so as to prevent abuse of the process of the court and to secure the ends of justice. The power, though of wide amplitude, must be exercised with caution, care and circumspection. The court has to be fully satisfied that the material produced by the accused is of sterling and impeccable quality; that such material would rule out and disprove the assertions contained in the charges levelled against the accused; and that the material cannot justifiably be refuted by the prosecution. In such a situation, the judicial conscience of the High Court should persuade it to exercise the power to quash. The High Court while considering quashing has the jurisdiction to consider facts as they emerge from evidences, statements, medical reports, correspondence and other material placed on record, so as to secure substantial justice.

Seven illustrative categories of cases where quashing may be warranted — (1) Allegations in the F.I.R., even if accepted in entirety, do not constitute any offence; (2) Allegations do not disclose a cognizable offence; (3) Uncontroverted allegations and evidence collected do not disclose commission of any offence; (4) Allegations do not constitute a cognizable offence; (5) Allegations are so absurd and improbable that no prudent person can conclude there is sufficient ground to proceed; (6) There is an express legal bar to continuation of proceedings; (7) Criminal proceedings are manifestly mala fide or initiated to wreak vengeance with a view to spite the accused due to private and personal grudge.

Four-step test for quashing — The High Court must determine: (i) whether the material relied upon by the accused is sound, reasonable and indubitable, i.e., of sterling and impeccable quality; (ii) whether such material rules out the factual assertions in the charges; (iii) whether the material has not been or cannot justifiably be refuted by the prosecution/complainant; and (iv) whether proceeding with the trial would result in abuse of process of the court and not serve the ends of justice. If all four steps are answered in the affirmative, the proceedings deserve to be quashed.

(ii) Ingredients of Sections 361, 363 and 366 I.P.C. — Voluntary act of the girl — Age of discretion — Section 361 I.P.C. requires that the accused must have 'taken or enticed' a minor female (below eighteen years of age) out of the keeping of her lawful guardian without the guardian's consent. Where a girl, having attained the age of discretion, voluntarily of her own accord and initiative, without any inducement, enticement, coercion, solicitation or active participation on the part of the accused, abandons her guardian's protection and joins/marries the accused, the ingredient of 'taking or enticing' is not satisfied and no offence under Section 363 I.P.C. is made out. The law does not cast any duty upon the accused to take the girl back to her father's house or to prevent her from accompanying him. Where the girl herself categorically deposes — including in her statement recorded under Section 164 Cr.P.C. — that she was neither kidnapped nor abducted but had willingly accompanied and married the accused, the element of coercion and enticement by the accused is absent and the ingredients of Sections 363 and 366 I.P.C. remain unsatisfied. Substantial justice cannot be sacrificed at the altar of technical interpretation.

A girl who has attained the age of discretion and is on the verge of attaining majority, capable of knowing what is good or bad for her, cannot be said to have been induced, particularly when the case of the girl

herself is that on her own initiative and by her voluntary act she went with the boy and married him. In such circumstances, the desire and welfare of the girl are required to be taken into account and the ingredients of Section 361 I.P.C. are to be considered accordingly, not in a mechanical or technical manner. So as to bring a case within Section 361 I.P.C. in such circumstances, some kind of inducement held out by the accused or active participation by him in the formation of the intention of the minor to leave her guardian's protection, is required to be established.

(iii) Effect of medical/radiological age contradicting testimonial age — Where the medical/radiological age of the prosecutrix is found to be approximately 19 years by the investigating agency itself — a fact not disputed by the prosecution — and such age contradicts the testimonial records relied upon to allege minority, the prosecution cannot maintain that the prosecutrix was a minor for the purpose of attracting the provisions of Section 361 I.P.C. The prosecutrix having been found by the medical examination to have attained majority, the ingredient of minority required under Section 361 I.P.C. is not satisfied, and therefore the offence under Section 363 I.P.C. is not made out.

(iv) Mala fide initiation of proceedings — Abuse of process — Where it is evident from the facts and circumstances that the impugned criminal proceedings have been initiated not on account of any bona fide grievance but solely because the complainant did not accept the marriage of choice of his daughter with the petitioner, and where continuance of the proceedings would disrupt the matrimonial life of the prosecutrix (who herself has not been kidnapped), the proceedings are manifestly mala fide and amount to an abuse of the process of the court and of the law. Such prosecution, if allowed to continue, would abrogate the constitutional right of the petitioners to marry as per their discretion, particularly when there is no evidence that the marriage is void. In such circumstances, the writ court, being a court of equity, must take into consideration all relevant factors to deliver substantial justice and is persuaded to quash the impugned proceedings. Continuance of trial in such circumstances would be an exercise in futility, as the victim/prosecutrix herself — who is the most material witness — would not support the prosecution case, resulting inevitably in acquittal.

The present case fell within Sub-Para 3 and Sub-Para 7 of Para 108 of *Bhajan Lal's* case (supra) — the uncontroverted evidence collected during investigation did not disclose commission of the alleged offences, and the proceedings were manifestly mala fide, being actuated by personal grudge.

RESULT:

Writ petition allowed. First Information Report dated 28.3.2016 bearing Case Crime No. 60 of 2016 under Sections 363 and 366 I.P.C., Police Station Mankapur, District Gonda, and all consequent proceedings thereon, hereby quashed. Copy of the order directed to be forwarded to the Superintendent of Police, Gonda and the concerned Magistrate.

Cases Referred:

State of Haryana v. Ch. Bhajan Lal, AIR 1992 SC 604; Rajiv Thapar v. Madan Lal Kapoor, (2013) 3 SCC 330.

S. Varadarajan v. State of Madras, (1965) 1 SCR 243; Shaheen Parveen v. State of U.P., Writ Petition No. 3519 (M/B) of 2015 (Allahabad High Court, decided 23.7.2015)

(Delivered by Hon'ble Ajai Lamba, J.

&

Hon'ble Dr. Vijay Laxmi, J.)

1. The petition seeks issuance of a writ in the nature of certiorari quashing First Information Report, lodged as crime no. 60 of 2016 under Sections 363, 366 I.P.C., police station Mankapur, district Gonda.

2. Order dated 16.5.2016 notices the gist of the issue raised by the petitioners. The order reads as under :-

"1. This petition seeks issuance of a writ in the nature of certiorari quashing Case Crime No.60/2016 under Sections 363, 366 I.P.C., P.S. Mankapur, district Gonda (Annexure-1).

2. Learned counsel appearing for the petitioners has argued that petitioner No.2 willingly got married to petitioner No.1. Evidence of marriage has been placed on record as Annexure-2. The petitioner No.2 has not been kidnapped. Offence has not been committed. Respondent No.4, however, has not accepted the marriage of the petitioners, therefore, impugned criminal proceedings have been initiated in abuse of process of the law and process of the Court.

3. Issue notice to respondent No.4, returnable on 21.7.2016.

4. Till the next date of listing, petitioners shall not be taken in custody. Petitioners are directed to join investigation.

5. The Investigating Officer is directed to ensure that statement of petitioner No.2 is recorded under Section 164 CrPC and counter affidavit is filed.

6. List on 21.7.2016."

3. Short counter affidavit has been filed on behalf of the State in Court, which is taken on record.

4. Sri Dinesh Kumar Shukla, Advocate has put in appearance for respondent no. 4 and has filed his Power of Attorney on behalf of the complainant, which is taken on record.

5. Learned counsel for the complainant has opposed the petition on the ground that the petitioner no. 2 is a minor and therefore offence under Section 363 I.P.C. has been committed. It has been pleaded that the petition is liable to be dismissed.

6. An affidavit has been filed on behalf of the investigating agency/prosecution bringing on record the facts unearthed in the course of investigation viz. Statement of the prosecutrix under Section 164 CrPC (Annexure SCA-1), and medical report of the prosecutrix (Annexure SCA-2). The case of the prosecution as pleaded is that offence has been committed because the prosecutrix was a minor on the date of the incident, as per her testimonials. It is, however, the admitted case of the prosecution that medical age of the prosecutrix is nineteen years (approx.)

7. Learned counsel for the petitioners, however, contends that considering the radiological age (19 years) of the victim of offence/petitioner no. 2, it appears that petitioner 2 has attained the age of majority. The petitioner no. 2 in her statement recorded under Section 164 Cr.P.C. has made it evident that she has not been kidnapped. Under the circumstances, the case of the petitioners is

covered by judgment dated 23.7.2015, rendered by a Division Bench of this Court, of which one of us (Ajai Lamba, J) was a member in **Writ Petition No.3519(M/B) of 2015 Shaheen Parveen and another versus State of U.P. and others.**

8. Before advertng to the facts and circumstances of the case to consider whether the impugned proceedings are liable to be quashed or not, we would like to refer to the law laid down by the Hon'ble Supreme Court of India. Hon'ble Supreme Court of India in **State of Haryana and others versus Ch. Bhajan Lal and others** AIR 1992 SC 604 has laid down certain conditions that may be considered by the Court for quashing criminal proceedings. The following has been held in Para 108 :

"108. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such powers should be exercised.

1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

4. Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

6. *Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.*

7. *Where a criminal proceeding is manifestly attended with malafide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.*

(Emphasised by us)

9. We would like to refer to another judgment rendered by Hon'ble Supreme Court of India on the issue of quashing of criminal proceedings viz. **Rajiv Thapar and others versus Madan Lal Kapoor** (2013)3 SCC 330. Shorn of the unnecessary details, the following are the facts and circumstances considered by the Hon'ble Court while allowing the appeal and setting aside the criminal proceedings pending against the accused at the stage of framing of charge :-

(a) One Dr. Monica Thapar married to Rajiv Thapar fell ill and was admitted in a hospital. Dr. Monica Thapar was diagnosed with a hole in her heart. She suffered a massive heart attack which proved fatal. Madan Lal Kapoor (deceased's father) filed a complaint and insisted that the deceased had been poisoned. Based on the complaint, a medical board was constituted which opined that the death of Dr. Monica Thapar was due to cardiac de-compensation. Madan Lal Kapoor, however, persisted with the allegation that Mrs. Monica had died under mysterious circumstances, within one year of her marriage and had been mentally and physically tortured on account of demand for dowry which had led to her illness and in that condition, she had been administered some poisonous substance. On the other hand, the post mortem report and forensic laboratory report indicated the death to be on account of natural causes/natural death.

(b) Madan Lal Kapoor filed a number of complaints on the basis of suspicion. Since the complaints did not fetch any fruitful result, he filed a criminal complaint before Metropolitan Magistrate, Delhi with the allegation of unnatural death of Dr. Monica Thapar by poisoning. It appears that the complainant himself was uncertain about the manner in which his daughter had died, i.e. by poisoning or by strangulation.

(c) Based on the statements given in prosecution of the criminal complaint by Madan Lal Kapoor, the complainant and his son Ravi Kapoor, the Metropolitan Magistrate, Delhi summoned the accused. The Metropolitan Magistrate, based on the evidence, formulated an opinion that there was sufficient material to proceed against the accused under Sections 498-A, 406, 304-B read with Section 120-B I.P.C. The case was committed to the Court of Sessions.

(d) Finally, after the order of summoning had been challenged in the High Court and a bout of litigation, the matter was considered by the Court of Sessions. The Addl. Sessions Judge found that provisions of Section 202 CrPC had not been fully complied with and some

evidences had not been brought on record, in so much as the post mortem report, inquest report and some correspondence were not available for consideration of the Court. The Addl. Sessions Judge summoned the Doctors who were members of the Medical Board that had conducted post mortem examination and sought clarification in regard to allegations of strangulation. The Addl. Sessions Judge, Delhi heard arguments on charge and on evaluation of the complaint and various evidences concluded that no prima facie case was made out against the accused, either under Section 304-B I.P.C. or under Section 498-A I.P.C. Accordingly, the accused were discharged.

(e) Dissatisfied with the order of discharge, Madan Lal Kapoor filed criminal revision petition before the High Court. The High Court of Judicature at Delhi set aside the order of discharge passed by the Addl. Sessions Judge dated 8.5.2008. Order dated 8.5.2008 was challenged before the Hon'ble Supreme Court of India by the accused.

10. The above noted skeleton of facts were considered by the Hon'ble Supreme Court of India in their minutest detail in reference to the evidences, documents and statements brought on record, not only in the Court of Additional Sessions Judge who passed the order of discharge, but also the Metropolitan Magistrate. Hon'ble Supreme Court of India set aside the order passed by the High Court of Judicature at Delhi. Criminal proceedings against the accused were accordingly set aside and the appeal was allowed. The following has been held by the Hon'ble Supreme Court of India in the relevant portion of the judgment :

*"29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 of the Cr.P.C., if it chooses to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 of the Cr.P.C., at the stages referred to hereinabove, would have far reaching consequences, inasmuch as, it would negate the prosecutions/ complainants case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. **To invoke its inherent jurisdiction under Section 482 of the Cr.P.C. the High Court has to be fully satisfied, that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such, as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such, as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section***

482 of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.

30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashing, raised by an accused by invoking the power vested in the High Court under Section 482 of the Cr.P.C.:-

(i) Step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?

(ii) Step two, whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false.

(iii) Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/ complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/complainant?

(iv) Step four, whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal proceedings, in exercise of power vested in it under Section 482 of the Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as, proceedings arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused."

(Emphasised by us)

X X X X X

38. We are persuaded to conclude from the facts and circumstances of the case exhaustively discussed in the foregoing paragraphs, that all the steps delineated in the paragraph 23 above, can be answered in the affirmative, on the basis of the material relied by the accused, more particularly, the post-mortem examination report dated 28.9.1992 conducted by a Medical Board comprising of four doctors, whose integrity has not been questioned by the respondent-complainant; the chemical analysis findings contained in the Central Forensic Science Laboratorys report dated 9.2.1993 which has not been disputed by the respondent-complainant; the inquest report of the SDM, Delhi, dated 6.7.1993, findings whereof have been painstakingly recorded by involving the respondent-complainant; the letter of Rajiv Kapoor (the brother of the deceased) dated 22.9.1992 addressed to Dr. Monica Thapar just four days before her death, the

contents and authenticity whereof are not subject matter of challenge at the hands of the respondent-complainant; and finally, the telephone bills produced by the appellants-accused substantiating consistent and regular contact between the rival families, which have not been questioned. We, therefore, have no hesitation in concluding, that the judicial conscience of the High Court ought to have persuaded it, on the basis of the material examined by it, to quash the criminal proceedings initiated against the appellants-accused. We, therefore, hereby quash the aforesaid proceedings.

39. *Despite the conclusion recorded hereinabove, we are of the view, that in the facts and circumstances of this case, there should have been no difficulty whatsoever for the High Court to have exercised its judicial conscience for invoking the power vested in it under Section 482 of the Cr.P.C. From the narration of the facts recorded above, it emerges, that even though the respondent-complainant Madan Lal Kapoor, in his complaint dated 6.7.1993, adopted a clear and categorical stance, that his daughter Dr. Monica Thapar had been poisoned to death, before the Additional Sessions Judge, Delhi, the respondent-complainant ventured to suggest, that the appellants-accused had strangled her. The Additional Sessions Judge, Delhi, summoned two of the doctors who were members of the Medical Board which had conducted the post-mortem examination, and sought clarifications from them. He also recorded the statement of one of the said doctors. The Additional Sessions Judge, thereupon, ruled out the plea of strangulation. When the respondent-complainant himself was uncertain about the manner in which his daughter had allegedly died, the High Court should have viewed the matter keeping in mind the likelihood of the hurt caused to a father who had lost his daughter within one year of her marriage. The matter needed to have been evaluated, on the basis of one of the parameters laid down in State of Haryana & Ors. Vs. Bhajan Lal & Ors., 1992 Supp. (1) SCC 335, namely, whether the criminal proceedings initiated by Madan Lal Kapoor (the respondent-complainant) were actuated by malice and ulterior motive for wreaking vengeance on the accused with a view to spite him due to some private/personal grudge.*

40. *There is yet another reason emerging from the facts of the case which needed to be kept in mind. Madan Lal Kapoor (the respondent-complainant) had continued to represent before the SDM, Delhi, that he would produce the mother of the deceased, who knew the facts best of all. Despite that, the mother of the deceased did not appear in the inquest proceedings to record her statement, even though a number of opportunities were afforded to the respondent-complainant to produce her. The permissible inference is that he was himself not privy to the facts. The fact that the mother of the deceased had not appeared to record a statement against the appellants-accused has to have some reason/justification. Would a mother who believes that her daughter had been poisoned/strangled, restrain herself from recording her statement, despite the persuasion of her husband? Probably not. The instant factual position has been recorded hereinabove, not for the sake of determination of the present controversy. In a factual situation not as clear as the one in hand, facts such as these, could be taken into consideration by a High Court for recording its satisfaction, on the parameters formulated above.*

41. For the reasons recorded hereinabove, criminal proceedings against the appellants-accused are hereby set aside. The order of the High Court is accordingly also set aside, but on grounds different from those taken into consideration by the High Court. The instant appeal, accordingly succeeds."

(Emphasised by us)

11. On consideration of the law laid down by the Hon'ble Supreme Court of India in Rajiv Thapar's case (supra), it becomes clear that to invoke jurisdiction for quashing criminal proceedings, the High Court has to be fully satisfied that the material produced by the accused is such, that would lead to the conclusion that his /their defence is based on sound, reasonable and indisputable material; the material produced is such, as would rule out and disprove the assertions contained in the charges levelled against the accused; and the material produced is such, as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this, the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power to quash such criminal proceedings, for that would prevent abuse of process of the Court and secure the ends of justice.

12. Hon'ble Supreme Court of India on the basis of above given parameters delineated certain steps to determine the veracity of a prayer for quashing, raised by an accused by invoking the power vested in the High Court to quash criminal proceedings. The steps are contained in the extracted portion of the judgment herein-above and need not be repeated.

13. Perusal of the judgment also establishes that the High Court while considering quashing of proceedings has the jurisdiction to consider the facts and circumstances as they emanate from the evidences, material, the statements, medical reports, correspondence between the parties etc. The purpose appears to be to secure ends of justice and prevent abuse of process of the Court. Spirit of the judgment is that High Court should consider whether judicial conscience of the High Court is persuaded by the material to consider quashing of the criminal proceedings.

14. In Bhajan Lal's case (supra), seven categories of cases have been detailed. In case an impugned proceeding falls under any of the categories (which though are not exhaustive), the Court can consider quashing of the impugned criminal proceedings.

15. From the law extracted and discussed above, it follows that the petitioner accused so as to seek quashing of criminal proceedings can rely on the defence available with him. The material relied upon by the accused is required to be of sound, reasonable and indisputable quality. The material should be such as to rule out/ disprove the assertions contained in the charges/ accusations

levelled against the accused. Further the material should be such which cannot justifiably be refuted by the prosecution/complainant.

16. It has been held that exercise of such power, besides doing justice to the accused, would save precious Court time because continuance of trial would not conclude in the conviction of the accused.

17. The criminal proceedings are rendered liable for quashing also if (a) the allegations, even if taken at their face value and accepted in entirety, do not prima facie constitute any offence; (b) where the allegations in impugned proceedings do not disclose a cognizable offence; (c) where uncontroverted allegations and evidence collected in support of the same do not disclose commission of an offence; (d) where the allegations made in the impugned proceedings are so absurd and improbable on the basis of which no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused; (e) where there is an express legal bar engrafted in any provision in the Code of Criminal Procedure or in the concerned Act (under which criminal proceeding has been instituted) to the institution and continuance of the proceedings; and (f) where a criminal proceeding has been initiated for mala fide reasons with ulterior motive for wreaking vengeance.

18. The criminal proceedings, in the considered opinion of this Court, also deserve to be quashed in case on consideration of material made available to the Court establishes that ingredients of the alleged offence (committed by the accused) are not satisfied. Such material may have been produced by the petitioner accused or might come through investigation in relevant aspects of the case.

19. The ingredients of offence under Sections 363, 366 I.P.C., in context of the relevant evidences, which are somewhat similar to the present case have been considered by this Court in Shaheen Parveen's case (supra). The following has been held in relevant portion of the judgment :

"7. Section 363 of the Indian Penal Code inheres that whoever kidnaps any person from lawful guardianship shall be punished in terms of sentence provided in the provision.

8. "Kidnapping from lawful guardianship" has been defined under Section 361 of the Indian Penal Code. The provision when extracted reads as under:-

*"Whoever takes or entices any minor under *[sixteen] years of age if a male, or under **[eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.*

Explanation: - The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception: - This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose."

9. Section 366 of the Indian Penal Code inheres that whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, shall be punished with a sentence, as provided in the provision.

10. At the time of considering whether on admitting the allegations made in the F.I.R., offence has been committed or not, the ingredients of the offence are required to be considered, in context of the evidence collected during the course of investigation.

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16. If the statement of the prosecutrix, above noted, is taken into account, it becomes evident that ingredients of the offence under Sections 363/366 of the Indian Penal Code in regard to coercion, kidnapping or abduction allegedly committed by Sarfaraj, are not satisfied. The provisions of Section 363 of the Indian Penal Code are required to be considered in context of provisions of Section 361 of the Indian Penal Code. So as to satisfy the ingredients of Section 361 of the Indian Penal Code, it has to be established by the prosecuting agency that the accused/sarfaraj took or enticed the prosecutrix out of the keeping of the lawful guardian of the prosecutrix, without the consent of the guardian/respondent no. 4. In the case in hand, it is the case of the prosecutrix herself that she of her free will went with Sarfaraj, lived with him, wants to live with him and is expecting his child. Element of coercion and enticement by Sarfaraj is absent, although consent of the guardian had not been taken.

17. The writ court, being a court of equity, must take into consideration all relevant factors brought before it to deliver substantial justice. Equity justifies bending the rules, where fair play is not violated, with a view to promote substantial justice. A writ court cannot contemplate any limitation on its power to deliver substantial justice. It has to be ensured that a consumer of justice gets complete justice, instead of going into the nicety of law. Under the circumstances, the court cannot be a mere onlooker if injustice is likely to be caused.

18. Petitioner No.1 the victim/prosecutrix would be the best witness, rather the only witness of commission of offence under Sections 363/366 I.P.C. Surely, the victim will not support the prosecution case, as has been made evident by her in her statement, recorded in the course of investigation under Section 164 Cr.P.C., and therefore the trial would result in acquittal. During course of trial, considerable number of man hours would be wasted in prosecution/defending and judging the case. No useful purpose would be served and the entire exercise of trial would be in futility because the victim has declared that she was not victimised or kidnapped.

19. *The facts that have emerged from the record make it evident that the impugned criminal proceedings have been initiated because mother of the Prosecutrix/victim (respondent no.-4) has not accepted the marriage of her daughter with petitioner No.2.*

20. *In case, despite the evidence that has come on record, as noted above, proceedings are not quashed, petitioner no.-2 would be required to face criminal charges and undergo the agony of a trial.*

21. *We have also taken into account the fact that in case the petitioner No.2 is allowed to be prosecuted, the matrimonial life of petitioner No.1/the alleged victim would be disrupted. Her husband would be incarcerated and there would be no one to take care of her child, who is yet-to-be-born.*

22. *If a minor, of her own, abandons the guardianship of her parents and joins a boy without any role having been played by the boy in her abandoning the guardianship of her parents and without her having been subjected to any kind of pressure, inducement, etc and without any offer or promise from the accused, no offence punishable under Section 363 I.P.C. will be made out when the girl is aged more than 17 years and is mature enough to understand what she is doing. Of course, if the accused induces or allures the girl and that influences the minor in leaving her guardian's custody and the keeping and going with the accused, then it would be difficult for the Court to accept that minor had voluntarily come to the accused. In case the victim/ prosecutrix willingly, of her own accord, accompanies the boy, the law does not cast a duty on the boy of taking her back to her father's house or even of telling her not to accompany him.*

23. *A girl who has attained the age of discretion and was on the verge of attaining majority and is capable of knowing what was good and what was bad for her, cannot be said to be a victim of inducement, particularly when the case of the victim/girl herself is that it was on her initiative and on account of her voluntary act that she had gone with the boy and got married to him. In such circumstances, desire of the girl/victim is required to be seen. Ingredients of Section 361 I.P.C. are required to be considered accordingly, and not in mechanical or technical interpretation.*

24. *Ingredients of Section 361 I.P.C. cannot be said to be satisfied in a case where the minor having attained age of discretion, alleged to have been taken by the accused person, left her guardian's protection knowingly (having capacity to know the full import of what she was doing) and voluntarily joins the accused person. In such a case, it cannot be said that the victim had been taken away from the keeping of her lawful guardian.*

25. *So as to show an act of criminality on the part of the accused, some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian, is required to be shown. Conclusion might be different in case evidence is collected by the investigating agency to establish that though immediately prior to the minor leaving the guardian's protection, no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. (The Court in above regards takes a cue from the judgment rendered by Hon'ble Supreme Court of India reported in (1965)1 SCR 243 S. Varadarajan versus State of Madras).*

26. When the above noted situation is considered in context of the facts and circumstances of the present case, it would become evident that the victim (petitioner No.1) was a few months short of attaining age of 18 years. The said petitioner had attained age of discretion, however, not age of majority. Petitioner No.1, the victim in her statement recorded under Section 164 CrPC has clearly demonstrated that it was she who went of her free will and accord on 10.2.2014 with Mohd. Sarfaraj, without any coercion, and stayed with him, and got married to him willingly. It is a consensual act on the part of petitioner No.1 all through. Such clear stand of the victim makes it evident that Mohd. Sarfaraj respondent No.2 cannot be attributed with coercing petitioner No.1, inducing petitioner No.1 or kidnapping or abducting her in commission of offence, as alleged. Surely, a girl who has attained an age more than 17 years and who is already carrying pregnancy cannot be stated to have not attained age of discretion. In such circumstances, a technicality in law would not be attracted. The Court has not been shown any material which would indicate coercion, inducement or forceful act on the part of Sarfaraj (petitioner No.2) so as to conclude that offence has been committed by him.

27. The writ Court considering totality of fact and circumstances, cannot ignore or disregard the welfare of the petitioners, particularly when the exercise of trial is going to be in futility, as observed hereinabove.

28. In view of the facts and circumstances of the case noted above, the Court is convinced that the impugned proceedings have been initiated in abuse of process of the Court and process of the law. A personal grudge against marriage of choice of the daughter is being settled by virtue of initiating impugned criminal proceedings, which would not be permissible in law. Such prosecution would abrogate constitutional right vested in the petitioners to get married as per their discretion, particularly when there is no evidence to indicate that the marriage is void.

29. The stand of the Prosecuting Agency that the victim was a few months below age of majority when she joined the company of the accused/petitioner No.2, and therefore offence has been committed, cannot be accepted if ground reality is taken into account. It has come on record that the prosecutrix is an expecting mother and is carrying a pregnancy of 31 weeks. Coupled with this fact is the statement of the prosecutrix wherein she has said that she was neither kidnapped nor abducted, rather has been living with petitioner No.2 as his wife. It is the prosecutrix who went in the company of the accused, willingly, knowingly, and rather than the accused taking the prosecutrix out of the custody of the lawful guardian; the victim herself had eloped with petitioner No.2. In the considered opinion of the Court, substantial justice cannot be sacrificed at the altar of technicality, as is being concluded by the Investigating Agency.

30. In view of above, petitioner No.2 cannot be said to have committed offence either under Section 363 I.P.C. read with Section 361 I.P.C. or under Section 366 I.P.C."

20. We have considered the facts and circumstances of this case in context of the evidences collected in the course of the investigation in the light of the judgments rendered by the Hon'ble Supreme Court of India and this Court, portions from which have been extracted above.

21. Perusal of the document, annexure S.C.A. 1 i.e. statement of the victim of offence recorded under Section 164 Cr.P.C. shows that she has shown herself as 19 years of age. The victim of offence/petitioner no. 2 has given statement to the effect that she was given beatings by her father. She was forced to leave education. She also stated that she was given beatings as she was in love with Vishal. It has further been clarified that petitioner no. 2/the prosecutrix on 20th April, 2016 got married to Vishal and wants to live with Vishal. Petitioner no. 2 has further stated that she apprehends danger to her life at the hands of her parents.

22. Annexure SCA 2 is medical examination report of petitioner no. 2, according to which, age of petitioner no. 2 has been found to be 19 years.

23. When facts and circumstances of this case are considered in context of the law laid down by the Hon'ble Supreme Court of India in Bhajan Lal's case (supra), portion of which has been extracted above, it becomes evident that the case of the petitioners falls under Sub Para 3 and Sub Para 7 of Para 108 extracted above and emphasised.

24. The investigating agency has already collected evidence in context of the most material witness/victim of offence, i.e. petitioner No.2 by way of her statement recorded under Section 164 CrPC and her medical examination. Petitioner No.2 has been found to have attained the age of majority, therefore, it is evident that ingredients of Section 363 I.P.C. are not satisfied, as discussed in detail in Shaheen Parveen's case (supra). Petitioner No.2 has given her statement under Section 164 CrPC to the effect that she has not been kidnapped. Under such circumstances, it becomes evident that Section 366 I.P.C. is not attracted to the facts of this case because ingredients of the said provision are also not satisfied.

25. We have taken into consideration the fact that petitioner No.2, the kidnappee has approached this Court to say that she had not been kidnapped; rather is married to petitioner No.1. Statement in the same terms has been given by the petitioner No.2 in the course of investigation. Under such circumstances, it would be absurd to conclude that petitioner No.2 had been kidnapped and offence in her context has been committed. In such circumstances, continuance of proceedings shall result in abuse of process of the Court and quashing of the proceedings shall rather secure the ends of justice.

26. The facts and circumstances of the case demonstrate that respondent No.4 did not accept the marriage of the petitioners, therefore, in malicious action so as to wreak vengeance on the accused initiated impugned criminal proceedings in abuse of process of the law and abuse of process of the Court. In such circumstances also, the impugned proceedings are liable to be quashed.

27. In view of the above, the writ petition is allowed. First Information report dated 28.3.2016, bearing case crime no. 60 of 2016 under Sections 363, 366 I.P.C., police station Mankapur, district Gonda and consequent proceedings are hereby quashed.

28. Let copy of this order be forwarded to Superintendent of Police, Gonda and the concerned Magistrate, by Senior Registrar of this Court.

(2016) 8 ILRA 619
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.08.2016

BEFORE

THE HON'BLE PANKAJ MITHAL, J.

S.C.C. Revision No.- 278 Of 2016

Shri Shobhit Nigam

...Revisionist

Versus

Smt. Batulan & Anr.

...Opposite Parties

Counsel for Revisionist:

Arvind Srivastava

Counsel for Opposite Parties:

Pushkar Srivasatava, Arvind Srivastava

Legislation referred to : Provincial Small Cause Courts Act, 1887 – Ss. 15, 15(2) (proviso), Second Schedule; U.P. Civil Laws (Amendment) Act, 1972; U.P. Civil Laws (Amendment) Act, 1991; U.P. Civil Laws (Amendment) Act, 2015 (w.e.f. 07.12.2015); Bengal, Agra and Assam Civil Courts Act, 1887 – Ss. 17, 25, 25(1), 25(2); Constitution of India – Arts. 226, 227; High Court Notification dated 08.02.1991; High Court Administrative Committee Resolution dated 20.05.1994.

NATURE OF PROCEEDINGS :

Civil Revision filed under Section 25 of the Provincial Small Cause Courts Act, 1887 challenging the judgment and order dated 24.05.2016 passed by the Additional District Judge in SSC Suit No. 16 of 2011 (Smt. Batulan v. Ayub Khan and another) — a lessor-lessee suit for rent and eviction — on the ground that by virtue of the U.P. Civil Laws (Amendment) Act, 2015 (w.e.f. 07.12.2015), the Additional District Judge had ceased to have pecuniary jurisdiction to decide the said suit, which fell within the enhanced jurisdiction of the Small Causes Court presided over by the Civil Judge, Senior Division.

LEGISLATIVE BACKGROUND :

The Provincial Small Cause Courts Act, 1887, as applicable to the State of Uttar Pradesh, classifies suits cognizable by the Court of Small Causes into two broad categories: (i) all civil suits up to a specified pecuniary value; and (ii) suits by the lessor for eviction of the lessee from a building after determination of lease and for arrears of rent. The pecuniary jurisdiction of the Small Causes Court over lessor-lessee suits has been enhanced progressively by successive U.P. amendment acts, as follows:

Prior to 15.01.1991 : Lessor-lessee suits (rent/eviction) up to Rs. 5,000/- — cognizable by Small Causes Court [U.P. Civil Laws (Amendment) Act, 1972].

W.e.f. 15.01.1991 : Enhanced to Rs. 25,000/- [U.P. Civil Laws (Amendment) Act, 1991]. High Court Notification dated 08.02.1991 and Administrative Committee Resolution dated 20.05.1994 vested jurisdiction upon the senior most Civil Judge, Senior Division of each district as the Small Causes Court for such suits up to Rs. 25,000/-; suits above Rs. 25,000/- were triable by the District Judge/Additional District Judge.

W.e.f. 07.12.2015 : Further enhanced to Rs. 1,00,000/- [U.P. Civil Laws (Amendment) Act, 2015 amending proviso to S. 15(2) of the Act]. Consequently, lessor-lessee suits for rent and eviction from a building after determination of lease up to Rs. 1,00,000/- became cognizable by the Small Causes Court

presided over by Civil Judge, Senior Division; suits above Rs. 1,00,000/- remain triable by the District Judge/Additional District Judge.

The Bengal, Agra and Assam Civil Courts Act, 1887 (as applicable to U.P.) — Section 25(1) empowers the High Court to invest Civil Judges (Senior Division and Junior Division) with Small Causes jurisdiction up to a specified value; Section 25(2) empowers the High Court to confer upon District Judges and Additional District Judges Small Causes jurisdiction for all suits irrespective of valuation in lessor-lessee matters. Section 17 of the said Act provides that where any civil court has ceased to have jurisdiction with respect to any case, the matter may be heard in the court to which the business of the former court has been transferred.

FACTS :

The suit (SSC Suit No. 16 of 2011) was instituted by the lessor against the lessee for rent and eviction from a building after determination of lease, under proviso to Section 15(2) of the Provincial Small Cause Courts Act, 1887. The admitted valuation of the suit is Rs. 44,000/-. At the time of its institution, the suit was rightly instituted before the District Judge/Additional District Judge functioning as Small Causes Court, since the civil jurisdiction of the Small Causes Court (presided over by the Civil Judge, Senior Division) extended only to suits up to Rs. 25,000/-.

On 07.12.2015, the U.P. Civil Laws (Amendment) Act, 2015 came into force, enhancing the pecuniary jurisdiction of the Small Causes Court for lessor-lessee suits from Rs. 25,000/- to Rs. 1,00,000/-. Consequently, a suit valued at Rs. 44,000/- became cognizable by the Small Causes Court presided over by the Civil Judge, Senior Division, and ceased to be within the jurisdiction of the District Judge/Additional District Judge.

Despite this change in jurisdiction, the Additional District Judge proceeded to decide SSC Suit No. 16 of 2011 on 24.05.2016 — i.e., more than five months after the amending Act came into force — and decreed the suit. An objection to jurisdiction was raised before the Additional District Judge but was brushed aside. The present revision was filed challenging the judgment and order as being without jurisdiction.

QUESTIONS OF LAW :

(i) Whether the U.P. Civil Laws (Amendment) Act, 2015 enhancing the pecuniary jurisdiction of the Small Causes Court over lessor-lessee suits (rent and eviction) from Rs. 25,000/- to Rs. 1,00,000/- under the proviso to Section 15(2) of the Provincial Small Cause Courts Act, 1887 applies only to suits instituted after 07.12.2015, or whether it also governs suits already instituted and pending before that date?

(ii) Whether the Statement of Objects and Reasons of the U.P. Civil Laws (Amendment) Act, 2015 — which uses the word 'institution' — can be used to restrict the plain and unambiguous language of the amended Section 15(2) so as to exclude pending suits from the operation of the amendment?

(iii) Whether the Additional District Judge, having ceased to have pecuniary jurisdiction over a pending lessor-lessee suit valued at Rs. 44,000/- by virtue of the U.P. Civil Laws (Amendment) Act, 2015 w.e.f. 07.12.2015, acted illegally in proceeding to decide and decree such suit after the said date?

HELD :

(i) **Plain language of amended S. 15(2) — Golden rule of statutory interpretation** — Where the language of a statute is plain, clear and unambiguous, it must be given its literal meaning and no other construction is permissible. The U.P. Civil Laws (Amendment) Act, 2015 amends the proviso to Section 15(2) of the Provincial Small Cause Courts Act, 1887 (as applicable to U.P.) in unmistakable terms, substituting the words 'twenty-five thousand rupees' with 'one lakh rupees' with effect from 07.12.2015. The provision thereby enacts that all lessor-lessee suits for rent and eviction from a building after determination of lease up to a valuation of Rs. 1,00,000/- shall be triable by the Small Causes Court presided over by the Civil Judge, Senior Division. The language leaves no room for two opinions. [Relied upon: Thalappalam Service Cooperative Bank Ltd. v. State of Kerala, (2013) 16 SCC 82; Maharishi Mahesh Yogi Vedic Vishwavidyalaya v. State of M.P., (2013) 15 SCC 677; M/s. Girdhari Lal and Sons v. Balbir Nath Mathur, 1986 SC 1499]

(ii) Statement of Objects and Reasons — Cannot override plain statutory language — The Statement of Objects and Reasons of the U.P. Civil Laws (Amendment) Act, 2015 uses the word 'institution' in the context of enhancing jurisdiction. However, the preamble or Statement of Objects and Reasons of a statute is not to be used to influence the meaning otherwise ascribable to the enacting provisions unless there is a compelling reason to do so. Since the language of the amended Section 15(2) is plain and unambiguous, it is impermissible to interpret the amended provision in a manner different from what it clearly expresses by importing limitations from the Statement of Objects and Reasons. Moreover, the institution of a suit necessarily implies and includes the trial of the suit. Therefore, the change of jurisdiction effected by the amendment operates not only for the purposes of institution of fresh suits but also for the trial of pending suits. [Relied upon: Maharishi Mahesh Yogi Vedic Vishwavidyalaya v. State of M.P., (2013) 15 SCC 677; M/s. Girdhari Lal and Sons v. Balbir Nath Mathur, 1986 SC 1499]

(iii) Effect of U.P. Civil Laws (Amendment) Act, 2015 on pending lessor-lessee suits — Transfer of jurisdiction — With effect from 07.12.2015, all suits between the lessor and lessee for rent and eviction from a building after determination of lease under proviso to Section 15(2) of the Provincial Small Cause Courts Act, 1887 (as applicable to U.P.) up to a valuation of Rs. 1,00,000/- — irrespective of the date of their institution — are triable exclusively by the Small Causes Court presided over by the Civil Judge, Senior Division of the district. The District Judge/Additional District Judge retains Small Causes jurisdiction only over such suits having a valuation exceeding Rs. 1,00,000/-. Section 17 of the Bengal, Agra and Assam Civil Courts Act, 1887 supports this conclusion by providing that where a civil court has ceased to have jurisdiction over any case, the matter may be heard before the court to which such business has been transferred.

(iv) Resolution of conflict between S. 15 of PSCC Act and S. 25 of Bengal, Agra and Assam Civil Courts Act — There is no conflict between Section 25 of the Bengal, Agra and Assam Civil Courts Act, 1887 (as amended by U.P. Act No. 37 of 1972) and the provisions of the U.P. Civil Laws (Amendment) Act, 1991. Both provisions can be read harmoniously. The net effect is that the Small Causes Court (presided over by Civil Judge, Senior Division) exercises jurisdiction over lessor-lessee suits up to the enhanced pecuniary limit (now Rs. 1,00,000/-), while the District Judge/Additional District Judge, invested with Small Causes powers, exercises jurisdiction over such suits without a valuation ceiling — i.e., only over suits exceeding Rs. 1,00,000/-. [Relied upon: Mohd. Haneef v. Sunil Tuli, 2009 (1) ARC 750 (All HC)]

(v) Assumption of jurisdiction by Additional District Judge — Illegal; Judgment set aside — The suit in question, valued at Rs. 44,000/-, was a lessor-lessee suit for rent and eviction falling under proviso to Section 15(2) of the Act. On the date of its decision (24.05.2016), by virtue of the U.P. Civil Laws (Amendment) Act, 2015 in force since 07.12.2015, the Additional District Judge had ceased to have pecuniary jurisdiction over this suit. Accordingly, the assumption of jurisdiction by the Additional District Judge in proceeding to decide and decree the suit is illegal and the judgment and order dated 24.05.2016 is liable to be set aside. The matter is to be remanded to the Small Causes Court presided over by the senior most Civil Judge, Senior Division of the district for decision in accordance with law.

DIRECTIONS OF GENERAL APPLICABILITY :

A copy of this judgment shall be circulated to all District Judges in the State of Uttar Pradesh for necessary compliance, directing that all pending suits of rent and eviction from a building after determination of lease falling under proviso to Section 15(2) of the Provincial Small Cause Courts Act, 1887, having a valuation up to Rs. 1,00,000/-, be transferred to the Small Causes Court presided over by the senior most Civil Judge, Senior Division of the respective district, irrespective of the date of their institution.

RESULT :

Civil Revision allowed. Judgment and order dated 24.05.2016 passed by the Additional District Judge in SSC Suit No. 16 of 2011 set aside as without jurisdiction. Matter remanded to the Small Causes Court presided over by the senior most Civil Judge, Senior Division of the district for decision in accordance with law.

Cases Referred:

Mohd. Haneef v. Sunil Tuli, 2009 (1) ARC 750 (All HC)
Thalappalam Service Cooperative Bank Ltd. v. State of Kerala, (2013) 16 SCC 82 (SC)
Maharishi Mahesh Yogi Vedic Vishwavidyalaya v. State of M.P., (2013) 15 SCC 677 (SC)
M/s. Girdhari Lal and Sons v. Balbir Nath Mathur, 1986 SC 1499 (SC).

(Delivered by Hon'ble Pankaj Mithal, J.)

1. The judgment and order dated 24.5.2016 passed by the District Judge decreeing SSC Suit No. 16 of 2011 (Smt. Batulan Vs. Ayub Khan and another) is sought to be revised under Section 25 of the Provincial Small Causes Court Act, 1887 (hereinafter referred to as the Act) on the ground that the Additional District Judge had ceased to have pecuniary jurisdiction to decide it.

2. The aforesaid Act provides for the establishment of Courts of Small Causes for the local limits of the area beyond the original civil jurisdiction of High Courts established in the Presidency Towns for the purposes of trying certain nature of civil suits in a summary manner.

3. The said Act vide Section 15 read with its Second Schedule provides that all suits of civil nature upto a particular value shall be cognizable by a Court of Small Causes.

4. The aforesaid Act was amended time and again and the pecuniary value of suits cognizable by Small Causes Court was enhanced from time to time.

5. The said Act stood amended in its applicability to the State of U.P., also.

6. The State of U.P., vide Civil Laws (Amendment) Act 1972 added a provision to Sub-section 2 of Section 15 of the Act providing that the suits by the lessor for eviction of the lessee from a building after determination of his lease shall be cognizable by the Small Causes Court and that the reference to Rs. 2,000/- mentioned in Sub-section 2 of Section 15 of the Act shall be construed as Rs. 5,000/- in respect to the above nature of suits.

7. In this way the aforesaid Act in its applicability to U.P., classified the suits cognizable by Small Causes Courts into two groups ie. (i) all suits of the civil nature; and (ii) suits between lessor and lessee for arrears of rent and eviction from a building after determination of lease.

8. Section 15 of the Act read with the Second Schedule in its amendment to the State of U.P., vide Civil Laws (Amendment) Act, 1991 vests the power of trial of all civil suits upto the valuation of Rs. 5,000/- and that of the suits between the lessor and lessee for rent and eviction from a building after determination of lease upto the valuation of Rs. 25,000/- upon the Small Causes Court.

9. The High Court vide notification of 8th February 1991 provided that all suits of the nature referred to in the proviso to Sub-section (2) of Section 15 of the Act as applicable in U.P., shall be cognizable by Munsifs (now Civil Judge, Junior Division) upto the valuation of Rs.

5,000/- and by the Civil Judge (now Civil Judge, Senior Division) upto the valuation of Rs. 25,000/-.

10. The High Court vide resolution dated 20.5.1994 of the Administrative Committee resolved that the senior most Civil Judge (Senior Division) in each district be conferred with the powers the powers of the Judge Small Causes Court.

11. Thus, the senior most Civil Judge (Senior Division) in each district of U.P., started functioning as the court of Small Causes to try suits of rent and eviction referred to in proviso to Section 15 (2) of the Act as applicable to U.P., having valuation upto Rs. 25,000/-.

12. Bengal, Agra and Assam Civil Courts Act, 1887 vide Sub-section (1) to Section 25 as applicable to U.P., empowers the High Court to invest Subordinate Judges (Civil Judge, Senior Division and Civil Judge, Junior Division) the jurisdiction of a Judge of a Court of Small Causes under the aforesaid Act upto such value not exceeding five thousand rupees. At the same time Sub-section (2) of Section 25 of the aforesaid Act invests the High Court to confer power upon any District Judge or Additional District Judge the jurisdiction of a Judge of the Small Causes under the Act for the purposes of trial of all suits irrespective of valuation by the lessor for arrears of rent and eviction of the lessee from the building after determination of lease.

13. The Bengal, Agra and Assam Civil Courts Act, 1887 was amended vide the U.P. Civil Laws (Amendment) Act, 1991 and Section 25 (2) of it was amended to construe Rs. 5,000/- referred to in Section 15 (2) of the Act as Rs. 25,000/- to bring the jurisdiction of the Small Causes Court in consonance with the amended Section 15 (2) of the Act.

14. In ***Mohd. Haneef Vs. Sunil Tuli 2009 (1) ARC 750*** His Lordship of the Allahabad High Court resolving the conflict between Section 15 of the Act and Section 25 of Bengal, Agra and Assam Civil Courts Act, 1887 held that there is no conflict in between the two provisions of Section 25 of the Bengal, Agra and Assam Civil Courts Act as amended by U.P. Act No. 37 of 1972 and the provisions as contained under U.P. Civil Laws Amendment Act, 1991. Both the provisions can be read harmoniously and the net effect of the same is that jurisdiction up the limit of Rs. 25,000/- can be exercised by Judge Small Cause Court under the provisions of Provincial Small Cause Courts Act, and as far as District Judges and Additional District Judges are concerned, they are empowered to exercise jurisdiction of the Judge Small Cause Court for unlimited valuation in suits of rent and eviction between lessor and lessee after determination of lease of a building.

15. In the light of the above provisions, notifications, amendments and the law laid down the position which was prevailing in U.P., since 1991 was that all suits between the lessor and lessee for rent and eviction were tried by the Small Causes Court presided over by senior most Civil Judge, Senior Division of the district upto the valuation of Rs. 25,000/- and those with higher valuation by the District Judge/Additional District Judge as Small Causes Court.

16. The instant suit is between the lessor and the lessee for rent and eviction from a building after determination of lease and is referable to proviso to Section 15 (2) of the Act. The valuation of the suit is admittedly Rs. 44,000/-. Therefore, it was instituted in the court of District Judge/Additional District Judge for trial as a Small Causes Suit as the Civil Judge (Senior Division) vested with power of Small causes Court was empowered to deal with suits having valuation upto Rs. 25,000/- only and the rest of the suits were cognizable by District Judge/Additional District Judge.

17. The pecuniary jurisdiction of the Small Causes Court in respect of the above nature of the suits was enhanced by U.P. Civil Laws (Amendment Act) 2015 w.e.f. 7th December 2015 upto Rs. 1,00,000/- only leaving the trial of such nature of suits of higher valuation upon the District Judge/Additional District Judge as Small Causes Court.

18. In view of the above amendment it is contended that on the date of decision of the aforesaid suit having valuation of Rs. 44,000/- was cognizable by Small Causes Court presided over by Civil Judge (Senior Division) and not by the District Judge/ Additional District Judge but the objection to this effect was brushed aside.

19. I have heard Sri Arvind Srivastava, learned counsel for the revisionist and another Sri Arvind Srivastava for the respondents.

20. The argument on behalf of the revisionist is that the impugned judgment and order is without jurisdiction. Had the suit been decided by the Small Causes Court, he would have got a chance to seek its revision before the District Judge/Additional District Judge. This statutory remedy has been snatched away from the revisionist and he had been compelled to prefer the revision before the High Court which has eliminated the recourse to remedy Under Article 226/227 of the Constitution.

21. On behalf of the respondents it has been contended that the amendments brought about in Section 15 of the Act as applicable to the State of U.P. vide U.P. Civil Laws (Amendment Act) 2015 applies only with regard to institution of suit and not in relation to pending suits in view of the statement and objects & reasons of the said Amendment Act. Therefore, the suits already instituted before the above amendment would continue to be tried and decided by the court before whom they were instituted and pending.

22. Section 15 of the Act as initially existed reads as under:-

15. "Cognizance of suits by courts of Small Causes.-

(1) A Court of Small Causes shall not take cognizance of the suits specified in the Second Schedule as suits expected from the cognizance from the cognizance of a court of Small Causes.

(2) Subject to the exceptions specified in that Schedule and to the provisions of of any enactment for the time being in force, all suits of a civil nature of which the value does not exceed five hundred rupees shall be cognizable by a Court of Small Causes.

(3) Subject as aforesaid the State Government may, by order in writing, direct that all suits of a civil nature of which the value does not exceed one thousand rupees shall be cognizable by a court of Small Causes mentioned in the order."

23. The aforesaid Section 15 of the Act in its applicability to the State of U.P., w.e.f. 15.1.1991 after the U.P. Civil Laws (Amendment) Act, 1991 reads as under:-

"(1) A Court of Small Causes shall not take cognizance of the suits specified in the Second Schedule as suits expected from the cognizance of a Court of Small Causes.

(2) Subject to the exceptions specified in that Schedule and to the provisions of any enactment for the time being in force, all suits of a civil nature of which the value does not exceed five thousand rupees shall be cognizable by a Court of Small Causes:

Provided that in relation to suits by the lessor for the eviction of a lessee from a building after the determination of his lease or for recovery from him of rent in respect of the period of occupation thereof after the determination of the lease, the reference in this sub-section to five thousand rupees shall be construed as a reference of twenty five thousand rupees.

Explanation.- For the purposes of this sub-section, the expression 'building' has the same meaning as in Art. (4) in the Second Schedule."

24. It appears that previously suits by lessor for eviction of the lessee from a building after determination of tenancy, upto the value of Rs. 5,000/- were cognizable by the Court of Small Causes but the aforesaid pecuniary jurisdiction was enhanced upto Rs. 25,000/- w.e.f. 15.1.1991.

25. The pecuniary jurisdiction of the Small Causes Courts in respect of the above category of suits has been further amended by the U.P. Civil Laws (Amendment Act) 2015 w.e.f. 7th December 2015 and it has been provided that the Small Causes suits upto the valuation of Rs. 1,00,000/- between the lessor and lessee for the rent and eviction shall be cognizable by Small Causes Court which refers to courts presided over by Civil Judge (Senior Division). The suits of higher valuation would therefore lay before the District Judge/Additional District Judge.

26. The U.P. Civil Laws (Amendment) Act, 2015 amends Section 15 of Provincial Small Causes Court Act, 1887 as amended in its application to U.P., with effect from 7th December 2015 as under:-

4. *"In Section 15 of the Provincial Small Cause Courts Act, 1887.-*

(a) in sub-section (2) for the words "five thousand rupees" the words "twenty five thousand rupees" shall be substituted;

(b) in the proviso to sub-section (2) for the words "twenty five thousand rupees" the word "one lakh rupees" shall be substituted."

27. Thus, Section 15 of the Act in its application to the State of U.P., after the U.P. Civil Laws Amendment Act, 2015 reads as under:-

"(1) A Court of Small Causes shall not take cognizance of the suits specified in the Second Schedule as suits expected from the cognizance of a Court of Small Causes.

*(2) Subject to the exceptions specified in that Schedule and to the provisions of any enactment for the time being in force, all suits of a civil nature of which the value does not exceed **twenty thousand** rupees shall be cognizable by a Court of Small Causes:*

*Provided that in relation to suits by the lessor for the eviction of a lessee from a building after the determination of his lease or for recovery from him of rent in respect of the period of occupation thereof after the determination of the lease, the reference in this sub-section to five thousand rupees shall be construed as a reference of **1 lakh** rupees.*

Explanation.- For the purposes of this sub-section, the expression 'building' has the same meaning as in Art. (4) in the Second Schedule."

28. The valuation of the suit at hand is Rs. 44,000/- ie., higher than Rs. 25,000/- and less than Rs. 1,00,000/-. Therefore, in view of the aforesaid amendment it falls within the jurisdiction of the Small Causes Court presided over by Civil Judge (Senior Division) and not the District Judge/Additional District Judge on the date of its decision.

29. The prefatory note of statement of objects and reasons contained in U.P. Civil Laws (Amendment Act) 2015 states that the pecuniary jurisdiction of Small Causes Court in the State of U.P., requires to be enhanced for the 'institution' of civil suits and appeals and therefore it is necessary to amend the Small Causes Court Act, 1887.

30. The emphasis has been laid upon the word 'institution' to denote that the jurisdiction has been altered only for the purposes of filing of the suits and not for the trial of the pending suits.

31. The institution of the suits by necessary implication includes the trial of the suits also. Therefore, the change of jurisdiction is not only for the purpose of institution but for the trial of the suits also.

32. The language used in the Amending Act to amend Section 15 of the Act is unambiguous, plain and clear. It provides that the suits of rent and eviction upto the valuation of Rs.

1,00,000/- are triable by the Small Causes court ie., of the Civil Judge, Senior Division with effect from the enforcement of Amending Act. It leaves no scope for two opinions. It is a golden rule of interpretation that where the language is plain and clear, the literal meaning conveyed should be followed and there is no need for taking aid of either the statement of objects and reasons or the purpose behind enacting the provision.

33. In ***Thalappalam Service Cooperative Bank Limited and others Vs. State of Kerala and others (2013) 16 SCC 82*** it has been observed that primarily the language employed in the statute is the determining factor of the legislative intention which must be found in the words used by the legislature itself and if the words used are capable of one construction only then it would not be open to courts to adopt any other hypothetical constrictions.

34. In ***Maharishi Mahesh Yogi Vedic Vishwavidyala Vs. State of Madhya Pradesh and others (2013) 15 SCC 677*** it was observed that the preamble or the statement of objects or reasons of any statute is not to influence the meaning otherwise ascribable to the enacting parts unless there is compelling reasons for it.

35. In ***M/s. Girdhari Lal and sons Vs. Balbir Nath Mathur and others 1986 (SC) 1499*** it was held that the golden rule of construction is that where the words of statutes are plain and unambiguous effect must be given to them. First, the legislative intention must be gathered from the statute itself, next from the preamble of the statute, next from the statement of objects and reasons, thereafter from legislative debates, reports of the Committee and commissions and finally from all legitimate and admissible sources which may throw light on it including the legislative history.

36. Thus, it is not proper for me to go into the objects and reasons behind the Amending Act and to interpret the provision in manner different from what it clearly expresses.

37. In this context Section 17 of The Bengal, Agra and Assam Civil Courts Act, 1887 is also relevant and important. It provides that where any civil court has ceased to have jurisdiction with respect to any case, it may be had in the court to which the business of the former court has been transferred. Now by virtue of the amendment in the pecuniary jurisdiction, the District Judge/Additional District Judge has ceased to have jurisdiction over suits below the valuation of Rs.1 lakh concerning rent and eviction from building. Therefore all suits including the above suit requires to be dealt with by Small Causes Court of the Civil Judge (Senior Division) and not by the District Judge/Additional District Judge.

38. In view of the aforesaid discussion with effect from 7th December 2015 the jurisdiction to try all suits between the lessor and lessee for rent & eviction under Section 15 of the Act as applicable to the State of U.P., upto the valuation of Rs.1 lakh irrespective of the date of their institution would lie before the Small Causes Court presided over by the Civil Judge (Senior Division) and the District Judge/Additional District Judge would not have jurisdiction to decide them except those having the valuation of over 1 lakh.

39. Accordingly, the assumption of jurisdiction by Additional District Judge in deciding the present suit having valuation of Rs. 44,000/- is illegal. It makes the judgment and order passed by him liable to be set aside.

40. Accordingly, the impugned judgment and order dated 24.5.2016 is set aside and the matter is remanded to the regular Small Causes Court presided over by senior most Civil Judge, Senior Division of the district for its decision in accordance with law.

41. A copy of this judgment be circulated to all the District Judges of U.P., for necessary compliance to ensure that all pending suits of rent and eviction from a building after determination of lease falling under proviso to Section 15 (2) of the Act upto the valuation of Rs. 1,00,000/- be transferred to the Small Causes Court presided over by senior most Civil Judge, Senior Division of the district irrespective of the date of their institution.

42. The revision is allowed.

(2016) 8 ILRA 629
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.08.2016

BEFORE

THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Application U/S 482 No.- 22839 Of 2016

Vinod Kumar Parihar ...Applicant
State Of U.P. & Anr. Versus
...Opposite Parties

Counsel for Applicant:
Viveka Nand Rai

Counsel for Opposite Parties:
G.A.

Legislation referred to:-

**Negotiable Instruments Act, 1881 — Section 138 (Dishonour of cheque)
Code of Criminal Procedure, 1973 — Sections 190, 482; Chapter XV (Cognizance of offences by Magistrates).**

FACTS :

The applicant was summoned by the court of A.C.J.M., Court No. 5, Agra, in Complaint Case No. 1300 of 2015 (Smt. Beby Upadhyay v. Vinod Kumar Parihar) for prosecution of an offence under Section 138 of the Negotiable Instruments Act, 1881, on account of dishonour of cheque drawn on his bank account in favour of the complainant/opposite party no. 2.

The applicant, through counsel, contended that prior to the filing of the complaint and prior to the presentation of the cheque in question in the bank, an FIR had been lodged by the applicant with the police to the effect that the complainant had forcibly obtained his signatures on cheques bearing nos. 641871 to 641885. It was further contended that pursuant to investigation of the said FIR, a charge-sheet was submitted against the complainant. The applicant urged that the trial court, while passing the summoning order, had failed to consider the contents of the reply to the statutory legal notice sent by the applicant, and that there was no reason or liability on the part of the applicant to issue the cheques in favour of the complainant, as they were alleged to be the result of a threat to his life.

The trial court, while passing the order of cognizance and summoning, had considered that the cheque relating to the applicant's bank account was drawn in the name of the complainant, who had presented it in the bank; that after dishonour, a legal notice was duly served upon the applicant; and that upon non-payment of the cheque amount, the complaint was filed. On this prima facie satisfaction, the summoning order was passed. The present application under Section 482 Cr.P.C. challenged the said proceedings.

Questions of Law

(i) Whether the proceedings of a complaint case under Section 138 N.I. Act are liable to be quashed under Section 482 Cr.P.C. on the basis of a defence version — namely, that the cheques in question were obtained by force — which is yet to be proved by adducing evidence before the trial court?

(ii) Whether the filing of a police charge-sheet against the complainant in connection with the cheques in question is sufficient ground for quashing or interdicting the complaint proceedings under Section 138 N.I. Act at the cognizance/summoning stage?

(iii) What is the scope and standard of scrutiny required at the stage of taking cognizance and issuing summons under Section 138 N.I. Act, and whether non-consideration of the reply to statutory notice vitiates the summoning order?

Held

(i) Defence version not a ground for quashing at cognizance stage: The contentions raised by the applicant — that the cheques were obtained by force under threat to life and that there was no reason for him to issue the cheques — are essentially in the nature of a defence version. Such contentions are required to be raised and proved before the trial court at the appropriate stage when evidence is adduced. At the stage of Section 482 Cr.P.C., the High Court cannot quash proceedings on the basis of a defence that is yet to be established. No justification exists for interference in the proceedings of the trial court on the basis of an unproved version.

(ii) Police charge-sheet against complainant not a bar to complaint proceedings: The mere fact that a charge-sheet was submitted by the police against the complainant in connection with the cheques in question does not constitute a valid ground for quashing the proceedings of the complaint case. The inquiry conducted by a Judicial Magistrate himself under Chapter XV Cr.P.C. stands on a higher pedestal than an investigation conducted by the police. The inherent jurisdiction of the High Court under Section 482 Cr.P.C. cannot be exercised to quash proceedings of the trial court solely on the basis of a police report, the facts of which are yet to be proved.

(iii) Sufficiency of material for cognizance and summoning: At the stage of taking cognizance and issuing summons under Section 138 N.I. Act, the trial court is required to examine only whether a prima facie case is made out. In the present case, the trial court had duly considered that: (a) the dishonoured cheque was drawn on the applicant's bank account in favour of the complainant; (b) the cheque was presented in the bank and dishonoured; (c) a statutory legal notice was duly served upon the applicant; and (d) the cheque amount was not paid within the prescribed period, leading to the filing of the complaint. These facts were sufficient to constitute a prima facie case for the purpose of cognizance and summoning. The trial court proceedings were found to have been carried out following the procedure and law, without any illegality or infirmity.

Result: No case for interference made out. Application under Section 482 Cr.P.C. dismissed. Proceedings in Complaint Case No. 1300 of 2015 before the A.C.J.M., Court No. 5, Agra, to continue in accordance with law.

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. The applicant has been summoned for prosecution of offence under section 138 N.I. Act in complaint case no. 1300 of 2015 (Smt. Beby Upadhyay Vs. Vinod Kumar Parihar) by the court of ACJM, Court No. 5, Agra. The proceeding of this complaint case has been challenged in present application. Heard learned counsel for the applicant, learned AGA and perused the records.

2. Learned counsel for the applicant contended that before filing of the complaint case and before the presentation of cheque in question in bank, the FIR was lodged in police that complainant had forcibly obtained the signatures of applicant on cheques no. 641871 to 641885. His contention is that on the basis of said police report, matter was investigated and charge-sheet was submitted against the complainant. In spite of it, trial court had summoned the applicant only on the ground of dishonour of cheque and service of legal notice, without considering the contents

of reply of notice by the applicant. Learned counsel for the applicant also contended that there was no reason for applicant to issue cheques in favour of complainant and that there is no reason for prosecution of applicant for dishonour of those cheques, which were result of threat of life to applicant.

3. In present matter, at the time of passing the order of cognizance and summoning, the trial court has considered that cheque relating to bank account of applicant was drawn in the name of complainant-OP No.-2, who had presented them in the bank, and after dishonour of cheque, he had served legal notice; and when amount of cheque was not paid to him, then he had filed complaint. These facts were prima facie established before trial court, which were sufficient for passing order of cognizance of aforesaid offence and summoning the applicant. The arguments placed before this Court by learned counsel for the applicants are in nature of defence version, which may be considered by trial court at appropriate stage, when evidences in that regard are adduced and facts are proved. At this stage, on the basis of defence version, which are still to be proved, there is no justification for quashing the proceedings of trial court or making any interference in it.

4. This contention of learned counsel for the applicant is unacceptable that since police had submitted charge-sheet against the complaint regarding cheques in question, therefore proceeding of complaint case should not be carried out. The enquiry made by trial court of Judicial Magistrate himself under Chapter XV CrPC is on higher pedestal than that of investigation made by police. Therefore the inherent jurisdiction of this Court cannot be exercised for quashing the proceedings of trial court, on the basis of any police report, the facts of which are yet to be proved.

5. In view of the above and after consideration of record, it is found that proceedings of trial court are being carried out after following procedure and law without any illegality or infirmity. There is no reason to interfere in said proceedings. Therefore, this application is dismissed.

(2016) 8 ILRA 632
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.08.2016

BEFORE

THE HON'BLE MRS. VIJAY LAKSHMI, J.

Application U/S 482 No.- 24718 Of 2016
&
Application U/S 482 No.- 24719 Of 2016

Ankush Jain

**...Applicant
Versus**

State Of U.P. & Anr.

...Opposite Parties

Counsel for Applicant:

Amit Daga

Counsel for Opposite Parties:

G.A.

Legislation referred to : Negotiable Instruments Act, 1881 – Ss. 138, 142, 142(2)(a) & (b), 142-A, 145; Code of Criminal Procedure, 1973 – Ss. 200, 406, 482.

FACTS :

The complainant-company (O.P. No. 2), a Private Limited Company registered under the Companies Act, alleged that during the course of business transactions since 2011, the accused-applicant issued two cheques bearing Nos. 000010 and 000011, each dated 31.12.2014 and each for Rs. 35 lakhs, drawn on Bank of Baroda, Shalimar Garden Branch, Ghaziabad, in favour of the complainant-company. Both cheques were deposited by the complainant-company in its account maintained with Punjab and Sindh Bank, Narayana, New Delhi, and were returned dishonoured with the endorsement „xceeds arrangement” vide Bank Memo dated 1.1.2015.

Statutory notices under Section 138 N.I. Act were served upon the applicant on 13.1.2015. The applicant, instead of making payment, replied by letter dated 22.1.2015 denying liability. Thereupon, complaints under Section 138 N.I. Act were filed before the Judicial Magistrate, Ghaziabad, supported by an affidavit of the Director of the complainant-company filed as statement under Section 200 Cr.P.C. read with Section 145 N.I. Act. The learned Magistrate, on the basis of the said affidavit and documents, summoned the applicant vide order dated 25.4.2015.

The applicant filed two applications under Section 482 Cr.P.C. before this Court praying to quash both the complaints and the summoning orders, primarily contending that by virtue of the amended Section 142(2) of the N.I. Act (which came into force w.e.f. 15.6.2015 with retrospective effect), the Court at Ghaziabad lacked territorial jurisdiction to entertain the complaints, since the complainant-company maintained its account at Delhi, and therefore the proceedings at Ghaziabad constituted an abuse of the process of court.

QUESTIONS OF LAW :

(i) Whether, in view of the amended Section 142(2) of the Negotiable Instruments Act, 1881 (as amended w.e.f. 15.6.2015), the territorial jurisdiction to try an offence under Section 138 N.I. Act vests in the court within whose local limits the branch of the bank where the payee maintains its account (i.e., the branch of delivery of the cheque for collection) is situated, even in respect of complaints filed prior to the amendment?

(ii) Whether, on account of lack of territorial jurisdiction arising from the retrospective amendment to Section 142(2) N.I. Act, a complaint under Section 138 N.I. Act pending before a court that has lost jurisdiction is liable to be quashed under Section 482 Cr.P.C., or whether it is required to be transferred to the court of competent jurisdiction in terms of Section 142-A N.I. Act?

HELD :

(i) **Territorial Jurisdiction under Amended Section 142(2) N.I. Act** — By virtue of the amended Section 142(2) of the Negotiable Instruments Act, 1881, the offence under Section 138 N.I. Act shall be inquired into and tried only by a court within whose local jurisdiction the branch of the bank where the payee or holder in due course maintains its account — i.e., the branch at which the cheque is delivered for collection — is situated. The Explanation to Section 142(2)(a) further clarifies that where a cheque is delivered for collection at any branch of the payee's bank, it shall be deemed to have been delivered to the branch where the payee maintains the account. Accordingly, since the complainant-company maintained its account with Punjab and Sindh Bank, Narayana, New Delhi, territorial jurisdiction vests in the competent court at Delhi, and not at Ghaziabad.

(ii) **No Ground for Quashing — Remedy is Transfer under Section 142-A N.I. Act** — Lack of territorial jurisdiction, arising on account of the retrospective application of the amended Section 142(2) N.I. Act, does not furnish a ground to quash proceedings under Section 482 Cr.P.C. The Legislature, while enacting the Negotiable Instruments (Amendment) Act, 2015, simultaneously inserted Section 142-A, which mandates that all cases pending before any court on 15.6.2015, whether filed before it or transferred to it prior to that date, shall be transferred to the court having jurisdiction under amended Section 142(2). Since the complaints in the present case were filed on 5.2.2015 and were admittedly pending when the Amending Act came into force on 15.6.2015, Section 142-A is clearly attracted and the proceedings are required to be transferred to Delhi, not quashed. Quashing or staying the proceedings would cause grave prejudice to the payee/creditor and would be contrary to the express legislative intent behind the Amendment.

(iii) **Legislative Intent of the 2015 Amendment — Protection of Creditors** — The Negotiable Instruments (Amendment) Act, 2015 was enacted to neutralise the effect of the judgment of the Supreme Court in Dashrath Rupasingh Rathod v. State of Maharashtra, (2014) 9 SCC 129, which had restricted jurisdiction to the court within whose local limits the cheque was dishonoured by the drawee bank — causing serious hardship to payees who were compelled to litigate at the place chosen by the defaulter/drawer. The Amendment Act, incorporating the non-obstante clause in Section 142-A(1), makes the provisions of the Code of Criminal Procedure yield to the N.I. Act insofar as territorial jurisdiction over cheque dishonour offences is concerned. The overriding intent of the Legislature is to protect creditors and payees and not to afford procedural refuge to defaulting drawers.

(iv) **Inter-State Transfer — Jurisdiction of Supreme Court under Section 406 Cr.P.C.** — Since the transfer of complaints from Ghaziabad (U.P.) to Delhi involves an inter-State transfer, this Court does not possess jurisdiction to order such transfer. The power to transfer criminal cases from one State to another vests exclusively in the Supreme Court of India under Section 406 of the Code of Criminal Procedure, 1973. The complainant-company/O.P. No. 2 is accordingly at liberty to apply to the Supreme Court for transfer of the complaints to the competent court at Delhi.

RESULT :

Both applications under Section 482 Cr.P.C. dismissed. The pending proceedings in both complaint cases before the Additional Civil Judge (J.D.)/J.M. Court No. 3, Ghaziabad, are not quashed but are liable to be transferred to the court of competent jurisdiction at Delhi under Section 142-A of the N.I. Act. The

complainant-company/O.P. No. 2 is at liberty to take steps for inter-State transfer of the complaints by approaching the Supreme Court of India under Section 406 Cr.P.C. The office is directed to send a copy of this order to the concerned Magistrate at Ghaziabad through the District Judge, Ghaziabad, who shall in turn inform the complainant-company of this order.

Cases Referred:

Bridgestone India Pvt. Ltd. v. Inderpal Singh, (2016) 2 SCC 75;

Dashrath Rupsingh Rathod v. State of Maharashtra, (2014) 9 SCC 129.

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. The applicant, who is the same person in both the aforesaid applications filed under Section 482 Cr.P.C., has invoked the inherent jurisdiction of this Court with prayer to quash the criminal complaint dated 4.2.1015 as well as entire proceedings of Complaint Case No. 196 of 2016 (initially numbered as Complaint Case No. 162 of 2015) and Complaint Case No. 195 of 2016 (initially numbered as Complaint Case No. 163 of 2015) A.N. Polymers Pvt. Ltd. Vs. Ankush Jain, under Sections 138 of N.I. Act, P.S. Shahibabad, district Ghaziabad, pending in the court of Additional Civil Judge (J.D.)/ J.M. Court No. 3, Ghaziabad. Prayer has also been made to quash the summoning order dated 25.4.2015 issued against the applicant by the aforesaid court in both the complaint cases.

2. As the applicant, the opposite parties and the issue involved in both the applications, are the same, both these applications are being disposed of by this common order.

3. Heard learned counsel for the applicant and learned A.G.A. for the State. Perused the records.

4. The brief facts of the case are that the complainant of both the complaint cases, who is O.P. No. 2 in both these applications, is a Private Limited Company, registered under the Indian Companies Act. The aforesaid Company filed criminal complaints against the accused- applicant with the allegations that the complainant company was doing business with the accused- applicant since 2011. During the course of business transactions, the accused- applicant, issued two cheque nos. 000010 and 000011 each dated 31.12.2014 and each amounting to Rs. 35 lacs, in the name of the complainant Company payable at Bank of Baroda, Branch Shalimar Garden, Ghaziabad. Both the said cheques were deposited in Punjab and Sindh Bank, Narayana, New Delhi, where the complainant Company was maintaining its account. However, both the cheques were dishonoured by the Banker of the accused- applicant and consequently the Banker of the complainant Company returned both the cheques with the endorsement "exceeds arrangement" along with Bank memo dated 1.1.2015. Thereafter the complainant Company, being payee of the dishonoured cheques, gave legal notices to the accused applicant on 13.1.2015. But, the accused applicant, instead of making payment of the amounts of the cheques in question within the stipulated period mentioned in the legal demand notices, replied to the said notices by his letter dated 22.1.2015, denying the payment to the complainant. Since the accused applicant, despite service of demand notices, failed to make payment of the amount mentioned in the cheques in question, the complainant Company

filed the aforementioned complaints against the applicant in the court of the Judicial Magistrate. In support of the complaint, the complainant Company/ O.P. No. 2, filed some documents and affidavit of the Director of the Company as its statement under section 200 Cr.P.C. and it was entitled to do so by virtue of section 145 of the N.I. Act.

5. The learned Magistrate on the basis of the aforesaid affidavit and the documents filed by the complainant Company in support of its allegations, summoned the applicant for the offences punishable under section 138 of the N.I. Act vide impugned order dated 25.4.2015.

6. The legality and correctness of the aforesaid summoning orders passed by learned Magistrate, Ghaziabad, has been challenged by learned counsel for the accused-applicant, in both these applications, mainly on the ground that in view of the amendment of section 142 of the N.I. Act, which has come into force w.e.f. 15.6.2015 and is having retrospective effect, the learned Magistrate at Ghaziabad, has no jurisdiction to entertain the complaints instituted by the complainant Company and to proceed against the accused- applicant on the said complaint. Learned counsel for the applicant has contended that in view of amended section 142(2) of the Act, learned Magistrate at Ghaziabad is not the competent court having jurisdiction to take cognizance and to issue process against the accused applicant and the entire proceedings pending before the court at Ghaziabad, which are wholly without jurisdiction, cannot be permitted to continue, as the same would amount to gross abuse of process of court and law and the same are liable to be quashed by this court on the ground of jurisdiction alone.

7. Some factual aspects of the case have also been contested by learned counsel for the applicant submitting that both the cheques, which are dated 31.12.2014, drawn at Bank of Baroda, Branch Shalimar Garden, Ghaziabad, each amount of Rs. 35 lacs, were the security cheques given by the accused- applicant to O.P. No. 2 earlier and none of these cheques was issued in discharge of any liability or debt. The complainant Company misused the aforesaid security cheques to initiate malicious proceedings against the applicant, only for the purpose of harassment and to extort money from him. It is also submitted that the applicant had made a detailed complaint to the complainant Company earlier that the material supplied by it was defective due to which the material was lying in their godown, whereupon the Director of the complainant Company had assured that the said defective material will be taken back shortly from the godown of the applicant but despite repeated requests, the defective material was not removed by the complainant Company from the godown of the applicant and subsequently the applicant gave a legal notice to the complainant Company, informing the complainant Company, not to present the security cheques to the Banker of the Company because the applicant had stopped the payment of said security cheques. However, despite the aforesaid legal notice the complainant Company misused those cheques.

8. Learned counsel for the applicant has submitted that considering all these facts and since the proceedings of the aforesaid complaints are beyond territorial jurisdiction and against the mandates of the amended section 142(2) of the N.I. Act, the court of learned Magistrate at

Ghaziabad has acted without jurisdiction and thus the impugned summoning orders as well as entire proceedings of the complaint cases are liable to be quashed.

9. In support of his contention the learned counsel for the applicant has placed reliance on the law laid down by the Hon'ble Apex Court **Bridgestone India Pvt. Ltd. Vs. Inderpal Singh (2016) 2 SCC 75**, in which Hon'ble Apex Court has held as under:

"A perusal of the amended Section 142 (2), extracted above, leaves no room for any doubt, specially in view of the Explanation thereunder, that with reference to an offence under Section 138 of the Negotiable Instruments Act, 1881, the place where a cheque is delivered for collection i.e. the branch of the bank of the payee or holder in due course, would be determinative of the place of territorial jurisdiction and the provisions of Code of Criminal Procedure, 1973, would have to give way to the provisions of instant enactment on account of the non obstante clause in subsection (1) of section 142-A of the N.I. Act."

10. The learned counsel has submitted that in similar matters coordinate Bench of this court has stayed the further proceedings of the complaint case under section 138 of the N.I. Act, keeping in view the aforesaid judgment of the Hon'ble Apex Court and the amended provisions of the N.I. Act.

11. Considered the submissions and carefully perused the judgment rendered by the Apex Court in the case of **Bridgestone India Pvt. Ltd. (supra)** and also the Gazette of India dated 15.6.2015 issued by the Ministry of Law and Justice, New Delhi, to amend the N.I. Act 1881.

12. In order to properly appreciate the controversy involved in the instant case, the relevant provisions of the amended section 142(2) of the N.I. Act are reproduced below:-

"142(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction,--

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Explanation.-- For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account."

13. The aforesaid amendment in N.I. Act was brought in view of the pendency of an estimated 18 lakh cheque bounce cases across the country. The litigants, who were already deprived of their money by the borrower, have to travel to different places from where the cheques were issued and dishonoured, thus denying them justice, equity and fair trial, adding more insult to their injury.

14. Earlier, Hon'ble Supreme Court in its judgment in the case of **Dashrath Rupsingh Rathod Vs. State of Maharashtra (2014) 9 SCC 129** had held that the jurisdiction for dishonour of cheques is restricted to the court within whose local jurisdiction, the offence was committed i.e. where the cheque is dishonoured by the Bank on which it is drawn.

15. Pursuant to the said judgment of the Apex Court, a number of pending cases under section 138 of N.I. Act were transferred to the courts having jurisdiction as per the said judgment.

16. Various representations were made to the Government by Industry Association and financial institutions, expressing their concerns about wide impact of the said judgment on the business interest since the same would offer undue protection to defaulters at the expense of complainants. Hence the Legislature, with a view to protect the interest of the creditors, passed the Amending Act, which clearly provides that except bearer cheques, which are presented to the branch of the drawee bank, (in which cases, the local court of drawee bank would get jurisdiction), the jurisdiction to try the offence of cheque bouncing, shall lie with the court within whose local jurisdiction the bank branch of the payee, where the payee delivers the cheque for payment through his account, is situated.

17. Thus, in view of the amendment in the N.I. Act, there is no doubt that the jurisdiction to try the instant case vests in the Court situated at Delhi where the O.P. No. 2 or the complainant Company, who is the payee or holder in due course, maintains its account.

18. Now the question, which arise for consideration is that whether both these complaints and the entire proceeding are liable to be quashed on account of lack of jurisdiction as prayed by the applicant?

19. The answer would obviously be "No".

20. Keeping in view of the intention of the Legislature behind passing of the Amending Act, which is to protect the interest of the creditor or the payee and not of the borrower, and the provisions of Amending Act, the proceedings of complaint cannot be quashed. If the proceedings are quashed only due to lack of territorial jurisdiction or even are stayed for sometime, calling for counter and rejoinder affidavits, it will cause great difficulty to the litigant, who is already facing problem, being deprived of his money due to bouncing of cheque drawn by the borrower.

21. To deal with such situation, the Legislature by the Amending Act of 2015 has inserted a new section 142-A in Negotiable Instrument Act, making provision for transfer of pending cases.

The newly inserted section 142-A provides that all cases pending before any court, whether filed before it or transferred to it before 15.6.2015, shall be transferred to the courts having jurisdiction.

22. In the present case, a perusal of the complaint, the copy whereof has been annexed in both the applications and copy of order sheet of the court proceedings, which is Annexure no. 5 in both the applications, shows that the complaint under the N.I. Act has been filed on 5.2.2015, meaning thereby that the complaint was pending on the date 15.6.2015 when the Amending Act came into force. Therefore, the proceedings pending at Ghaziabad, deserves to be transferred from Ghaziabad to Delhi where the complainant Company is maintaining its account and no ground to quash those proceedings is made out.

23. In view of the above, both the instant applications are dismissed.

24. As this court cannot order for inter State transfer, the jurisdiction being only with the Hon'ble Apex Court by virtue of section 406 Cr.P.C., it is open for the complainant/ O.P. No. 2 to take steps for transfer of his complaint to Delhi.

25. The office is directed to send a copy of this order to the concerned Magistrate at Ghaziabad, through the District Judge, Ghaziabad. The concerned Magistrate is further directed to inform the complainant about this order so that the complainant may take necessary steps for transfer of his complaints to Delhi.

(2016) 8 ILRA 639
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.08.2016

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Application U/S 482 No.- 12840 Of 2016

Mahesh Tiwari

...Applicant

Versus

State Of U.P. & Anr.

...Opposite Parties

Counsel for Applicant:

Chetan Chatterjee

Counsel for Opposite Parties:

G.A, Amit Kumar Srivastava.

Legislation referred to : Code of Criminal Procedure, 1973 — Sections 190, 195(1)(b)(i), 200, 202, 340, 341, 482

Indian Penal Code, 1860 — Sections 191, 192, 193

Indian Evidence Act, 1872 — Sections 1 and 3

Code of Civil Procedure, 1908 — Section 30; Order XIX, Rules 1 and 2.

FACTS :

The applicant instituted Suit No. 94 of 2013 for permanent injunction against the complainant/opposite party no. 2. The plaint was supported by an affidavit sworn by the applicant stating facts to be true to his personal knowledge. In paragraph 16 of the said affidavit, it was averred that on 26 July 2013, the opposite party threatened the principal of the college to remove the wall, failing which the wall would be removed by force.

The complainant/opposite party no. 2 assailed this averment as false, contending that she was abroad in the USA from 18 May 2013 to 10 September 2013 and could not have made any such threat on the said date. She filed an application under Section 340 Cr.P.C. before the Civil Court for initiation of perjury proceedings, which was dismissed by order dated 18 November 2013 on the ground that the affidavit having been prepared and sworn outside the court, proceedings under Section 340 Cr.P.C. were impermissible.

Thereafter, the complainant filed a private complaint under Section 190 Cr.P.C. for prosecution of the applicant under Section 193 IPC. The learned Judicial Magistrate-I, Anwla, Bareilly, upon examining the complainant under Section 200 and recording the witness's statement under Section 202 Cr.P.C., passed summoning order dated 17 December 2014. Criminal Revision No. 22 of 2015 filed by the applicant was dismissed by the Additional Sessions Judge, Court No. 1, Bareilly, vide impugned order dated 31 February 2015. Both orders were challenged under Section 482 Cr.P.C.

Questions of Law

(i) Whether a private complaint for an offence under Section 193 IPC — arising out of a false affidavit filed in support of a plaint in civil proceedings — is maintainable, or whether initiation of such proceedings is barred by the mandatory requirement of a complaint in writing by the court under Section 195(1)(b)(i) Cr.P.C.?

(ii) Whether an affidavit filed in support of a plaint/written statement constitutes "evidence" within the meaning of Sections 191 and 192 IPC so as to attract Section 193 IPC?

(iii) Whether the failure of the complainant to prefer an appeal under Section 341 Cr.P.C. against the dismissal of the application under Section 340 Cr.P.C. by the Civil Court renders the subsequent private complaint non-maintainable?

(iv) Whether Section 195(1)(b)(ii) Cr.P.C. as interpreted in *Iqbal Singh Marwah* applies to a false affidavit filed in civil proceedings?

Held

(i) Affidavit as evidence under Sections 191/192 IPC: An affidavit filed in support of a plaint is "evidence" within the meaning of Section 191 IPC. A person who is legally bound to verify the averments in pleadings and does so falsely commits the offence of giving false evidence under Section 191 IPC, punishable under Section 193 IPC. It is not necessary that the person should have appeared in the witness

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

1. The prospective accused /applicant has approached this Court, in proceedings under Section 482 Cr.P.C., assailing order dated 31 February 2015 passed by the Revisional Court /Additional Sessions Judge, Court No. 1 Bareilly, in Criminal Revision No. 22 of 2015 (Mahesh Tiwari vs. State of U.P. and others) affirming summoning order dated 17 December 2014 passed by the Judicial Magistrate-1 Anwla, Bareilly in complaint case no. 743 of 2014 for an offence under Section 193 IPC.

2. The facts, briefly is, that the applicant instituted a suit for permanent injunction against the complainant/opposite party no. 2 being suit no. 94 of 2013 (Sri Subhash Inter College, Anwla through its Manager, Mahesh Tiwari, Advocate vs. Smt. Ruchi Saxena and others). The plaint was duly supported by an affidavit sworn by the applicant which was stated to be true to personal knowledge. In paragraph 16 of the affidavit filed in support of the plaint, it was averred that the cause of action for instituting the suit arose on 26 July 2013 when the opposite party no. 2/complainant threatened the principal of the college to remove the wall, however, in the event of failure, it was alleged that the wall would be removed by using force.

3. Aggrieved by the assertion, which according to the complainant, was false for the reason that the complainant was abroad (USA) from 18 May 2013 until 10 September 2013. The complainant, therefore, filed an application under Section 340 Cr.P.C. for initiating proceedings for perjury, which was rejected by the civil court by order dated 18 November 2013 for the reason that the alleged affidavit was prepared and sworn out side the court and thereafter filed in the court, therefore, the proceedings in terms of Section 340 Cr.P.C. would be impermissible.

4. Thereafter, complainant filed a private complaint under Section 190 Cr.P.C. against the applicant seeking his prosecution for an offence alleged to have been committed under Section 193 IPC. The learned Magistrate upon examining the complainant under Section 200 and recording statement of the witness under Section 202 Cr.P.C. summoned the applicant. Aggrieved, applicant preferred a revision, which by the impugned order affirmed the summoning order.

5. The summoning order, revisional order and the complaint proceedings is being assailed.

6. Sri Chetan Chatterji, learned counsel appearing for the applicant would contend that: (i) an application filed under Section 340 Cr.P.C. arising out of original suit was dismissed, against the dismissal order, since appeal was not preferred by the complainant under Section 341 Cr.P.C., therefore, subsequent private complaint was not maintainable; (ii) evidence would not include an affidavit in view of Section 1 read with Section 3 of the Indian Evidence Act 1872; (iii) Section 30 read with Order 19 of the Code of Civil Procedure (CPC), would provide the circumstances, when an affidavit can be permitted to be filed in evidence or in the alternative the circumstances in which certain facts may be proved by means of an affidavit, therefore, pleadings, as such, would not be an evidence within the meaning of Section 191/192 IPC; (iv) private complaint for an offence under Section 193 IPC for perjury would be barred in view of Section 195(1) Cr.P.C.

7. In rebuttal Sri Amit Kumar Srivastava, learned counsel appearing for the complainant would submit that the statement made on oath by the applicant being false, which fact he knew to be false on the date of swearing, therefore, would tantamount to giving false evidence in a judicial proceeding defined under Section 191/192 IPC, which is punishable under Section 193 IPC, therefore, would contend that an affidavit is an evidence within the meaning of Section 191/192 IPC. A private complaint for filing a false affidavit in civil proceedings would be maintainable, therefore, the impugned orders are lawful and valid.

8. Rival submission falls for consideration.

9. The salient features of giving false evidence under Section 191 IPC are:-

- (i) intentionally making a false statement, or
- (ii) declaration by a person who is under a legal obligation to speak the truth.

10. The giving of false evidence amounts to practicing of fraud upon the court. Thus to make a statement of false evidence within the meaning of this section, it must be established that the person was legally bound by an oath or an express provision of law (a) to state the truth, or (b) to make a declaration upon any subject.

11. In certain cases, the law requires a declaration from a person on verification in a pleading, and if such a declaration is made falsely it will come under this clause.

12. Section 191 and 192 deal with perjury and filing of false affidavit in pleadings would be covered under Section 191. Section 191 deals with evidence on oath and Section 192 with fabricating false affidavits; the offence under Section 191 IPC is constituted by swearing falsely when one is bound by oath to state the truth because a declaration made under an oath. The definition of the offence of giving false evidence thus applies to the affidavits. The offence may also fall within Section 192 which, inter alia, lays down that a person is said to fabricate false evidence if he makes a document containing a false statement intending that such false statement may appear in evidence in a judicial proceeding and so appearing in evidence may cause any person who, in such proceedings is to form an opinion upon the evidence to entertain an erroneous opinion touching any point material to the result of such proceedings. Therefore, where declarations in affidavits which were tendered in the Court to be taken into consideration, the authors of the affidavit clearly intended the statement to appear in evidence in a judicial proceedings and so appearing, to cause the Court to entertain an erroneous opinion regarding the compromise, therefore, the offence would fall within Section 191, 192 which is punishable under Section 193 IPC, therefore, it was held that the authors of the affidavits were guilty of offence of giving false evidence or fabricating false evidence for the purpose of being used in judicial proceedings. **(Refer: Baban Singh and another vs. Jagdish Singh and others (AIR 1967 68).**

13. Where a verification is specific and deliberately false, there is nothing in law to prevent a person from being proceeded for contempt. But it must be remembered that the very essence of crimes of this kind is not how such statements may injure this or that party to litigation but how they may deceive and mislead the courts and thus produce mischievous consequences to the administration of justice. A person is under a legal obligation to verify the allegations of fact made in the pleadings and if he verifies falsely, he comes under the clutches of law. Consequently, there cannot be any doubt that if a statement or averment in a pleading is false, it falls within the definition of offence under Section 191 IPC. It is not necessary that a person should have appeared in the witness box. The offence stands committed and completed by the filing of such pleading.

14. **In Ranjeet Singh vs. State of Pepsu AIR 1959 SC 843** the accused, a police officer, was called upon to make a statement against an application under Article 226 of the Constitution for a writ of habeas corpus in which it was alleged that the accused had illegally detained a man in police custody. In his written (statement), the accused filed an false affidavit denying that the man was never arrested by the police or was in his custody. It was held that the accused was legally bound to place the true facts before the court in his affidavit and since the statements made by him in the affidavit were found to be false, it was held that he has committed the offence under Section 193 IPC for giving false evidence as defined in Section 191 IPC.

15. The making of a false statement, without knowledge as to whether the subject matter of the statement is false or not is giving of false evidence. A witness falsely deposing in another's name, and a persons falsely verifying his plaint, and an official making a false statement upon the service of summons were held guilty of giving false evidence under this Section. **(Refer: S.P. Kohli (Dr.) vs. High Court of Punjab and Haryana AIR 1978 SC 1753.)**

16. Section 191 contemplates declarations which a person is bound by law to make. The most familiar instances of such declarations are complaints and pleadings in suits. A person being under a legal obligation to verify facts in complaints and pleadings is liable to be punished under Section 193 for perjury, if he verifies falsely. (**Asgar Ali Mulla Ibrahimji vs. Emperor AIR 1943 Nag 17(18)**).

17. Where a person falsely verifies a written statement he will be liable for perjury. Where a person falsely verifies an execution application he will be liable for perjury. (**Emperor vs. Padam Singh AIR 1930 All 490**).

18. An affidavit is 'evidence' within the meaning of Section 191 IPC and a person swearing to a false affidavit is guilty of perjury. The definition of the offence of giving false evidence applies to the affidavits. (**Parag Dutt vs. Emperor AIR 1930 Oudh 62 (63)**).

19. Where a police officer, accused taking delivery of draft of counter affidavit from Standing Counsel for being signed by his superior for filing in Supreme Court. Asking a police official to forge signature of his superior on carbon copy of counter affidavit. On refusal, he contacted his superior and latter directing official asked to forge his signature. Official acting accordingly. Accused sending carbon copy with others for filing it in Supreme Court, said affidavit containing false averments. Accused officer present in Supreme Court premises along with the officer whose signature was forged on date of filing affidavit. Accused is guilty of offence under Section 193. He abetted officer to forge signature of his superior. (**Refer: Afzal and another vs. State of Haryana and others AIR 1996 SC 2326 (2334)**).

20. A five Judge Bench in **Iqbal Singh Marwah and another vs. Meenakshi Marwah and another 2005 (51) ACC 910 (SC)** noted the conflict of language between two decisions rendered by Bench of three Judge in **Sachida Nand Singh and others vs. State of Bihar and others 1998 Criminal Law Journal 1565** and **Surjeet Singh and another vs. Balbeer Singh 1996 Criminal Law Journal 2304** regarding interpretation of Section 195(1)(b)(ii) Cr.P.C. The Court was of the opinion that **Sachida Nand Singh** has been correctly decided and the view taken therein is the correct view. Section 195(1)(b)(ii) Cr.P.C. would be attracted only when the offences enumerated in the said provision have been committed with respect to a document after it has been produced and given in evidence in proceedings in a Court i.e. during the time when the document was in custodia legis.

21. **Iqbal Singh Marwah** case involved the interpretation of the expression "when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceedings in any court".

22. In the facts of the present case, the ratio of **Iqbal Singh Marwah** would not apply as affidavit in support of a complaint / written statement is neither a document or evidence as contemplated in 195(1)(b)(ii) of Cr.P.C. Nor does the offence under Section 193 IPC is covered therein, Section 195 (1)(b)(ii) deals with all kinds of forgery committed in respect of a document or evidence produced in the court. The complaint in the present case has been filed for filing a false

affidavit in civil proceedings for an offence punishable under Section 193 which is referred to under Section 195(1)(b)(i) Cr.P.C. for the offence defined under Section 191 and 192 IPC.

23. Section 1 and Section 3 of Evidence Act together make it clear that affidavit is not regarded as evidence under the Act, but can be used as evidence only if for sufficient reason court passed an order under Order XIX Rule 1 and 2 of the CPC. Affidavits, though, are not included in Section 3 of the Act, same can be used as evidence, if law specifically permits certain matters to be proved by affidavit. Mere swearing of affidavit does not make statement contained therein a piece of evidence. Swearing is only a guarantee of the authenticity of the affidavits but not of their contents. **(Sudha Devi vs. M.P. Narayanan and others AIR 1988 SC 1381, Rita Pandit vs. Atul Pandit AIR 2005 AP 253 (FB)).**

24. As regards documentary evidence, documents requiring proof cannot become evidence before they are proved. A document has to be proved first then the question of its authenticity has to be determined. A written statement filed on behalf of an accused cannot be treated as a document produced for inspection of the Court. It is not strictly evidence even though the Court may consider it. The word 'evidence' means instruments by which relevant facts are brought before Court viz witnesses and documents by means of which court is convinced of these facts.

25. Filing of a false affidavit in a proceedings pending before the Civil Court would amount to an offence falling under Section 193 IPC and proceedings would have to be initiated on a complaint in writing by that court. Private complaint filed by the opposite party for an offence allegedly committed under Section 193 IPC is not maintainable being vitiated for non-compliance of the mandatory provisions under Section 195(1)(b)(i) Cr.P.C.

26. In Kailash Mangal vs. Ramesh Chand (D) Through Legal Representative (LAWS (SC)-2015-1-117) Supreme Court held as follows:

"In the instant case, the false affidavit alleged to have been filed by the appellant was in a proceeding pending before the civil court and the offence falls under Section of the 193 of the IPC and the proceeding ought to have been initiated on the complaint in writing by that Court under Section 195 (1)(b)(i) of the (Cr.P.C.). Since the offence is said to have been committed in relation to or in a proceeding in a civil court, the case of Iqbal Singh Marwah (supra) is not applicable to the instant case.

The private complaint filed by the respondent for the offences allegedly committed under Section 193 of the Code is not maintainable as the same is vitiated on account of non-compliance of the mandatory provision of Section 195(1)(b)(i) of the Cr.P.C." (Refer: Govind Mehta vs. State of Bihar (1971) 3 SCC 329, Surjit Singh and others vs. Balbir Singh (1996) 3 SCC 533, K. Venqadachalam vs. K.C. Palanisamy (2005) 7 SCC 352)

27. Therefore, false averments in pleadings are sufficient to attract Chapter XI of the Indian Penal Code.

28. Section 190 Cr.P.C. provides that a Magistrate may take cognizance of an offence (a) upon receiving a complaint of facts which constitute such offence (b) upon a police report of such facts, and (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed. Section 195 Cr.P.C. is a sort of exception to this general provision and creates an embargo upon the power of the court to take cognizance of certain types of offences enumerated therein. The procedure for filing a complaint by the court as contemplated by Section 195(1) Cr.P.C. is given in Section 340 Cr.P.C. The purpose of the section is to bar private prosecution where the courts of justice is sought to be perverted leaving to the court itself to uphold its dignity and prestige.

29. In **M.S. Ahlawat v. State of Haryana & Anr., AIR 2000 SC 168**, Supreme Court considered the matter at length and held as under :

"5....Provisions of Section 195 CrPC are mandatory and no court has jurisdiction to take cognisance of any of the offences mentioned therein unless there is a complaint in writing as required under that section." (**Refer: Kamla Prasad Singh vs. Hari Nath Singh AIR 1968 SC 19, Iqbal Singh Marwah (supra)**)

30. Normally, a direction for filing of a complaint is not made during the pendency of the proceeding before the court and this is done at the stage when the proceedings is concluded and the final judgment is rendered. (**Refer: N. Natarajan vs. B.K. Subba Rao AIR 1993 SC 541**)

31. For the law and reasons stated herein above, the impugned order dated 31 February 2015 passed by the Revisional Court/Additional Sessions Judge in Criminal Revision No. 22 of 2015 (Mahesh Tiwari vs. State of U.P.) and summoning order dated 17 December 2014 passed by the Judicial Magistrate-I, Anwla, Bareilly cannot be sustained, accordingly, is set aside, the proceedings being Complaint Case No. 743 of 2014 (Vijay Kumar vs. Mahesh Tiwari) instituted by opposite party no. 2 is thereby quashed.

32. The application is **allowed**.

(2016) 8 ILRA 646
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.08.2016

BEFORE

THE HON'BLE RAN VIJAI SINGH, J.

Writ C No.- 36872 Of 2012

Samar Bahadur Yadav

...Petitioner

Versus

State Of U.P. & Ors.

...Respondents

Counsel for Petitioner:

Sheo Ram Singh, Ajeet Singh, Raj Kumar Yadav

Counsel for Respondents:

C.S.C., Mahesh Narain Singh, Vikash Chandra Tiwari

Facts

The petitioner was appointed fair price shop agent of Village Deva Patti in 1993 and had been continuously operating the shop since then. In 2010, his wife was elected as Pradhan of Village Panchayat Machligaon — a different Gram Panchayat from the one in which the petitioner held the fair price shop licence.

On a complaint made on Tehsil Divas, the Supply Inspector submitted a report taking shelter of Government Order dated 17.5.2010, and the Sub-Divisional Officer, Tehsil Badlapur, District Jaunpur, by order dated 24.8.2011, cancelled the petitioner's agreement to run the fair price shop without affording any opportunity of hearing to the petitioner.

Appeal No. 123 of 2011 filed by the petitioner before the Additional Commissioner (Food and Civil Supplies), Varanasi Region, was dismissed vide order dated 31.3.2012. Both orders were challenged in the present writ petition.

Questions of Law

Whether the prohibition contained in the Government Orders dated 3.7.1990 and 18.7.2002, as revived by Government Order dated 17.5.2010, applies where the family member of the fair price shop agent is elected as Pradhan of a *different* Gram Panchayat/village — not the village where the fair price shop is situated?

Whether the cancellation of the petitioner's agreement, without affording an opportunity of hearing, was sustainable?

Held

(i) Territorial scope of the prohibition: The Government Orders prohibiting appointment/continuation of family members of a Pradhan or Up-Pradhan as fair price shop agents are purposive in nature. Their object is to prevent favouritism, nepotism, and to ensure transparency in the selection process and in the distribution of essential commodities within that very Gaon Sabha. The expression "open meeting of the Gaon Sabha" in Government Order dated 3.7.1990 refers to the Gaon Sabha where the fair price shop is proposed to be situated. The prohibition is territorially limited to the Gaon Sabha concerned and does not extend beyond its territorial limits.

(ii) Applicability on facts: Since the petitioner was running the fair price shop of Village Deva Patti and his wife was elected as Pradhan of Village Panchayat Machligaon — a different village — the apprehension of nepotism or favouritism does not arise. The Government Orders cannot be stretched to cover a situation where the family member of the fair price shop agent is elected as Pradhan of an altogether different Gram Panchayat having no territorial nexus with the fair price shop. The authorities erred in cancelling the petitioner's agreement and in dismissing the appeal.

(iii) Relied upon: *Samiullah v. State of U.P. and Others*, 2011 (6) ADJ 68 (Division Bench), wherein it was observed that the prohibition is intended to ensure no favouritism or nepotism in distribution of essential commodities and to maintain the faith of villagers of that very Gram Panchayat.

Result: Writ petition allowed. Orders dated 24.8.2011 (Sub-Divisional Officer, Tehsil Badlapur, District Jaunpur) and 31.3.2012 (Additional Commissioner, Food and Civil Supplies, Varanasi) quashed.

Cases Referred:

1. Samiullah v. State of U.P. and Others, 2011 (6) ADJ 68 (Division Bench).

(Delivered by Hon'ble Ran Vijai Singh, J.)

1. Heard Sri Sheo Ram Singh, learned counsel for the petitioner, learned Standing Counsel appearing for the State-respondents, Sri V.C.Tiwari, learned counsel appearing for the caveator and Sri M.K.Yadav, learned counsel for the Gaon Sabha.

2. Through this writ petition, the petitioner has prayed for issuing a writ of certiorari quashing the order dated 24.8.2011 passed by the Sub Divisional Officer, Tehsil Badlapur District Jaunpur as well as the order dated 31.3.2012 passed by the Additional Commissioner (Food and Civil Supplies) Varanasi Region, Varanasi.

3. Vide order dated 24.8.2011 the agreement of the petitioner to run the fair price shop of Village Deva Patti has been cancelled by the Sub Divisional Officer whereby the subsequent order dated 31.3.2012 the Additional Commissioner, (Food and Civil Supplies) has dismissed the Appeal No. 123 of 2011 (Samar Bahadur vs. State) filed by the petitioner against the order dated 24.8.2011.

4. The facts of the case, in brief, are that the petitioner herein was appointed as fair price shop agent of village Deva Patti in the year 1993 and since then he has been running the shop. However, her wife was elected as Pradhan of Village Panchayat Machligaon in the year 2010. The caveator, namely Smt. Uttama Devi, wife of Ram Raj has filed a complaint on 19.7.2011 on Tehsil Divas for cancelling the agreement of the petitioner's fair price shop on the ground that her wife has been elected as Village Pradhan. On the aforesaid complaint the Block Development Officer was required to submit a report. The Block Development Officer, pursuant thereto on 14.8.2011 informed that the matter has been enquired by the Assistant Development Officer, Panchayat who reported that the wife of the petitioner has been elected as Pradhan of Village Panchayat Machligaon whereas the petitioner is running fair price shop of Village Deva Patti since 1993. Simultaneously a report was also submitted by the Supply Inspector who taking shelter of the Government Order dated 17.5.2010 has reported that in the event, any family member of the fair price shop agent is elected as Pradhan or Up Pradhan then the agreement to run the fair price shop

has to be cancelled with immediate effect. Taking note of that the petitioner's agreement to run the fair price shop was cancelled for the reason that the petitioner's wife has been elected as Pradhan of Village Panchayat Machligaon.

5. Aggrieved by the aforesaid order the petitioner herein has filed Appeal No. 123 of 2011 (Samar Bahadur vs. State) on the ground that while passing the order dated 24.8.2011 no opportunity was ever offered to the petitioner and the provisions contained in the Government Order dated 17.5.2010 are not applicable upon the petitioner as the petitioner's wife was not elected as Pradhan of Village Panchayat Deva Patti but the Additional Commissioner vide order dated 31.3.2012 has discarded the argument of the petitioner and dismissed the appeal.

6. Aggrieved by the aforesaid orders the petitioner has filed the present writ petition.

7. While entertaining the writ petition this Court on 5.10.2013 has passed the following order:

"List after three weeks.

The learned Standing Counsel will file an affidavit enclosing the Government Order, which prohibits a family member to hold a fair price shop license, if any, member of the family becomes a Pradhan. The learned Standing Counsel will also file an affidavit indicating as to whether, the petitioner is a member of the village, in which, she has been elected as a Pradhan. The learned Standing Counsel will also indicate as to whether the petitioner's wife could be elected as a Pradhan of a different village, when her husband is residing in another village."

8. Learned standing counsel was directed to file counter affidavit. Pursuant thereto, learned standing counsel has filed counter affidavit as well as supplementary counter affidavit to which learned counsel for the petitioner has filed rejoinder affidavit. Another counter affidavit has been filed by the Gaon Sabha to which no rejoinder affidavit has been filed. On being confronted as to whether learned counsel for the petitioner desires to file rejoinder affidavit as well as supplementary rejoinder affidavits to the counter affidavit filed by the Gaon Sabha as well as supplementary counter affidavit filed by the State, learned counsel for the petitioner submitted that the question involved is with regard to the interpretation of the relevant Government Orders and in that respect the reply has already been given in the rejoinder affidavit to the counter affidavit filed by the State, therefore, he does not propose either to file rejoinder affidavit to the counter affidavit filed by the Gaon Sabha or the supplementary rejoinder affidavit to the supplementary counter affidavit filed by the State.

9. In view of the fact that counter and rejoinder affidavits have been exchanged, with the consent of learned counsel for the parties, the writ petition is taken up for final disposal.

10. It is not in dispute that the petitioner was appointed as fair price shop agent of Deva patti in the year 1993 and since then he continued to operate the fair price shop till the date of the

order of cancellation dated 24.8.2011. It is not in dispute that the petitioner's wife has been elected as Pradhan of Village Panchayat Machligaon. The Government Order dated 3.7.1990, which has been taken note of by the Supply Inspector, while submitting the report before cancellation of the agreement of the fair price shop, provides that no proposal for appointment of fair price shop shall be made in favour of the family members of elected Pradhan and Up Pradhan. For convenience, paragraph 4.7 of the aforesaid Government Order is reproduced herein below:

4.7 ग्राम प्रधान या उप प्रधान के परिवार के सदस्यों / संबंधियों के पक्ष में उचित दर की दुकान के आबंटन का प्रस्ताव नहीं किया जायेगा। परिवार की परिभाषा निम्नलिखित मानी जायेगी स्वयं स्वी पुतः अविवाहित पुती माता, पिता, भाई या अन्य कोई सदस्य जो साथ में रहता हो तथा एक ही चूल्हे का बना खाना खाता हो।

11. In continuation thereto a Government Order was issued on 18.7.2002. Relevant paragraph no. 2 of the said

12. Government Order is reproduced herein below:

2. इस संबंध में सम्यक विचारोपरांत जचोहज्ञताक्षरी को यह कहने का निदेश हुआ है कि उक्त शासनादेश के प्रस्तर 4.7 के आगे प्रस्तर-4.7 अ निम्नानुसार जोड़ दिया गया है

यदि किसी दुकानदार या उसके परिवार के किसी सदस्य को जिसकी परिभाषा प्रस्तर 4.7 में दी गई है प्रधान या उप प्रधान चुन लिया जाता है तो उसकी दुकान का आबंटन निरस्त कर दिया जायेगा।

कृपया उक्त शासनादेश कुल समय तक संशोधित समझा जाये।

13. It appears another Government Order was issued on 28.2.2007 in which it was stated that if the appointment of the fair price shop agent is prior in time to the election of his family member as Pradhan or Up Pradhan then his or her agreement to run fair price shop be not cancelled.

14. However, this Government Order was superseded by another Government Order dated 17.5.2010. Relevant paragraph no.2 of the same is reproduced herein below:

2 इस सम्बन्ध में पूर्व में निर्गत शासनादेश दिनांक 03-07-90 को अंशतः संशोधित करते हुए शासनादेश संख्या-276/29-6-2002-162 सा/01 दिनांक 18.7.2002 द्वारा प्राविधानित किया गया है कि यदि किसी दुकानदार या उसके परिवार के किसी सदस्य को जिसकी परिभाषा शासनादेश दिनांक 03.07.90 के प्रस्तर 47 में दी गयी है प्रधान या उपप्रधान चुन लिया जाता है तो उसकी दुकान का आबंटन निरस्त कर दिया जायेगा। शासन का पत्र संख्या संख्या-255/29.6. 2008-162 सा/01 टीसी दिनांक 28 फरवरी 2007 निर्गत किये जाने के पूर्व उक्त शासनादेश दिनांक 18.7.2002 का संज्ञान नहीं लिया गया है।

3- अतएव शासन स्तर पर सम्यक विचारोपरान्तः शासन का पत्र संख्या-555/29.6.2007-162 सा/01 टीसी दिनांक 28 फरवरी, 2007 एतद द्वारा निरस्त किया जाता है। पुनः यह स्पष्ट किया जाता है कि इस सम्बन्ध में शासनादेश दिनांक 18.7.2002 (सुलम सन्दर्भ हेतु प्रति संलग्न) में उल्लिखित प्राविधान ही लागू होंगे। शासन के पत्र दिनांक 28.2.2007 का लाम जिन दुकानदारों को दिया गया हो तो कृपया उनके अनुबन्ध भी तत्काल प्रभाव से निरस्त कर दिये जाय।

15. From the bare reading of the Government Order dated 3.7.1990, which has been brought on record as Annexure 5 to the writ petition, it transpires that the Government has intended to open fair price shop in each Gaon Sabha.

16. It was also made clear that where units are more than 4000, on the recommendation to the Gaon Sabha, another fair price shop can be opened. In paragraph 4.4 of the Government order it is provided that proposal for appointment of fair price shop shall be made in open meeting of the Gaon Sabha. As has been noticed earlier in paragraph no. 4.7 of the aforesaid Government Order, it is provided that no proposal shall be made for appointment of fair price shop agent in favour of the family member of Pradhan or Up Pradhan. The definition of the family has been described as wife, son, unmarried daughter, mother, father, brother or any other member who is living with Pradhan or Up Pradhan and takes meal together. The Government Order dated 18.7.2002 provides that if any family member of the fair price shop agent is elected as Pradhan or Up Pradhan, his or her agreement to run fair price shop be cancelled, which was slightly modified vide Government Order dated 28.2.2007 where relaxation was given, if after the appointment of the fair price shop agent any family member is elected as Pradhan or Up Pradhan then the agreement to run the fair price shop will not be cancelled. However, that Government Order dated 28.2.2007 has been superseded by the Government Order dated 17.5.2010 with the further direction that if the person is continuing as fair price shop agent whose family member has been elected as Pradhan or Up Pradhan his agreement shall be cancelled forthwith.

17. These Government orders are purposive and have been issued with the view to achieve certain objectives, which in my opinion, are that while electing/ selecting a fair price shop agent, there must be transparency in the process of selection and ruling out possibility any favouritism, nepotism etc. Provision was also made in the Government Order dated 3.7.1990 that no proposal for appointment of fair price shop agent of the family members of Pradhan or Up Pradhan shall be made and the rigour of not appointing the family members of Pradhan or Up-Pradhan is continuing till date. In the government order dated 3.7.1990, it has also been provided that the election/selection of the fair price shop agent be made in the open meeting of the gaon sabha. The word open meeting of the gaon sabha means open meeting of that very gaon sabha where the fair price shop agent is proposed to be appointed. In my opinion, it will not include any other gaon sabha as limit of apprehension of favouritism, nepotism is not intended to be allowed beyond the territorial limit of the gaon sabha from the bare reading of prohibitory language used in the various government orders referred herein above.

18. The purpose behind not electing/selecting the family members of the Pradhan/Up-Pradhan as fair price shop agent is to avoid favouritism, nepotism and to maintain transparency in the process of the selection which is limited to that very gaon sabha and in case, any relative of Pradhan or Up-Pradhan has been appointed as fair price shop agent in another village Panchayat, the possibility of nepotism, favouritism cannot be apprehended. The Division Bench of this Court in *Samiullah Vs. State of U.P. and others*, 2011 (6) ADJ 68, of which I was also member, while interpreting the aforesaid government order, has observed as under :-

The purpose and object for which the prohibition is contained is not far to seek. In a Gram Panchayat Pradhan plays a very pivotal role and with regard to distribution of essential commodities by a fair price shop dealer the Pradhan has specific role under the relevant Government orders and the scheme enforced by the State Government. The Pradhan supervise the

distribution of commodities of a fair price shop dealer to ensure that essential commodities are distributed to the members of the village. The distribution of essential commodities by a fair price shop dealer in public distribution system is one of the most important function entrusted to Gram Panchayat. The provision prohibiting family members and relatives of Pradhan to get a fair price shop has been incorporated with some object to achieve, i.e. there may be no favouritism or nepotism with regard to distribution of essential commodities and if a fair price shop dealer is not relative or family member of the Pradhan there shall be more transparency and faith of the villagers.

19. Here in this particular case as would appear from the order and the report submitted by the Block Development Officer contains that the wife of the petitioner has been elected as a Pradhan of Village Panchayat Machligaon whereas the petitioner is running fair price shop of Village Deva Patti that too since 1993, therefore the government order dated 3.7.1990 which prohibits the election/selection of fair price shop agent of the relative of Pradhan or Up-Pradhan in order to avoid favouritism, nepotism in the process of the election/selection or in distribution will not be applicable under the facts and circumstances of the case and the authorities have erred in cancelling the agreement of the petitioner to run fair price shop and dismissing the appeal.

20. In view of foregoing discussions, the writ petition succeeds and is allowed. The impugned orders dated 24.8.2011 passed by the Sub-Divisional Officer, Tehsil Badlapur District Jaunpur as well as the order dated 31.3.2012 passed by the Additional Commissioner (Food and Civil Supplies) Varanasi are hereby quashed.

21. So far as the election of the petitioner's wife as a Pradhan of Village Machligaon is concerned, in this regard, learned counsel for the petitioner contended that it is a separate issue and that question cannot be gone into in this writ petition.

22. I find substance in the submissions of learned counsel for the petitioner. Since the wife of the petitioner has already been elected as a Pradhan of Machligaon it is for the aggrieved person to question election of fair price shop agent. Otherwise also, assuming election of the petitioner's wife as Pradhan of Village Machligaon is illegal, it will go in favour of the petitioner.

(2016) 8 ILRA 652
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Writ Tax No.- 70 Of 2016

Sri Harbhajan Singh Chadha

...Petitioner

Versus

Deputy Commissioner Of Income Tax & Ors.

...Respondents

Counsel for Petitioner:

Suyash Agarwal

Counsel for Respondents:

C.S.C (I.T.Deptt.), Ashok Kumar, Manish Goyal

Income Tax — Transfer of Cases — Section 127(2)(a) of Income Tax Act, 1961 — Opportunity of Hearing — Recording of Reasons — Phrase "Wherever it is Possible to Do So" — Coordinated Investigation — Search and Seizure

INCOME TAX ACT, 1961 — Section 127(2)(a) — Transfer of income tax cases from ACIT, Moradabad to ACIT, New Delhi — Challenge to transfer order — Grounds: no show cause notice, no opportunity of hearing, no reasons recorded — Held: Section 127(2)(a) contemplates two distinct requirements: (i) affording Assessee a reasonable opportunity of hearing, wherever it is possible to do so; and (ii) recording of reasons for passing the transfer order — First requirement of opportunity of hearing is conditional and not mandatory in all cases — It is subject to the phrase "wherever it is possible to do so" — However, second requirement of recording of reasons is mandatory and absolute in all cases irrespective of whether opportunity of hearing was afforded or not — Reasons must not merely be recorded in file but must be contained in the order itself and communicated to Assessee — Non-communication of reasons renders the order of transfer bad in law.

(Paras 12, 13, 17 and 28)

INCOME TAX ACT, 1961 — Section 127(2)(a) — Phrase "Wherever it is Possible to Do So" — Meaning and scope — Held: The phrase "wherever it is possible to do so" qualifies only the requirement of opportunity of hearing and not the requirement of recording of reasons — Legislature has consciously used this phrase and it cannot be rendered redundant or ignored — When Authority bona fide and reasonably concludes that grant of opportunity is not possible in the facts and circumstances of the case, order of transfer without hearing is not ipso facto vitiated — Authority must act reasonably and bona fide in arriving at such conclusion — Mere absence of notice to Assessee will not vitiate order of transfer if circumstances justify such non-affording of opportunity — Requirement of opportunity is not mandatory but discretionary, subject to feasibility.

(Paras 20, 23, 24 and 25)

INCOME TAX ACT, 1961 — Section 127(2)(a) — Sufficiency of Reasons — Transfer order mentioning centralization of cases of group of Assesseees at one place consequent upon search and seizure operations conducted at various places — Whether sufficient — Held: Yes. Requirement of reasons under Section 127 does not mean that order must contain a detailed discussion on several grounds — Requirement of statute stands satisfied if from a bare reading of the order, any person of ordinary prudence may ascertain the reason which prevailed in the mind of Competent Authority — Such reason must not be flimsy, imaginary or whimsical and must disclose application of logic and prudence — Centralization of cases of an entire group of Assesseees, where search and seizure operations have been conducted, for coordinated investigation and assessment by one officer at one place, is a valid and sufficient reason for passing order of transfer.

(Paras 27, 28, 29, 30 and 31)

INCOME TAX ACT, 1961 — Section 127(2)(a) — Transfer of Cases — Right of Assessee to be Assessed by Particular Officer — Held: There is no vested right in an Assessee to be assessed by a particular Assessing Officer — Transfer from one Assessing Officer to another may cause minor inconvenience but does not infringe any substantial or material right of Assessee — Even after transfer, cases are dealt with under the normal prescribed procedure — There is no differential treatment occasioned by such transfer and the same cannot be assailed as causing serious prejudice.

(Para 23)

WRIT JURISDICTION — ARTICLE 226 — INTERFERENCE — CONDUCT OF PETITIONER — Petitioner did not raise objection to transfer order at earliest opportunity — Objection raised only at fag end when cases were about to become time-barred — Assessments already completed — Appeals pending — Held: Conduct of petitioner shows that objection was raised to frustrate assessment proceedings — Writ Court should decline to interfere in extraordinary jurisdiction in such circumstances — Not a fit case for interference under Article 226 of the Constitution of India.

(Para 32)

RESULT:

Writ Petition *dismissed*. No order as to costs.

Cases Referred:

1. **Ajantha Industries v. Central Board of Direct Taxes, (1976) 102 ITR 281 (SC)**
2. **Panna Lal Binjraj v. Union of India, AIR 1957 SC 397 (SC)**
3. **Kanshi Ram Agarwal v. Union of India, AIR 1965 SC 1028 (SC)**
4. **K.P. Mohammed Salim v. Commissioner of Income Tax, Cochin, (2008) 11 SCC 573 (SC)**
5. **M/s Redwood Hotel (P.) Ltd. v. Chief Commissioner of Income Tax and Others, (2003) 259 ITR 191**
6. **Bansal Sharevests Services Ltd. and Another v. Commissioner of Income Tax and Another, (2006) 283 ITR 332 (All.)**
7. **RPS Associates v. Director of Income Tax (Investigation), (2015) 280 CTR 582 (All.)**
8. **Vinay Kumar and Another v. Commissioner of Income Tax and Another, (1996) 221 ITR 566 (All.)**
9. **Sanjay Gupta v. Union of India and Others, Writ (Tax) Petition No. 877 of 2010, decided on 25.11.2010 (All.)**
10. **Smt. Chandra Prabha Kushwaha and Others v. CIT and Others, Writ Tax Petition No. 16 of 2014, decided on 9.1.2014 (All.)**
11. **Sahara Hospitality Ltd. and Another v. Commissioner of Income Tax and Others, (2013) 352 ITR 38 (Bom.)**
12. **Naresh Kumar Agarwal v. Union of India, (2010) 320 ITR 361 (Cal.).**

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Rakesh Ranjan Agarwal, Senior Advocate assisted by Sri Suyash Agarwal, learned counsel for petitioner and Sri Manish Goyal, learned counsel for Respondent.

2. Petitioner has challenged order dated 11th September, 2012 passed by Commissioner of Income Tax, Moradabad (hereinafter referred to as 'CIT') transferring income tax cases of petitioner from the jurisdiction of Assistant Commissioner of Income Tax, Moradabad [(hereinafter referred to as "ACIT(M)"] to Assistant Commissioner of Income Tax, New Delhi [hereinafter referred to as "ACIT(New Delhi)"] by exercising power under Section 127 (2)(a) of Income Tax Act, 1961 (hereinafter referred to as 'Act, 1961'). Petitioners have also challenged notices under Sections 153(A) and 276 CC and 277D issued by Assessing Officer at New Delhi, after cases stood transferred to New Delhi, on the ground that transfer order itself being illegal, all consequential actions initiated by Assessing Officer at New Delhi are also illegal.

3. The order of transfer has been challenged on the ground that neither any show cause notice nor opportunity was afforded to petitioner nor the impugned order mentions any reason which is an obligatory requirement under Section 127, before an order of transfer could have been passed, in view of law laid down in **Ajantha Industries Vs. Central Board of Direct Taxes, (1976) 102 ITR 281 (SC)** and Division Bench judgments of this Court in **Bansal Sharevests Services Ltd. and another Vs. Commissioner of Income Tax and another, (2006) 283 ITR 332 (All); RPS Associates Vs. Director of Income Tax (Investigation), (2015) 280 CTR 582; Bansal Sharevests Services and another Vs. Commissioner of Income Tax and another, (2006) 283 ITR 332; Vinay Kumar another Vs. Commissioner of Income Tax another, (1996) 221 ITR 566; Writ (Tax) Petition No. 877 of 2010, Sanjay Gupta Vs. Union of India and others decided on 25.11.2010. Writ Tax Petition No. 16 of 2014, Smt. Chandra Prabha Kushwaha and others Vs. CIT and others, decided on 9.1.2014 and Bombay High Court in Sahara Hospitality Ltd. and another Vs. Commissioner of Income Tax and others, (2013) 352 ITR 38 (Bom).**

4. Sri Manish Goyal, learned counsel for respondents, per contra, submitted that search and seizure operation was carried out at different places of petitioner on 1st February, 2012 which continued up to 3rd February, 2012. Petitioner challenged search and seizure proceedings and warrant of authorization in Writ (Tax) No. 451 of 2012, Harbhajan Singh Chadha and others Vs. Director of Income Tax and others. When aforesaid writ petition was pending, having regard to incriminating material and other valuable items and cash found in search and seizure, Director of Income Tax (Intelligence and Criminal Investigation), New Delhi [(hereinafter referred to as "DIT(ICI)"] requested vide letter dated 1.5.2012 to Chief Commissioner of Income Tax (Central) New Delhi (hereinafter referred to as 'CCIT (Central)' that all cases need be centralized and assessments be made by one Assessing Officer in Central Circle, Delhi so that coordinated investigation leading to meaningful conclusion may be carried out. Consequent thereto, and

finding request to be genuine, CCIT (Central) vide letter dated 18/21 May, 2012, communicated to Commissioner of Income Tax (Central) Circle-III, New Delhi (hereinafter referred to as 'CIT (Central-III)'); his administrative approval for centralization of cases under his charge. He also advised, since some of the cases of the Group were being assessed by Assessing Officer under Central Range-6 so functionally it would be convenient to allocate cases preferably to an officer working with Additional Commissioner of Income Tax, Central Range-6, New Delhi, keeping in mind equitable distribution of work.

5. Accordingly, CIT (Central-III) vide letter dated 3rd September, 2012 informed CIT that CCIT (Central) has conveyed approval for centralization of cases at New Delhi for coordinated investigation and hence CIT (Central-III) is conveying concurrence for transfer of cases to Assessing Officer at New Delhi by issuing an order under Section 127 of Act, 1961. A request was made to take an expeditious decision in the matter. Thereafter, CIT passed impugned order dated 11.9.2012. It is mentioned in the transfer order that in view of request for centralization of twelve cases of Chadha Group of Moradabad which include petitioner also, and concurrence granted by CIT (Central-III) for centralization of these cases, necessary order of transfer under Section 127 for coordination and investigation of cases is being passed. Stand taken by respondents is that looking to urgency and objective of coordinated investigation at one place, centralization of all cases was found necessary.

6. Manish Goyal, counsel for respondent urged that Section 127 contemplates reasonable opportunity of hearing "wherever it is possible to do so" and not in all cases. In the present case looking to above facts, authorities found utmost expediency to pass immediate order hence opportunity was not found feasible. Further, disclosure of detailed reasons could have defeated the purpose of transfer and may have come in the way of proper and effective enquiry, hence detailed reasons were not furnished in the order.

7. Before proceeding further, we may place on record certain additional facts which have emerged from record. After order of transfer was passed, Assessing Officer at Delhi issued notice under Section 153A to petitioner on 8th April, 2013 for filing returns for Assessment Years 2006-07 to 2011-12. Petitioner filed objection dated 30.4.2013 requesting that photocopy of seized material has not been provided and, in absence thereof, it is not possible to file return. He, therefore, prayed for supply of copy of seized material. He also pointed out that challenging aforesaid search and seizure, a writ petition is pending in High Court, hence time to file return be extended till the date of disposal of writ petition or till the date of supply of seized material, whichever is later.

8. Assessing Officer at New Delhi vide order dated 10.10.2013 informed petitioner that there is no restraint order in pending Writ Petition No. 451 (Tax) of 2012, therefore, petitioner should file return since time to complete assessment would expire on 31st March, 2014.

9. For the first time, vide letter dated 18.10.2013, petitioner took objection with regard to transfer of cases stating that no transfer order has been served upon him and, therefore, Assessing Officer at New Delhi should inform as to how jurisdiction stood conferred upon him.

10. Assessing Officer at New Delhi then issued a notice dated 2nd January, 2014 for proceeding under Section 276 CC and 272 (3). This notice was replied by petitioner through his Chartered Accountant on 16th January, 2014, stating that Assessee attended office of Assessing Officer on 18th October, 2013 i.e. the date fixed for hearing with notice under Section 142(1) and also filed written submission through his counsel along with Vakalatnama. Fundamental objection raised therein was regarding jurisdiction of Assessing Officer at New Delhi, since no order of transfer was served upon petitioner. We have also been informed by counsel for parties that Assessing Officer at New Delhi has already made assessment after transfer of cases. Against orders of assessment, petitioner has filed appeals which are pending.

11. Now we proceed to examine respective issues raised in this petition. Power of transfer has been exercised in this case under Section 127(2)(a) which reads as under : -

"where the Directors General or Chief Commissioners or Commissioners to whom such Assessing Officers are subordinate are in agreement, then the Director General or Chief Commissioner or Commissioner from whose jurisdiction the case is to be transferred may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, pass the order;"

(emphasis added)

12. Provision is very clear, Order of transfer can be passed after complying two requirements; (i) after giving Assessee, a reasonable opportunity of hearing wherever it is possible to do so; and (ii) recording of reasons for doing so.

13. Statute says that opportunity of hearing is necessary in such cases where it is possible to do so meaning thereby it is not necessary to be observed invariably in each and every case, whenever orders transferring cases are passed. However, second requirement that reasons shall be recorded is applicable in all the cases irrespective of the fact whether order of transfer has been passed after giving opportunity of hearing or not. Statute is clear and in emphatic terms requires that reasons shall be recorded by Competent Authority. Not only that but reasons must be communicated to Assessee, otherwise very purpose of recording reasons would be frustrated. When it is said that order shall be passed after recording reasons, in our view, reasons cannot be recorded and kept in file but the order itself must contain reasons for transfer and communicated to Assessee.

14. Respondents in this case have taken defence that grant of opportunity was not found feasible, therefore, referring to the words "wherever it is possible to do so", used in Section 127(2)(a), submission is that present case is one where grant of opportunity to petitioner was not possible and hence it will not vitiate impugned order of transfer.

15. We find that in various authorities wherein validity of order of transfer under Section 127(2)(a) has been dealt with, consensus view is that, opportunity of hearing if not afforded or reasons not recorded, order of transfer would be bad. However, no authority has been placed before us wherein this phrase "wherever it is possible to do so", has been considered in the context of Section 127 of Act, 1961. No authority is cited to show meaning of the words "wherever it is possible to do so" and how and in what manner, the aforesaid phrase would dilute or mitigate, otherwise mandate of legislature, of affording a reasonable opportunity of being heard to Assessee, before passing order of transfer.

16. In **Sanjay Gupta Vs. Union of India (supra)**, notices were issued to Assessee inviting objections Assessee actually filed objections and thereafter transfer order was passed. Basic issue was, where objection has been filed but neither grounds taken in the objections are discussed nor reasons are given in the order of transfer, can it be said that reasonable opportunity was given to Assessee and order contain reason. Court held that mere mention of words that transfer is required for "administrative convenience and coordinated investigation", is not sufficient, particularly when Assessee has made objections raising grounds which have not been considered at all. For this purposes Court also relied and followed Calcutta High Court's judgment in **Naresh Kumar Agarwal Vs. Union of India, (2010) 320 ITR 361**.

17. In **Ajantha Industries Vs. Central Board of Direct Taxes (supra)**, a notice was served upon Assessee, proposing transfer to facilitate investigation whereagainst Assessee filed objection and thereafter order of transfer was passed. It was challenged on the ground that no reasons were given or communicated in the order of transfer. Revenue took a defence that reasons were mentioned in the show cause notice, therefore, order of transfer for absence of reasons would not be bad. This argument of Revenue was not accepted. Court said that Section 127 has been introduced in Act, 1961 and even substituted Section 127 by Finance Act, 1976 emphasizes upon "recording of reasons". Once an order is passed transferring a case of an Assessee to another area, order containing reasons has to be communicated. Communication of order is absolutely essential requirement since Assessee is then made aware of reasons which impelled authority to pass order of transfer. Assessee shall have an opportunity to approach High Court under Article 226 of Constitution of India. Court thus said that "we are clearly of opinion that the requirement of recording reasons under Section 127(1) is a mandatory direction under the law and non-communication thereof is not saved by showing that the reasons exist in the file although not communicated to Assessee". Court specifically overruled an otherwise judgment of Delhi High Court in **Sunanda Vs. Union of India, (1975) 99 ITR 391**. Court said, when law requires reasons to be recorded in the order affecting prejudicially, interests of any person, who can challenge such order in Court, it ceases to be a mere administrative order and the vice of violation of principles of natural justice on account of omission to communicate reasons is not expiated.

18. In **Smt. Chandra Prabha Kushwaha and others Vs. CIT and others (supra)** neither any opportunity was afforded to Assessee nor reasons were communicated. Revenue admitted this flaw and did not take defence that opportunity was not possible in that matter. Court therefore followed the decision in **Ajantha Industries Vs. Central Board of Direct Taxes (supra)** and

earlier Division Bench decision of this Court in **Vinay Kumar Jaiswal Vs. CIT, (1996) 221 ITR 568 (All); Ashok Kumar Jain Vs. Commissioner of Income Tax and others Writ Tax No. 620 of 2010** decided on 7.7.2014 and held that there is an admitted case of denial of opportunity and lack of reason hence order of transfer is bad. Revenue in the relied on cases also did not take any defence that opportunity was not possible in the facts of the cases.

19. Propositions of law with respect to application of principles of natural justice, when specifically incorporated in a statute, and requirement of recording of reasons, distinguished from conclusions, are well established.

20. However, in this particular case, looking into the facts, we have to examine, whether respondents are justified in contending that non issue of notice and giving reasonable opportunity to Assessee, would not vitiate order of transfer in view of the fact that the requirement of notice is qualified with the phrase "wherever it is possible to do so" and, therefore, in every case, law does not require that opportunity is must" and also "whether this defence is available in this case".

21. Phrase "wherever it is possible to do so" as such could not be shown to have been used in any other statute and came up for consideration before Court, but a similar phrase "as far as possible" has been used in several statutes and considered by Court's time and again.

22. Section 127 is a procedural provision for ascertaining liability of an Assessee to determine in a fair, impartial and effective manner, so that no one is unduly benefited and wherever competent authority, having power of transfer under section 127 or any Assessee has apprehension, or for other administrative reason, it is found necessary that case should be transferred from jurisdiction of one authority to another, the same may be done. Statute also incorporates requirement of principles of natural justice as also recording of reason but simultaneously has used phrase "whenever it is possible to do so". This has been noticed by a Constitution Bench in **Kanshi Ram Agarwal Vs. Union of India, AIR 1965 SC 1028**. Reading Section 127, Court has said that Section 127(1) imposes an obligation on the authority exercising its power under the said Section to record its reasons for directing transfer of a case from one Income Tax Officer to another. It further requires that whenever power conferred by Section 127 is intended to be exercised, an opportunity should be given to Assessee, "whenever it is possible to do so" and reasons have to be recorded for making the order of transfer. Court thus held that opportunity to Assessee shall be offered "whenever it is possible to do so" but order must contain reasons for transfer. Court further held that "requirement that opportunity should be given, cannot be said to be on obligatory, because it has been left to discretion of authority to consider whether it is possible to give such opportunity to Assessee". This is of course, true, in coming to the conclusion, that Authority must act reasonably and bona-fide; but if Authority comes to conclusion that it is not possible to give a reasonable opportunity to Assessee, same can be dispensed with. However, it is not so with regard to requirement that reasons must be recorded for making transfer. So far as Section 127(1) is concerned, there is no dispute about this position. The twin requirement under Section 127 has some reasons. It is true that under Act, 1961 i.e. Section 120 read with Section 124, Assessing Officer is vested with jurisdiction over an area where any person carrying on the business or

profession resides. Therefore, in normal course, an Assessee is entitled to be assessed by Assessing Officer having jurisdiction as stated in the aforesaid provisions, but there is no such vested right in an Assessee to be assessed by a particular Assessing Officer. In given case, Competent Authority may transfer a matter from one Assessing Officer to another, may be having effect of change of place also but that will not affect any substantial right of Assessee.

23. On this aspect, we find support from judgment in **Panna Lal Binjraj Vs. Union of India, AIR 1957 (SC) 397**, wherein Court held that infringement of right to be assessed by Assessing Officer having jurisdiction in a particular area by transferring case to another cannot be said to be an infringement, material in nature. It is only a deviation of a minor character from general standard and does not necessarily involve a denial of equal rights for simple reason. Even after such transfer, case is dealt with under the normal procedure which is prescribed in the Act. Production and investigation of books of account, enquiries to be made by Income Tax Officer are same in a transferred case as in others which remain with Assessing officer of area in which other Assessee resides or carries on business. There is thus no differential treatment and no scope for argument that particular Assessee is discriminated with reference to other Assesseees similarly situated whose cases are not transferred, therefore, the transfer of case from one place to another is a matter which may disturb some convenience of Assessee but if other factors of importance of higher degree are available, an order of transfer otherwise validly passed, is not to be assailed as something which has caused serious prejudice to Assessee. An attempt on the part of learned counsel for Assessee that mere fact that opportunity was not given shall vitiate order of transfer, in our view, cannot be accepted for reason that statute does not make requirement of opportunity mandatory but it is subject to condition "wherever it is possible to do so" and in a given case, the mere fact that notice was not given to Assessee, will not vitiate order if the circumstances do justify such non affording opportunity.

24. A careful reading of Section 127(2)(a) leads no manner of doubt that requirement of "reasonable opportunity" to Assessee is subjected and conditional i.e. "whenever it is possible to do so". Department may proceed to pass an order of transfer without giving such opportunity if opportunity is not possible.

25. When a phrase has actually been used by Legislature in a statute, we cannot either ignore it or omit or render it redundant by reading that in every case an opportunity is must, else order of transfer is rendered bad. The words used by legislature have to be read and given due meaning and effect and that is the basic principle of interpretation. Each and every word used by legislature has some meaning or consequence and whenever an statute is considered, every word must be given its logical meaning and consequence unless there appears to be some inconsistency or conflict resulting in consequences to be disturbing or there are other compelling reasons showing that some part does not convey the same meaning as it ought to be or the same is redundant or is inconsistent with rest of the provisions. However that is not so particular in this case and from judgment of Constitution Bench in **Panna Lal Binjraj Vs. Union of India (supra)**, we find that requirement of opportunity has not been held mandatory, and mandate is available only for requirement of recording of reason.

26. Absence of opportunity to Assessee has been explained on the ground that there is a large number of Assessee's who were under different Assessing Officers and some of the matter were already assigned to Assessing Officer under Central Range-6, New Delhi. Thus for coordinated assessment by an authority who has a complete information with him, transfer of cases from Moradabad which was under one Commissioner, to Delhi which was under another Commissioner, was found expedient and since time was short as a period would have expired on 31st March, 2012, Competent Authority in its wisdom found it a case of urgency to transfer cases without giving any opportunity. In our view, looking to the entire facts as noted above, it is not a fit case where impugned order of transfer deserves to be interfered on the ground that no reasonable opportunity was granted to Assessee.

27. Then comes the question "whether order of transfer contains any reason and mandatory requirement of recording of reason is satisfied or not". Only reason mentioned in the order is "centralization of cases at one place" since some other cases were already being assessed by Assessing Officer under Central Range-6, New Delhi .

28. Requirement of reason under Section 127 has a basic idea that before causing some inconvenience or prejudice to Assessee, Competent Authority passing order of transfer must show, from order of transfer, a conscious application of mind on its part that transfer order is not in mechanical exercise. Requirement of reasons does not mean that order must contain a detailed discussion on several grounds for justifying order of transfer, but requirement of statute stands satisfy if from a bare reading of order, any person of ordinary prudence may come to know as to what is the reason which has prevailed in the mind of Competent Authority to exercise power of transfer and such reason or ground is not flimsy, imaginary, whimsical. It must disclose that patently, logic and prudence has been applied before passing it.

29. In **M/s Redwood Hotel (P.) Limited Vs. Chief Commissioner of Income Tax and others, (2003) 259 ITR 191**, a similar reason for transfer of cases under Section 127(2) was held valid. Court observed that Section 127 only provides for an administrative arrangement authorizing Chief Commissioners to transfer files from one officer to another for better and more efficient handling of files. When group of cases are handled, it is always desirable to have one officer handling all assessments together so that related transactions can be better appreciated by officer. Court further held that it is for Department to consider consolidation of all files of firms and companies and partners and directors, including those who are now assessed at different places so as to be assessed at one place.

30. In **K.P. Mohammed Salim Vs. Commissioner of Income tax, Cochin, (2008) 11 SCC 573**, considering Section 127, Court said, order of transfer is passed for the purpose of assessment of income. It serves a larger purpose. Such an order has to be passed in public interest. It may transfer cases involving more than one assessment year. Power of transfer in fact provides for a machinery provision and it must be given its full effect. It must be construed in a manner so as to make it workable. It should be construed to effectuate a charging section so as to allow the

authorities concerned to do so in a manner wherefor statute was affected. Power of transfer can be exercised for regular assessment as well as block assessment.

31. In the present case, reason of centralized assessment as a result of search and seizure conducted at entire group of Assessee, in our view, is justified cause for transferring all the cases so that the same may be handled by one officer at one place.

32. We find some other reasons also to non suit the petitioner. When petitioner received notice from Assessing Officer to whom cases were transferred, at the earliest opportunity, he did not raise any objection that cases have been transferred without complying requirement of Section 127. It is only at the fag end when there remains a short time, rendering his cases time barred, he raised this objection obviously to frustrate the assessment. Lastly, we are also informed that assessments have already been made and petitioner has filed appeals, which are pending. These facts, in our view, also justify to decline interference in writ jurisdiction under Article 226 of Constitution of India. Thus, this is not a fit case where interference by this Court in extraordinary jurisdiction would be justified.

33. In result, writ petition fails and is hereby dismissed accordingly. There is no order as to cost.

(2016) 8 ILRA 662
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.08.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Writ Tax No.- 773 Of 2013

Commissioner Of Income Tax, Central Circle, Kanpur Versus Income Tax Settlement Commissioner, IV Floor & Anr.	...Petitioner ...Respondents
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Counsel for Petitioner:

Ashok Kumar(S.S.C.in.Tax), Bharat Ji Agarwal, S. Chopra, Manish Goel

Counsel for Respondents:

S.D. Singh, Ashish Bansal, Nishant Mishra, S.K. Garg

Legislation referred to : Income Tax Act, 1961 – Ss. 132(1), 145, 153A, 153B, 153C, 245B, 245C, 245C(1), 245C(1A)–(1E), 245D, 245D(1), 245D(2B), 245D(2C), 245D(4), 245F, 271(1)(a), 273; Income Tax Rules, 1962 – R. 9; Finance Act, 2007; Constitution of India – Art. 226.

NATURE OF PROCEEDINGS :

Writ petition under Article 226 of the Constitution of India filed by the Commissioner of Income Tax (Central), Kanpur, challenging the order dated 20.12.2012 passed by the Income Tax Settlement Commission (ITSC), New Delhi, whereby the ITSC settled the income tax dispute of the respondent-assessee — Salimuddin, Proprietor of M/s Akbar International, Agra — at a total income of Rs. 12,36,96,506/- for Assessment Years 2004-2005 to 2011-2012, on the ground that the assessee had not made a 'full and true disclosure' of his income in the application under Section 245C(1) of the Income Tax Act, 1961, and that the ITSC had no jurisdiction to settle at a figure higher than that disclosed in the original application.

FACTS :

The respondent-assessee, Salimuddin, is a proprietor of M/s Akbar International, Agra, engaged in the manufacture and sale of handicraft items primarily of marble. He was assessed to tax by the Assistant Commissioner of Income Tax (ACIT), Central Circle, Agra. A search and seizure/survey operation was conducted under Section 132(1) of the Income Tax Act, 1961 on 10.03.2010. Pursuant thereto, notices were issued under Section 153A for Assessment Years 2004-2005 to 2011-2012. The assessee filed returns disclosing an aggregate additional income of Rs. 1,76,50,000/- outside the books of accounts.

Income declared by the assessee in original returns and in returns filed under Section 153A for each assessment year is tabulated below:

Assessment Year	Income as per Original Return (Rs.)	Income as per Return u/s 153A (Rs.)
2004-2005	1,69,52,775	2,25,46,910
2005-2006	3,85,15,060	4,25,15,060
2006-2007	3,97,16,743	4,32,16,740
2007-2008	4,14,96,340	4,30,96,713
2008-2009	4,78,27,710	4,88,77,710
2009-2010	2,95,03,950	3,20,03,950
2010-2011	2,46,68,100	2,46,68,100
2011-2012	2,92,29,380	2,92,29,380

Thereafter, the assessee filed an application under Section 245C(1) before the ITSC on 06.06.2011, disclosing additional income (over and above income disclosed before the AO) of Rs. 3,21,85,040/- for Assessment Years 2004-2005 to 2011-2012, year-wise as follows:

Assessment Year	Additional Income disclosed before ITSC (Rs.)
2004-2005	10,00,000
2005-2006	15,00,000
2006-2007	25,00,000
2007-2008	50,00,000
2008-2009	65,00,000
2009-2010	75,00,000
2010-2011	68,10,040
2011-2012	13,75,000
Total	3,21,85,040

The ITSC passed an order under Section 245D(1) on 14.06.2011 allowing the application to proceed. A report was called from the CIT under Section 245D(2B). The CIT failed to file his report within the prescribed period under Section 245D(2C) and the ITSC accordingly proceeded treating the application valid. The CIT subsequently filed a report dated 05.11.2011 (with a covering letter dated 05.11.2011) disclosing a colossal estimated undisclosed income of approximately Rs. 155,91,66,555/- (Rs. 155 crores) — comprising uncounted salary payments, estimated gross profit, unexplained advances/investments, and excessive stock of Rs. 7,30,01,487/- — and raised an objection that the application was not eligible as the assessee had offered Rs. 17 crores as undisclosed income during the search but disclosed only Rs. 3.21 crores in the application before ITSC.

The ITSC found the Revenue's figure of Rs. 155 crores to be artificial and unfeasible, particularly noting that the gross profit computed by the CIT exceeded the total turnover, which was plainly incorrect. Regarding the

disputed stock, the CIT had valued it at tag price claiming excess stock of Rs. 7,30,01,487/-, whereas the assessee had calculated commission at 32% of tag price. During hearing, the ITSC suggested that the stock dispute be settled by treating Rs. 7,26,28,670/- as additional income (based on commission at 8.5% instead of 32%), to which the assessee agreed in the spirit of settlement and to buy peace. Taking the average gross profit rate at 45% of sale price, the ITSC finally settled the total income at Rs. 12,36,96,506/-.

The petitioner-CIT challenged this order on the sole ground that the assessee's acceptance of the higher income figure (Rs. 7,26,28,670/- towards stock valuation) during hearing amounted to a revision of the income disclosed in the application under Section 245C(1), thereby proving that the original application did not contain a 'full and true disclosure' of income, rendering the application invalid and the ITSC's order without jurisdiction.

QUESTIONS OF LAW :

- (i) What constitutes 'full and true disclosure of income which has not been disclosed before the Assessing Officer' within the meaning of Section 245C(1) of the Income Tax Act, 1961, and whether the disclosed amount in the application is the final and immutable figure for settlement proceedings before the ITSC?
- (ii) Whether acceptance by an assessee, during the course of proceedings before the ITSC, of a higher income figure suggested by the ITSC — in the spirit of settlement and to buy peace — amounts to a 'revision' of the original application and constitutes proof of non-disclosure of full and true income in the application under Section 245C(1), so as to oust the jurisdiction of the ITSC?
- (iii) Whether the Income Tax Settlement Commission, being a statutory body with wide jurisdiction under Chapter XIX-A of the Income Tax Act, 1961, can proactively suggest adjustments to income during proceedings and whether such adjusted income, if accepted by the assessee, can be included in the final settlement order under Section 245D(4)?
- (iv) Whether enhanced valuation of stock-in-trade accepted by an assessee before the ITSC, where the method of valuation adopted by Revenue (tag price) has never been recognized under any commercial accounting system or under the Income Tax Act, 1961, can ipso facto be treated as 'income' not disclosed in the original application?
- (v) What is the scope of judicial review by the High Court under Article 226 of the Constitution against a final settlement order passed by the ITSC under Section 245D(4) of the Income Tax Act, 1961?

HELD :

(i) **Meaning of 'full and true disclosure' under S. 245C(1) — Nature and scope** — Section 245C(1) of the Income Tax Act, 1961 requires an assessee to make a 'full and true disclosure' of income not disclosed before the Assessing Officer, the manner in which such income was derived, and the additional tax payable thereon. The word 'disclosure' under Section 245C is in the nature of voluntary disclosure of concealed income. An application under Section 245C(1) is not a device to frustrate income discovered suo motu by Revenue Authorities. The disclosure must relate to income neither previously disclosed before the AO nor already discovered by the Income Tax Authorities, nor in respect of which material establishing the concealment has already been gathered by such authorities. However, the requirement of 'full and true disclosure' does not mean that the figure disclosed in the application will be the ultimate and immutable income. During proceedings before the ITSC, the amount of undisclosed income may increase, depending on the views of the Revenue, the submissions of the assessee, and other relevant facts and circumstances. [Relied upon: CIT v. Express Newspapers Ltd., (1994) 206 ITR 443 (SC)]

(ii) **Acceptance of higher income suggested by ITSC during hearing — Not equivalent to revision of application or non-disclosure** — An assessee accepting an enhanced income figure during the course of proceedings before the ITSC, pursuant to a suggestion or proposal made by the ITSC in the spirit of settlement, cannot be equated with a suo motu revision of the original application. Such acceptance does not prove that the original application did not contain a full and true disclosure of income. The term 'settlement' by its very nature implies a process of give and take between two disputing parties before an independent third party, with scope for negotiation. The ITSC is not designed to act as a passive spectator; it is empowered to proactively gather evidence and make suggestions. An assessee accepting a ITSC suggestion,

in a bonafide manner to buy peace and expeditiously conclude the dispute, cannot be treated at par with a case where the assessee suo motu files a revised application disclosing higher income. It is only where an assessee suo motu and unilaterally revises his original disclosure that his application may be rendered invalid. [Relied upon: Major Metals Ltd. v. Union of India, (2014) 303 ELT 380 (Bom HC); CIT v. ITSC, (2016) 65 taxmann.com 40 (Bom HC); CIT v. K.T.P. Mohammed Mazhar, (2015) 58 taxmann.com 315 (Ker HC); Director of IT (International Taxation) v. ITSC, (2014) 365 ITR 108 (Bom HC)]

(iii) Ajmera Housing Corpn. — Distinguished — The decision of the Supreme Court in Ajmera Housing Corpn. v. CIT, (2010) 326 ITR 642, is distinguishable on facts. In that case: (a) the assessee had suo motu filed a second application disclosing additional income of Rs. 11.41 crores after having initially disclosed only Rs. 1.94 crores, after the CIT's report was submitted; (b) the revised disclosure was voluntary and not pursuant to any suggestion by the ITSC; and (c) the ITSC had failed to seek a fresh report from the CIT upon the second disclosure in violation of natural justice. In the present case, no revised application was ever filed by the assessee. The enhanced income arose during hearing from a suggestion by the ITSC relating to valuation of stock, which the assessee accepted in a bonafide spirit of settlement. The CIT had itself not filed its report within the prescribed time. The factual matrix being entirely different, Ajmera Housing Corpn. (supra) does not apply.

(iv) ITSC — Wide jurisdiction; not confined to figures in original application — By virtue of Section 245F of the Income Tax Act, 1961, the ITSC has, until an order is passed under Section 245D(4), the powers and functions of an Income Tax Authority under the Act in relation to the case. The ITSC is empowered to pass an order providing for 'terms of settlement' on matters covered by the application and on any matter relating to the case referred to in the CIT's report, including demands of tax, penalty, interest and all matters to make the settlement effective. Settlement is intended to be final, comprehensive and conclusive. ITSC is not required to act mechanically upon the exact figure disclosed by the assessee in the application; it is vested with wide discretion to achieve a just and final settlement. The Statute mandates that ITSC be manned by persons of integrity and outstanding ability with special knowledge of direct taxes and business accounts. [Relied upon: CIT v. Express Newspapers Ltd., (1994) 206 ITR 443 (SC); Major Metals Ltd. v. Union of India, (2014) 303 ELT 380 (Bom HC); Shreeram v. Settlement Commission, 118 ITR 169]

(v) Valuation of stock-in-trade — Not per se 'income'; recognized principles of commercial accounting — Valuation of closing stock at tag price — as adopted by Revenue in its report — is not recognized under any system of commercial accounting or under the Income Tax Act, 1961. The recognized principle is that closing stock should be valued at cost or market price, whichever is lower. The true purpose of crediting the value of unsold stock is to cancel out the cost of that stock entered on the other side so as to show only actual profits realised on the year's trading. Anticipated loss is taken into account but anticipated profit in the shape of an appreciated value of unsold stock is not brought to charge. Valuation of stock-in-trade is not per se 'income' taxable under the Act; it is the correct computation of profit and gains that is the object. The colossal figure of approximately Rs. 155 crores computed by Revenue was rightly found by the ITSC to be artificial, imaginary and based on unfeasible estimation. [Relied upon: CIT v. British Paints India Ltd., (1991) 188 ITR 44 (SC); Chainrup Sampatram v. CIT, (1953) 24 ITR 481 (SC); Shakti Trading Co. v. CIT, (2001) 250 ITR 871 (SC); CIT v. Bannari Amman Sugars Ltd., (2012) 349 ITR 708 (SC); CIT, Delhi v. Woodward Governor India Pvt. Ltd., (2009) 13 SCC 1 (SC)]

(vi) Scope of judicial review against ITSC orders — Extremely limited — The scope of judicial review by the High Court under Article 226 of the Constitution against a final settlement order passed by the ITSC under Section 245D(4) of the Income Tax Act, 1961 is extremely limited. The High Court would not be justified in re-appreciating findings of the ITSC based on the record. Interference is permissible only if the order of the ITSC is contrary to any provision of the Act, or is vitiated by bias, fraud, malice, or a breach of natural justice. Where no contravention of any statutory provision is made out and no manifest error is demonstrated, the writ court shall not interfere with the order of the ITSC. [Relied upon: Jyotendrasinji v. S.I. Tripathi, (1993) 201 ITR 611 (SC); Union of India v. Ind-Swift Laboratories Ltd., (2011) 4 SCC 635 (SC)]

RESULT :

Writ petition dismissed. The order dated 20.12.2012 passed by the Income Tax Settlement Commission, New Delhi, settling the income tax dispute of the respondent-assessee at a total income of Rs. 12,36,96,506/- does not suffer from any manifest error or contravention of any provision of the Income Tax Act, 1961. The acceptance by the assessee of the enhanced income figure suggested by the ITSC during hearing in respect of stock valuation, in a bonafide spirit of settlement, does not constitute non-disclosure of full and true income in the original application under Section 245C(1). No order as to costs.

Cases Referred:

CIT v. Express Newspapers Ltd., (1994) 206 ITR 443 (SC)
Jyotendrasingji v. S.I. Tripathi, (1993) 201 ITR 611 (SC)
Ajmera Housing Corpn. v. CIT, (2010) 326 ITR 642 (SC)
Union of India v. Ind-Swift Laboratories Ltd., (2011) 4 SCC 635 (SC)
Shreeram v. Settlement Commission, 118 ITR 169
Chainrup Sampatram v. CIT, (1953) 24 ITR 481 (SC)
Shakti Trading Co. v. CIT, (2001) 250 ITR 871 (SC)
CIT v. British Paints India Ltd., (1991) 188 ITR 44 (SC)
CIT v. Bannari Amman Sugars Ltd., (2012) 349 ITR 708 (SC)
CIT, Delhi v. Woodward Governor India Pvt. Ltd., (2009) 13 SCC 1 (SC)
CIT v. Ponni Sugars and Chemicals Ltd., (2008) 306 ITR 392 (SC)
Major Metals Ltd. v. Union of India, (2014) 303 ELT 380 (Bom HC – DB)
CIT v. ITSC, (2016) 65 taxmann.com 40 (Bom HC)
Director of IT (International Taxation) v. ITSC, (2014) 365 ITR 108 (Bom HC – DB)
CIT v. K.T.P. Mohammed Mazhar, (2015) 58 taxmann.com 315 (Ker HC)
ACE Investment Ltd. v. Settlement Commission, (2004) 186 CTR 486 (Mad HC)
V.M. Shaik Mohammed Rowther v. Settlement Commission, (1999) 236 ITR 581 (Mad HC)
Rasik Ramji Kamani v. S.K. Tripathi, (1993) 203 ITR 848
Dr. C.M.K. Reddy v. Settlement Commission, (2008) 306 ITR 403
Mohanlal S. Doppa v. CIT, (2002) 253 ITR 33 (Guj HC)
Azmera Housing Corpn. v. CIT, (2000) 246 ITR 63 (Bom HC)
Whimster & Co. v. CIR, (1925) 12 Tax Cases 813.

(Delivered by Hon'ble Sudhir Agarwal, J.
 &
 Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Shri Manish Goel learned counsel for the petitioner and Shri S.D.Singh, learned Senior Advocate assisted by Shri Nishant Mishra, learned counsel for the respondent.

2. This writ petition has been filed by Commissioner of Income Tax (Central) Kanpur (hereinafter referred to as "CIT") being aggrieved by order dated 20.12.2012 passed by Income Tax Settlement Commission, New Delhi (hereinafter referred to as "ITSC").

3. Salimuddin, Prop.M/s Akbar International, Agra is an individual Assessee and assessed to Tax by Assistant Commissioner of Income Tax, Central Circle, Agra (hereinafter referred to as "ACIT"). Assessee commenced its business as partnership concern which subsequently became Proprietarship with effect from 1.6.1990. Assessee is engaged in the business of manufacture and sale of Handicraft items, mainly of Marble.

4. A search and seizure/survey operation was conducted under section 132(1) of Income Tax Act 1961 (hereinafter referred to as "Act 1961") on 10.3.2010. Pursuant to seizure memo and survey report, notices were issued by Assessing officer (hereinafter referred to as 'AO') to Assessee under section 153-A for assessment years 2004-2005 to 2011-2012.

5. Pursuant thereto return of income was filed by Assessee disclosing aggregate income to Rs.1,76,50,000/- as income from outside of books of accounts, not disclosed in regular books of accounts. Thereafter, Assessee submitted an application under section 245-C(1) before ITSC disclosing total additional income to Rs.3,21,85,040/-.

6. In accordance with Section 245D(2B), ITSC called for a report from CIT. Report dated 2.11.2011 was submitted under Rule 9 with a covering letter dated 5.11.2011. Besides other, CIT stated that Assessee during course of search & seizure, offered 17 crores as undisclosed income for Assessment Year 2010-2011 while in the application filed before ITSC he has disclosed additional income of only Rs.3,21,85,040/-, hence, application is not eligible to be proceeded with. Thereafter Assessee (respondent 2) further disclosed additional income of Rs.7,26,28,670/- and ITSC settled the matter finally on a total income of Rs.12,36,96,506/- vide order dated 20.12.2012.

7. Shri Manish Goel, learned counsel for petitioner submitted that the additional income of Rs.7,26,28,670/- disclosed by Assessee, subsequently before ITSC, after report under Rule 9 was submitted by CIT, shows that application under section 245-C(1) did not contain full and true disclosure of his income which had not been disclosed before AO and since there was non compliance of Section 245-C(1), application was not eligible to be proceeded with and liable to be rejected. ITSC has committed manifest error in passing impugned order accepting additional income of Assessee to the extent of Rs. 12.36 crores in all, though in the application Assessee disclosed only Rs. 3.21 crores. He urged that a valid application under section 245-C(1) needs disclosure of full and true particulars of undisclosed income, hence, application not being consistent to the requirement of Section 245 C(1), was not eligible to be proceeded.

8. He further contended that Assessee has no right to revise an application, and relied on ***Azmera Housing and another versus CIT 2010 326 ITR 642***. He further contended that application, if inconsistent with Section 245-C(1), was not maintainable and if ITSC has proceeded and passed order, such order of ITSC shall be invalid and liable to be set aside. To buttress above submission, Shri Manish Goel, learned counsel for petitioner relied on a Madras High Court judgment in ***ACE Investment Ltd.versus Settlement Commission (2004) 186 CTR (Madras) 486*** and Kerala High Court in ***Jyotendrasinghi versus S.I.Tripathi & others in (1993) 201 ITR 611***.

9. Shri S.D.Singh, learned Senior Counsel however, submitted that initially CIT took an objection that additional income disclosed was less than Rs.50 lacs, hence, application was not eligible and liable to be rejected. Reason being that additional income of Rs.3,21,85,040/- was inclusive of income of Rs.1,76,50,000/- shown in regular returns filed under section 153-A but this fact was not found correct by ITSC as additional income of Rs.3.21 crores and odd was not inclusive of additional income of Rs.1,76,50,000/- crores disclosed in the return filed under section

153-A. Shri Singh pointed out that CIT raised an objection with regard to stock valued at Rs.7,30,01,487/-. The inventory of stock was prepared at tag price. In the application filed before ITSC, while calculating stock valuation, Assessee took element of commission at 32% based on tag price but CIT said that actual commission paid was only 8.33% in financial years i.e 2007-2008 to 2010-2011. Meaning thereby that there was a difference of stock to the tune of Rs.7,30,01,487/-. ITSC during hearing observed that value of stock i.e Rs.7,26,28,670/-, in view of the discussion made above, be treated additional income, to which suggestion, Assessee agreed and that is how additional income of Rs.12.24 crores in all has been finalised by ITSC. Learned counsel for respondent Assessee pleaded that such surrender or acceptance, during proceedings of ITSC, cannot be faulted and it will not amount to non disclosure of full and correct facts in the application under section 245-C(1). Learned counsel for respondent-2 further contended that as a matter of fact 'valuation of stock' cannot be said to be income and could not have been taxed but in order to purchase peace and avoid any harassment or prolong litigation, Assessee agreed to suggestion of ITSC during proceedings and such conduct of Assessee cannot be treated as if he had not made disclosure of correct facts in the application. He also placed reliance on certain authorities which we propose to discuss while discussing merits, later on.

10. We have heard learned counsel for parties and perused record and relevant authorities.

11. The first question is, "what an Assessee has to disclose in the application under section 245-C(1)", and, second, "what is the meaning of words "full and true disclosure of his income which has not been disclosed before Assessing Officer".

12. When application was filed by Assessee before ITSC it is not in dispute that cases of Assessment Years 2004-2005 to 2011-2012 were pending before Assessing Officer. In the returns filed under section 153-A of Act 1961, Assessee had disclosed additional income of Rs.1,76,50,000/-. A chart showing income as per original income and shown in returns filed under section 153-A for assessment years 2004-2005 to 2011-2012 reads as under:

Asstt.Year	Income as per original return	Income as per return u/s 153A/142(1)/139
2004-2005	1,69,52,775	2,25,46,910
2005-2006	3,85,15,060	4,25,15,060
2006-2007	3,97,16,743	4,32,16,740
2007-2008	4,14,96,340	4,30,96,713
2008-2009	4,78,27,710	4,88,77,710

2009-2010	2,95,03,950	3,20,03,950
2010-2011	2,46,68,100	2,46,68,100
2011-2012	2,92,29,380	2,92,29,380

13. However, before ITSC, Assessee disclosed additional income of Rs.3,21,85,040/-. It is not disputed before us that said income disclosed before ITSC was not inclusive of income disclosed before AO. Chart showing disclosure of additional income before ITSC in relevant assessment years reads as under:-

A.Y	Additional Income disclosed before Hon'ble Income Tax Settlement Commission
2004-2005	Rs.10,00,000
2005-2006	Rs.15,00,000
2006-2007	Rs.25,00,000
2007-2008	Rs.50,00,000
2008-2009	Rs. 65,00,000
2009-2010	Rs. 75,00,000
2010-2011	Rs. 68,10,040
2011-2012	Rs. 13,75,000
Total	Rs.3,21,85,040

14. Thus total income disclosed by Assessee before AO under section 153-A and before ITSC in application under section 245-C(1) comes to Rs.49835040/-. The said income included stock also. CIT in report submitted that as per his computation, tentative undisclosed income comes to Rs.155,91,66,555/- crores which included stock worth Rs.7,30,01,487/- in the assessment year 2010-2011. CIT report also included and estimated gross profit to the tune of Rs.12,03,72,096/- for assessment years 2004-2005 to 2011-2012. The break up of this amount of Rs.155 crores and odd, is broadly in the following heads:

(i)	Uncounted/unexplained payment of salary	Rs. 6,27,37,344/-
(ii)	Estimated gross profit	Rs.1,20,99,72,094/-
(iii)	Unexplained advanced expenditure/investment etc.	Rs. 21,34,55,630/-
	Excessive stock	Rs. 7,30,01,487/-

15. ITSC found that in computing gross profit vis-a-vis valuation of stock entry, there was a huge gap in as much as Revenue has determined gross profit at 125% of tag price and for that reason report disclosed a colossal figure which was not justified. It also found that even gross profit worked out by CIT resulted in a figure which was more than turnover which cannot be correct since gross profit is embedded in turnover.

16. Assessee explained lesser rate of gross profit but ITSC after considering submissions of both sides took average rate of gross profit as 45% of sale-price.

17. On the question of unexplained stock of Rs.,7,30,01,487/- which was highlighted by Revenue before ITSC, in paragraph 7 of order it has observed that though in the inventories prepared by Department, there were several deficiencies yet Assessee, in the spirit of settlement and to buy peace of mind, made an offer of 90 lacs on account of stocks. Assessee had claimed that they used to pay commission to agents who bring customers to showroom and that was claimed at 32%. During proceedings before ITSC, Assessee however, agreed to a suggestion of ITSC for addition of income by treating commission to 8.5% only instead of 32%.

18. Hence, ITSC neither accepted version of Revenue nor that of Assessee as such, instead followed a middle path, made certain suggestions to Assessee to accept some increased undisclosed income which was admitted by Assessee.

19. Shri Manish Goel however, contended that after filing application before ITSC under section 245-C(1) and submission of report by CIT, Assessee if made a further declaration, meaning thereby, he has revised his undisclosed income mentioned in the application though such revision was not permissible. It also shows that Assessee had not disclosed full and true disclosure of his income in the application filed initially.

20. In order to test above submission, we may first examine Section 245-C. It reads as under:

Application for settlement of cases.

245C. (1) An assessee may, at any stage of a case relating to him, **make an application** in such a form and in **such manner as may be prescribed**, and **containing a full and true disclosure of his income which has not been disclosed before the A.O.**, the manner in which such income has been derived, the additional amount of income-tax payable on such income and such other particulars as may be prescribed, to the Settlement Commission to have the case settled and any such application shall be disposed of in the manner hereinafter provided:

Provided that no such application shall be made unless,-

(i) in a case where proceedings for assessment or reassessment for any of the assessment years referred to in clause (b) of sub-section (1) of section 153A or clause (b) of sub-section (1) of section 153B in case of a person referred to in section 153A or section 153C have been initiated, the additional amount of income-tax payable on the income disclosed in the application exceeds fifty lakh rupees,

(ia) in a case where-

(A) the applicant is related to the person referred to in clause (i) who has filed an application (hereafter in this sub-section referred to as "specified person"); and

(B) the proceedings for assessment or re-assessment for any of the assessment years to in clause (b) of sub-section (1) of section 153A or clause (b) of sub-section (1) of section 153B in case of the applicant, being a person referred to in section 153A or section 153C, have been initiated,

the additional amount of income-tax payable on the income disclosed in the application exceeds ten lakh rupees,

(ii) in any other case, the additional amount of income-tax payable on the income disclosed in the application exceeds ten lakh rupees,

and such tax and the interest thereon, which would have been paid under the provisions of the Act had the income disclosed in the application been declared in the return of income before the Assessing Officer on the date of application, has been paid on or before the date of making the application and the proof of such payment is attached with the application.

Explanation.-For the purpose of clause (ia),-

(a) the applicant, in relation to the specified person referred to in clause (ia), means,-

(i) where the specified person is an individual, any relative of the specified person;

(ii) where the specified person is a company, firm, association of persons or Hindu undivided family, any director of the company, partner of the firm, or member of the association or family, or any relative of such director, partner or member;

(iii) any individual who has a substantial interest in the business or profession of the specified person, or any relative of such individual;

(iv) a company, firm, association of persons or Hindu undivided family having a substantial interest in the business or profession of the specified person or any director, partner or member of such company, firm, association or family, or any relative of such director, partner or member;

(v) a company, firm, association of persons or Hindu undivided family of which a director, partner or member, as the case may be, has a substantial interest in the business or profession of the specified person; or any director, partner or member of such company, firm association or family or any relative of such director, partner or member;

(vi) any person who carried on a business or profession,-

(A) where the specified person being an individual, or any relative of such specified person, has a substantial interest in the business or profession of that person; or

(B) where the specified person being a company, firm, association of persons or Hindu undivided family, or any director of such company, partner of such firm or member of the association or family, or any relative of such director, partner or member, has a substantial interest in the business or profession of that person;

(b) a person shall be deemed to have a substantial interest in a business or profession, if -

(A) in a case where the business or profession is carried on by a company, such person the date of search], the beneficial owner of shares (not being shares (not being shares entitled to a fixed rate of dividend, whether with or without a right to participate in profits) carrying not less than twenty per cent of the voting power; and

(B) in any other case, such person is, [on the date of search], beneficially entitled to not less than twenty per cent of the profits of such business or profession.]

(1A) For the purposes of sub-section (1) of this section, the additional amount of income-tax payable in respect of the income disclosed in an application made under sub-section (1) of this section shall be the amount calculated in accordance with the provisions of sub-sections (1B) to (1D).

(1B) Where the income disclosed in the application related to only one previous year,-

1. if the applicant has not furnished a return in respect of the total income of that year ,then, tax shall be calculated on the income disclosed in the application as if such income were the total income;

2. if the applicant has furnished a return in respect of the total income of that year, tax shall be calculated on the aggregate of the total income returned and the income disclosed in the application in the application as if such aggregate were the total income.

(1C) The additional amount of income-tax payable in respect of the income disclosed in the application relating to the previous year referred to in sub-section (1B) shall be,-

a) in a case referred to in clause (i) of that sub-section, the amount of tax calculated under that clause;

(b) in a case referred to in clause (ii) of that sub-section, the amount of tax calculated under that clause as reduced by the amount of tax calculated on the total income returned for that year;

*(c) [***]*

(1D) Where the income disclosed in the application related to more than one previous year, the additional amount of income -tax payable in respect of the income disclosed for each of the years shall first be calculated in accordance with the provisions of sub-section (1B) and (1C) and the aggregate of the amount so arrived at in respect of each of the years for which the application has been made under sub-section (1) shall be the additional amount of income-tax payable in respect of the income disclosed in the application.

*(1E)[***]*

(2)Every application made under sub-section (1) shall be accompanied by such fees as may be prescribed.

(3) An application made under sub-section (1) shall not be allowed to be withdrawn by the applicant.

(4) An assessee shall, on the date on which he makes an application under sub-section (1) to the Settlement Commission, also intimate the Assessing Officer in the prescribed manner of having made such application to the said Commission.

(quote is only relevant part of Section 245C).

21. Assessee filed application dated 6.6.2011 in respect to assessment years 2004-2005 to 2011-2012 showing additional income of Rs.32185040/-. He also explained the manner in which such income has been derived and on this aspect we have not been addressed at all that this condition has not been complied by Assessee. ITSC passed order under section 245D(1) on 14.6.2011 directing to proceed on the said application and sent copy of order to Assessee as well as CIT. It also called upon CIT to send a report as provided under section 245-D(2B) within the period prescribed under section 245D(2C). CIT did not furnish report, hence, ITSC vide order dated 28.7.2011 proceeded further treating application valid under section 245D(2C).

22. CIT then furnished report along with covering letter dated 5.11.2011 and during course of proceedings before ITSC, when objection was raised with respect to stock of Rs.73001487/-, it (ITSC) made a suggestion to Assessee to accept valuation as Rs.7,26,28,670/- as additional income which was accepted by Assessee and thereafter ITSC proceeded to determine tax liability of Assessee and question of waiver of penalty etc. and passed impugned order.

23. This acceptance of additional income by way of increased valuation of stock is on the proposal made by ITSC, during the course of hearing, as is evident from following findings recorded in paragraph 7.3 of impugned order of ITSC.

"The applicant agreed to the suggestion of the Commission for increasing valuation of stock by Rs.7,26,28,670/- and submitted as under:

"During the course of the hearing, Hon'ble Commission propsoed to settle the issue related to stocks at Rs.7,26,28,670/- over and above what has already been offered in this regard at Rs.90 lakhs thereby making a proposal of additional income at Rs.12,24,63,710/- i.e 7,26,28,670/- + 4,98,35,040/- additional income offered while filing returns in response to notice u/s 153A of the Act for Assessment Years 2004-2005 to 2009-2010 and as per the statement of facts."

(emphasis added)

24. The argument of Shri Goel that it amounts to revision of income disclosed by Assessee before ITSC, in our view, is not acceptable. From the report of CIT, it is evident that an extraordinary colossal figure was disclosed therein to the tune of Rs.155 crores and odd which could not be substantiated before ITSC at all. Figures were imaginary, artificial and founded on unfeasible estimation. This has been castigated by ITSC itself and learned counsel for petitioner could not show anything wrong on the part of ITSC in making such observations against colossal imaginary figure worked out by Revenue and mentioned by CIT in its report dated 5/11/2011.

25. The entire dispute has centered around valuation of stock which Assessee had disclosed to worth Rs.90 lacs while CIT claimed more than 7 crores.

26. Scope of Section 245C(1) and the procedure prescribed in Section 245D of Act 1961 was considered by a three judges Bench in **Commissioner of Income Tax versus Express Newspapers (1994) 206 ITR 443 (SC)**. Court observed, when an application is filed before ITSC by an Assessee, CIT had an opportunity to submit report and raise objection regarding eligibility of application. Thereafter ITSC shall decide, whether application is valid and it should proceed or not. In the present case within prescribed time under section 245-D(2B) , CIT did not raise any objection by submitting report. Hence, ITSC after scrutinizing application on its own held application valid and proceeded.

27. Court in **Commissioner of Income Tax versus Express Newspaper (Supra)** also observed, when ITSC decide to allow application to be proceeded with or not, may have to consider several aspects of the matter. It may be a complex one. It may involve prolonged or cumbersome investigation or may be where having regard to the nature of case and other circumstances, ITSC may feel, in the interest of Revenue and in the interest of justice, that it is better to give a quietus to the case, once for all, instead of allowing it to be fought through the usual channels. The decision has to be taken by ITSC having regard to all the facts and circumstances before it, in the light of the object, purpose and scheme of enactment. A wide discretion has been given to ITSC under Act, 1961 and for that reason, provisions relating to appointments of members of ITSC, make it evident that ITSC should be manned by men of integrity and outstanding ability, having special knowledge of direct taxes and business accounts.

28. The only conditions necessary to exist are that Assessing Officer has not already discovered it or has either gathered material to establish particulars of such income or fraud, to enable an Assessee to file application under section 245-C. Court in **Commissioner of Income Tax versus Express News Papers Ltd. (Supra)** said that for a proper delineation of jurisdiction of ITSC, language of Section 245C(1) must be kept in mind. It provides that an Assessee, at any stage of case relating to him, may make an application to ITSC disclosing fully and truly income which has not been disclosed before Assessing Officer. He must also disclose how said income was derived by him besides certain other particulars. It means that Assessee cannot approach ITSC for settlement of his case with respect to income already disclosed before Assessing Officer. Such an application is maintainable only if it discloses income which has not been disclosed before Assessing Officer.

29. Thus, the word "disclosure" under section 245C is, in the nature of voluntary disclosure of concealed income. Moreover, application under section 245-C is not a escape goat to Assessee to frustrate suo motu discovered, concealed, income by Revenue Authorities. If Assessing Officer after gathering or receiving information discovered some income which was not disclosed by Assessee and had added it to Assessee's income, in such a case ITSC cannot be approached by filing application under section 245C in respect to income which has been discovered by Assessing Officer. Similarly, there may be cases where Income-Tax Authorities after gathering information and material, are likely to establish that Assessee has concealed particulars of a particular income and in that respect also ITSC may not admit an application. The underlying idea, therefore, is that the disclosure under section 245C must be of an income neither disclosed by Assessee before

Assessing Officer nor Assessing Officer has already discovered it nor has either gathered material to establish particulars of such income or fraud or is at a stage of investigation/enquiries where material gathered by him is likely to establish particulars of such income or fraud. Assessee cannot be allowed to defeat or forestall the entire exercise of Income-Tax Authorities just by approaching ITSC. When an application however, is made, the requirement of Section 245C is that Assessee must mention full and true disclosures.

30. The term "full and true disclosure" does not mean that whatever Assessee has disclosed will be ultimate income whereupon ITSC shall pass order. Instead during the course of proceeding before ITSC, amount of undisclosed income by Assessee mentioned in application may increase subject to point of view of Revenue before ITSC and other relevant facts and circumstances.

31. Application submitted by Assessee, it is not pointed out did not disclose full and true details of income. What is contended is that valuation of stock assessed by Revenue, which, during the course of hearing before ITSC, was accepted by Assessee, should be treated as if this was a fact which was not disclosed to ITSC at the time of filing application and amounts to non disclosure of full and true facts. The argument assumes that ITSC has to proceed with the matter in a mechanical manner in as much as whatever is disclosed by Assessee in the application, shall be the complete figure, not worthy of variation upward and if there is any occasion to get it increased during negotiation before ITSC, it will amount to non disclosure of full and true disclosure and will render application bad and in the teeth of Section 245-C(2). This argument, in our view, would not only defeat the very purpose of constitution of ITSC but will also render ITSC, a statutory body, to do some mechanical work instead of considering a matter of settlement wherein there is scope of negotiation also.

32. The term "settlement" by itself means that there are two parties to the dispute and a third party, independent and objective in functioning, shall bring out settlement between two disputing parties, following a process of give and take.

33. A similar argument, we find, was raised before Bombay High Court in ***Major Metals Ltd. Versus Union of India 2014(303) E.L.T 380 (Bombay)***. It was argued that ITSC had no jurisdiction to deal with an issue not raised in the application and adjudicating function is confined to the matters covered by application. Referring the entire scheme under Chapter XIX-A of Act 1961, a Division Bench, vide judgement delivered by Hon'ble Dr.D.Y.Chandrachud (as his Lordship then was) observed that ITSC is not designed to act as a passive spectator to what Assessee discloses. ITSC can act proactively in gathering or obtaining evidence. Statute confers upon it power to settle a case, which is nothing but an assessment. Settlement is intended to be final, comprehensive and conclusive. Orders which ITSC would pass are on matters covered by application and on any matter relating to the case not covered by application but referred to in the report of CIT. Vide Section 245F, ITSC, untill an order is passed under section 245-D(4), would have jurisdiction to exercise powers and perform functions of an Income Tax Authority under Act 1961 in relation to the case.

34. In a further recent decision of Bombay High Court in ***Commissioner of Income Tax versus Income-Tax Settlement Commission and others (2016) 65 taxmann.com 40 (Bombay)***, ITSC determined additional income during proceedings of the case, changed disclosed income by Assessee in his application. Before ITSC, during the course of hearing, Assessee who had disclosed additional income of Rs.8.54 crores during assessment years 2004-2005 to 2009-2010, increased his offer for settlement by offering Rs.59.11 crores and Rs.3 crores. ITSC considered and accepted the same. Order of ITSC was challenged by Revenue on the same ground that additional offer admitted by Assessee during proceedings of hearing before ITSC would mean that there was no full and true disclosure of income in the application filed under section 245-C(1) and hence application should have been rejected by ITSC for that reason alone. Reliance was also placed by Revenue on the decision of Apex Court in ***Azmera Housing and another (Supra)***. Analysing dispute in Azmera Housing and another (Supra), Bombay High Court said:

*"7. It would, therefore, be noticed that there was a clear finding of failure to make full and true disclosure of the income made by the Applicant in Ajmera Housing Corpn. (supra) to the Settlement Commission. The wpl-1806-2015 revision of the income offered for tax therein was suo-motu. **This was after the hearing had concluded and orders were awaited.** Normally, the income offered for tax in an application for settlement would bind the parties concerned and any revision thereof, would prima facie, be evidence of the original application for settlement not declaring the full income in its original application. However, this is not cast in stone and will depend upon the factual context from case to case to wpl-1806-2015 determine whether there was any failure to disclose fully and truly the income. **This is particularly so where the correct determination of income is dependent upon the application of the appropriate Transfer Pricing Rule which to an extent is subjective, as in this case. In such a case, if an additional income is declared during the course of the hearing in view of what emerges during debate before the Commission, it cannot be said that the original application did not make true and full disclosure of its undisclosed income.** It is for the Commission to consider on the basis of the facts that emerge before it, whether the original application contained a bonafide true and full disclosure of the Applicant's income or not. This would necessarily be dependent upon various factors including the manner in which the application for wpl-1806-2015 settlement has been made out."*

(emphasis added)

35. In the present case also, Assessee did not file any revised application after report was submitted by CIT under section 245D(2B) though that was the case in ***Azmera Housing Corpn. (Supra)***. Here CIT did not file any report within time, and thereafter application was held valid and ITSC proceeded. During course of hearing, on the valuation of stock, when an offer was made by ITSC, Assessee accepted the same. Obviously acceptance during the course of hearing is only with a view to expeditiously settle the dispute and buy peace.

36. A similar view has been taken by Kerala High Court in ***Commissioner of Income Tax versus K.T.P Mohammed Mazhar (2015) 58 taxmann.com 315***. Court rejected a similar contention raised by Revenue and in paragraph 8 of judgment, said as under:

"8. The primary contention of the learned senior counsel for the petitioner is that the very fact, that additional amounts were offered by the respondent- assessee before the Settlement Commission, would indicate that the original declaration made by the respondent - assessee, along with the application filed before the Settlement Commission, did not contain a full and true disclosure of the undisclosed income or the manner in which such income was derived. While considering a similar contention, raised in the other batch of cases that I has decided namely, in Writ Petn. No. 2637 of 2014 and connected cases, I had examined the scheme of the Chapter XIX-A of the IT Act and found as follows:

"It is apparent from a perusal of the scheme of Chapter XIX-A of the IT Act that the jurisdictional fact that confers the Settlement Commission with the jurisdiction to proceed with an application is the filing by an applicant, of an application that contains a full disclosure of his income which has not been disclosed before the AO, the manner in which such income had been derived and the additional amount of income- tax payable on such income. If, at any stage of the proceedings before the Settlement Commission, it finds that the disclosure made by the applicant is not a full and true disclosure, then the said authority cannot proceed further with the application. It get denuded of its jurisdiction to proceed with the matter. It is in the backdrop of this fact that I must analyse the decision of the Supreme Court in the case of Ajmera Housing Corporation (supra) that has been relied by the petitioner. It must, at once be noted that the provisions of Chapter XIX-A that were analysed by the Supreme Court in that case were slightly different from those under consideration in the instant case in that, it was the provisions, as they stood prior to the amendments introduced by the Finance Act, 2007, that were considered by the Supreme Court. Moreover, the **Supreme Court was considering the case of an assessee who had suo moto revised his declaration, by making offers of additional amounts by way of disclosure of income at various stages of the proceedings before the Settlement Commission.** Under those circumstances, the Court found that, judging by the assessee's own conduct, his original application could not be seen as containing a full and true disclosure of his income for the purposes of settlement under the Act....."

37. Further, Court held in paragraph 13, as under:

"13. The issue to be considered here is whether, the observations of the Supreme Court in the aforementioned judgment are to be taken to mean that in every case where an applicant makes an offer of additional amounts, even at the instance or suggestion of the Settlement Commission, it would follow that the original declaration made by the applicant did not contain a full and true disclosure of his income and thereby rendering it invalid and, consequently, denuding the Settlement Commission of its jurisdiction to proceed further in the matter? In my view, such an interpretation would render meaningless the scheme of settlement that is envisaged under the IT Act. **One cannot discount the possibility of the Settlement Commission finding the disclosure of income made by an assessee as being full and true and yet requiring minor adjustments to include even those amounts, which though disputed by the assessee, would nevertheless be offered by the assessee in the interests of putting an end to litigation and in the spirit of settlement. These could be amounts, in respects of which, neither the Department nor the**

*assessee have sufficient material to substantiate their contentions, but the assessee is nevertheless willing to give up his claim in the interests of finality to litigation. The consent by an assessee to forgo such amounts, at the suggestion of the Settlement Commission, cannot have the effect of rendering his original disclosure dubious for the purposes of settlement under the Act. In my opinion, it is only in those cases where an assessee resiles from his original declaration of undisclosed income, by sua motu effecting revisions thereto, that he renders his application invalid for the purposes of settlement. In cases where additional amounts are offered by an assessee, pursuant to a relinquishment of his claims with regard to the non-taxability of such income, it would not be a case where the assessee is resiling from his original stand as regards undisclosed income. In the latter type of cases, the Settlement Commission would be well within its jurisdiction to include such amounts in the final amount for which the case before it is settled with the assessee. In taking the said view, I am fortified by the decisions of **Bombay High Court in Director of IT(International Taxation) v. ITSC [2014] 267 CTR (Bom) 18 : [2014] 101 DTR (Bom) 108 : [2014] 365 ITR 108 (Bom).**"*

(emphasis added)

38. Shri Goel on the contrary has relied on a Madras High Court judgment in **V.M.Shaik Mohammed Rowther versus Settlement Commission (IT & WT) and others (1999) 236 ITR 581** but therein Assessee had submitted application making disclosure subject to several conditions, ITSC rejected this application on the ground that there was no full and true disclosure of income which had not been disclosed before AO and this order was upheld by High court. The decision has no application to the facts of present case.

39. Another authority relied by Shri Manish Goel is a Bombay High Court judgment in **Commissioner of Income Tax versus Income Tax Settlement Commisison and others 2000(246) 63**, Azmera Housing Corporation and 19 individuals filed 31 applications under section 245-C in October 1993 in respect of assessment years 1989-90 to 1993-94. Therein Assessee's applications filed under section 245C(1) on 19.9.1994 were forwarded by ITSC to Commissioner seeking his report. Commissioner submitted report on 27.1.1994 informing that on the basis of seized material and documents found in search under section 132, an order was already passed under section 132(5) on 12.3.1992 determining concealed income at Rs.200.60 crores. Court found that Assessee initially, in the application filed before ITSC, disclosed additional income of Rs.1.94 crores and then filed another application on 11.9.1994 i.e after almost 7 and 1/2 months, after CIT had submitted report, disclosing additional income of Rs.11.41 crores. ITSC passed order to proceed with the application on 8.12.1994. Court found that Assessee neither disclosed correct facts nor correct income and after CIT's report, himself filed an application with additional disclosure of income showing that his disclosure at initial stage in the application under section 245C was not full and true. Court also found that after second disclosure to the tune of Rs.11.41 crores, ITSC did not seek any report from CIT though if it was a new application and hence it was incumbent upon ITSC to seek report of CIT. Court observed:

"Therefore, in our opinion, it was obligatory on the part of the Settlement Commission to have considered whether an additional or supplementary report from the Commissioner immediately after the second disclosure as contemplated under section 245D(1) of the Act was necessary and ought to have further considered whether an opportunity to the Commissioner to file his objection, and advance his submissions in support of his report through the departmental representative was necessary or not. We, therefore, find fault with the decision - making process adopted by the Commission, in exercise of our powers of judicial review. As pointed out in Jyotendrasinji v. S.I.Tripathi [1993] 201 ITR 611 (SC), this court can interfere with the order if it is found to be contrary to the provisions of the Act. As already recorded herein, we have pointed out as to how the order is in breach of the principles of natural justice and also contrary to the provisions of section 245C(1) and section 245D (1) of the Act. Consequently, the order dated November 17, 1994, is liable to be set aside as bad, illegal and ab initio void being in breach of the principles of natural justice."

(emphasis added)

40. This judgment of Bombay High Court was confirmed by Supreme Court in **Azmera Housing Corpn.(Supra)**. The distinguishing facts are self evident which is not the case in hand and therefore in our view, petitioner do not get any help from the aforesaid judgment.

41. Another decision relied by Shri Goel is **Rasik Ramji Kamani versus S.K.Tripathi and others (1993) 203 ITR 848** but from a perusal of judgment, we find that application and the documents filed by Assessee did not disclose correct facts and most documents were irrelevant. ITSC sought clarification from Assessee who did not cooperate. Court said that a party approaching ITSC must adjust to the requirement of scheme and needs of the procedure. If essential material is withheld by Assessee from ITSC, who could ordinarily be expected to have the care and custody of such materials, that by itself would be a good ground for the Settlement Commission to refuse to exercise its power. Court as a matter of fact recorded its findings as under:

"The appellant according to it, made false and misleading ascertains about having submitted all the details, while in fact he had not done so".

42. Lastly, in **Dr.C.M.K.Reddy versus Settlement Commission (IT/WT) and Others 2008 (306) ITR 403**, application under section 245C(1) filed by Assessee was rejected on various grounds including non disclosure of full and true income. Court found that in the application Assessee claimed to have received Rs.12.5 lacs through a will executed by his mother but as a matter of fact, the said amount was paid by Testator during her life time i.e on the date of execution of deed and hence it was a gift deed but neither source of amount was disclosed nor gift tax return was filed. Further from the cash flow statements of different assessment years, filed by Assessee, ITSC found that investment in fresh assets and higher amount of investment in existing assets had been shown in addition to the claim made for the receipt of fresh loans and gifts for most of the years which had not been established. Therefore, rejection of application was on its own facts. The above judgment does not support petitioner.

43. Then comes Gujarat High Court judgment in ***Mohanlal S.Doppa versus Commissioner of Income Tax (2002) 253 ITR 33***. The dispute was, whether penalty proceedings could have been initiated where ITSC order did not contain any specific direction for levy of penalty. Court observed that:

"After receiving the report, the Settlement Commission is to give an opportunity of hearing to the Assessee as well as to the Department and thereafter the Commission is to pass an order which "shall provide for the terms of the settlement including any demand for tax, penalty and interest and the manner in which any sum due under the settlement shall be paid and all other matters to make the settlement effective".

44. It is thus said, once application was entertained by ITSC, it has jurisdiction to decide all matters pertaining to that "case" and if ITSC does not impose any penalty or does not give any direction for imposition of penalty, it is to be treated as that ITSC has exempted Assessee from imposition of penalty. Court held:

"Looking to the constitution of the Settlement Commission as set out in section 245B of the Act, it is obvious that once the Settlement Commission decides the application for settlement including any direction (or absence thereof) for any penalty or interest, it is not for the Assessing Officer to invoke his powers under other provisions of the Act empowering him to levy penalty such as under section 271(1) (a) or section 273 or under section 139(8) of the Act for levying interest, because all such powers were very much available to the Commission under section 245F of the Act and if, in its discretion, the Settlement Commission did not choose to invoke those powers, the Assessing Officer cannot subsequently invoke them after the Settlement Commission has passed an order under section 245D(4) of the Act."

45. Therefore, this judgment is also on a different issue and has no application to the case in hand.

46. None of the above authorities therefore, bars an Assessee from admitting or agreeing for a higher amount of disclosure than what is mentioned in the application, during course of proceeding before ITSC, if it is a part of negotiation before ITSC and Assessee in a bonafide manner, to purchase peace, agree for such a suggestion made by ITSC. The only restriction is that, whatever disclosure has been made by Assessee in his application or subsequently accepted before ITSC, should not be an income which was disclosed before Assessing Officer earlier or has already been discovered by income-tax authorities establishing the same to be an undisclosed income supported with due material. In all other cases where jurisdiction has been exercised by ITSC and order has been passed, such enhancement has been held valid.

47. Even otherwise, we should also keep in mind that scope of judicial review in respect of final orders of ITSC is extremely limited. ITSC is a kind of statutory authority. Background facts with regard to constitution of ITSC have been considered in *Shreeram v. Settlement Commission* 118 ITR 169. It was held that purpose is to settle a tax dispute expeditiously which will serve cause

of nation needing huge resources for its vast welfare schemes. ITSC is to be manned by persons of impeccable integrity and unquestioned competence. Great expertise and greater responsibility in the decision-making process are integral parts of its independent functioning. It has to free itself from extraneous considerations or alien influences. It is not reasonable for an Assessee or Revenue to expect that ITSC should function as if it is a mere rubber stamp or yet another limb of ordinary executive mechanism of tax-gatherers. Neither Revenue nor taxpayer can, therefore, play truant with that high, responsible, purpose-actuated and result-oriented mechanism.

48. In ***Director of Income-Tax (international Taxation) versus Income-Tax Settlement Commission and others (2014) 365 ITR 108(Bom)***, a Division Bench held that a suggestion made by ITSC, if accepted by Assessee to bring an end to that dispute with Revenue, it cannot be said to be a case of revised application or multiple disclosures by Assessee. Assessee has not detracted disclosure made in application but further amount offered by ITSC, as a gesture of bonafide or goodfaith, if accepted by Assessee, cannot be treated at par with a case where Assessee has withdrawn earlier application and filed another application disclosing additional income. Acceptance of certain amount before ITSC on its suggestion would not amount to, as if, original application did not contain full and true disclosure.

49. Nothing of that sort has been shown to us also during course of argument by Shri Manish Goel as to how application filed by Assessee did not contain true and full particulars disclosing of his income.

50. So far as valuation of stock is concerned, even on broader side we asked him to show as to how an inventory of stock with Assessee by itself can be said to be an "income". Nothing could be substantiated by him to show that valuation of stock by itself can be treated to be "income", liable for tax under Act 1961. The entire dispute on account of additional income accepted by Assessee before ITSC is in respect to valuation of stock. Act 1961 does not contain any specific provision for valuation of stock. Profit and gain, however, must be computed in the manner provided by Act 1961. It is the duty of Officer concerned to determine profit and loss of Assessee according to correct principles of accounting. For that purpose he may depend upon nature of business and its special character, allow certain adjustments but primary purpose and object is to deduce correct income, profit and gains. The Revenue Official cannot do without taking into account value of stock entered at the beginning and at the end of the year by ascertaining difference between two.

51. In ***Commissioner of Income Tax versus British Paints India Ltd. (1991) 188 ITR 44***, Court said, that a well recognized principle of commercial accounting to enter in the profit and loss account is the value of stock-in-trade at the beginning and at the end of the accounting year at cost or market price whichever is lower. Court cited an observation of ***Lord President in Whimster and Co. versus CIR (1925) 12 Tax Cases 813***, It says:

"..... in computing the balance of profit and gains for the purposes of incomes-tax,two general and fundamental common places have always to be kept in mind. In the first place, the profits of any particular year or accounting period must be taken to consist of the

difference between the receipts from the trade or business during such year or accounting period and the expenditure laid out to earn those receipts. In the second place, the account of profits & loss to be made up for the purpose of ascertaining that difference must be framed consistently with the ordinary principles of commercial accounting, so far as applicable and in conformity with the rules of the Act, 1961, or of that Act as modified by the provisions and schedules of the Acts regulating excess profits duty, as the case may be. For example, principles of commercial accounting require that in the profit and loss accounts of merchant's or manufacturer's business, the values of the stock- in-trade at the beginning and at the end of the period covered by the account should be entered at cost or market price, whichever is lower, although there is nothing about this in the taxing statute....."

52. In **Commissioner of Income Tax versus British Paints India Ltd.(Supra)** Court also said, where market value has fallen before the date of valuation and on that date, market value of article is less than its actual cost, Assessee is entitled to value the articles at market value and thus anticipate loss which he will probably incur at the time of sale of goods.

53. Valuation of stock-in-trade at cost or market value, whichever is lower, is a matter entirely within the discretion of Assessee. But whichever method he adopts, it should disclose a true picture of his profit and gains. If, on the other hand, he adopts a system which does not disclose true state of affairs for determination of tax, even if ideally suited for other purposes of his business, such as the creation of a reserve declaration of dividends, planning and the like, it is duty of Assessing Officer to adopt any such computation as he deems appropriate for proper determination of true income of Assessee. This is not only a right but a duty that is placed on the Officer, in terms of first proviso to Section 145 which concerns a correct and complete account but which, in the opinion of Officer does not disclose a true and proper income.

54. In **Chainrup Sampatram versus Commissioner of Income Tax (1953) 24 ITR 481 (SC)**, Court said that it is not correct to assume that valuation of closing stock at market rate has, for its object, to bring into charge any appreciation in the value of such stock. The true purposes of crediting the value of unsold stock is to balance the cost of those stock entered on the other side of the account at the time of their purchase so that cancelling out of entries relating to the same stock from both sides of the account would leave only the transaction on which there have been actual sales in the course of the year, showing profit or loss, actually realised on the year's trading.

55. In **Shakti Trading Company versus Commissioner of Income Tax (2001) 250 ITR 871 (SC)**, Court observed that as no prudent trader would care to show increased profit before its actual realization, that is the theory underlying the rule that closing stock is to be valued at cost or market price whichever is lower. (Cost here means raw material plus expenditure).

56. In **Commissioner of Income Tax versus Bannari Amman Sugars Ltd. (2012) 349 ITR 708 (SC)** Court observed that valuation of opening and closing stock is a very important aspect of ascertainment of true profits. An improper valuation could result in rejection of books of account though all that is needed for rectifying it, is to make an addition or necessary adjustment based on

proper valuation. Valuation of stock, whatever be the method, should be consistently followed. Method of valuation is generally at cost or the market value, whichever of the two is lower. However, it is open to the Assessing Officer to probe accounts so as to arrive at the real income.

57. Profits of business could only be ascertained by comparison of assets and liabilities of the business at the opening and closing of the accounting year. The method that an Assessee adopts for closing is an integral part of accounting, within the meaning of section 145. There are different methods of valuation of closing stock. The popular system is cost or market, whichever is lower. However, adjustments may have to be made in the principle, having regard to the special character of assets, the nature of the business, the appropriate allowances permitted, etc., to arrive at taxable profits.

58. In *Commissioner of Income Tax versus Ponni Sugars and Chemicals Ltd. (Supra) (2008) 306 ITR 392 (SC)* closing stock of incentive sugar should be allowed to be valued at levy price, was upheld though it was less than the cost of manufacture of sugar, this is one example of adjustment in special cases.

59. Similar views have been expressed in *Commissioner of Income Tax, Delhi versus Woodward Governor India Private Limited (2009) 13 SCC 1* observing that Act 1961 makes no provision with regard to valuation of stock. The ordinary principle of commercial accounting requires that in profit and loss account, value of stock-in-trade at the beginning and at the end of the accounting year should be entered at cost or market price whichever is lower. This is how business profits arising during the year need to be computed. Court observed "For valuing the closing stock at the end of a particular year, the value prevailing on the last date is relevant. This is because profit/loss is embedded in the closing stock. While anticipated loss is taken into account, anticipated profit in the shape of appreciated value of closing stock is not brought into account, as no prudent trader would care to show increased profits before actual realisation. This is the theory underlying the rule that closing stock is to be valued at cost or market price, whichever is lower. As profits for income tax purposes are to be computed in accordance with ordinary principles of commercial accounting, unless such principles stand superseded or modified by legislative enactments, unrealized profits in the shape of appreciated value of goods remaining unsold at the end of the accounting year and carried over to the following year's account in a continuing business are not brought to the charge as a matter of practice, though as stated above, loss due to fall in the price below cost is allowed even though such loss has not been realized actually.

60. There are dozen of authorities on the question as to how value in stock is to be taken but our purpose is not to write down a thesis on the subject but only to highlight the fact that as a matter of fact, method of determination of valuation of stock in the case in hand by taking tag price of the goods lying in stock was something which has never been recognized either in any recognized system or for the purposes of computation of tax under the fiscal statute. Revenue in the case in hand determined valuation of stock on the basis of tag price of goods and raised dispute. If contested, Assessee might have got success to a larger extent but his intention appears to be quite bonafide and reasonable that he wanted to give a quietus to the entire dispute, and therefore,

whatever determination was made giving a marginal discount towards commission, when it was offered by ITSC to Assessee to accept as additional income, he accepted and agreed for payment of tax thereon

61. Before ITSC it was not the case of Revenue that valuation of stock represented income not already disclosed by Assessee, or that the Assessee has concealed income by under valuation of stock.

62. Be that as it may, real objection on the part of Revenue raised before us is the acceptance by Assessee of an offer made by ITSC during proceedings for accepting an additional income and submission is that it amounts to withdrawal of application disclosing particular income and substituting the same by another quantum of income. This submission, in our view is not correct. During proceeding before ITSC, it has ample power, to go for such offer as that is the process implicit in 'settlement' and such settlement cannot be read or interpreted in a restricted and narrow manner as suggested by Shri Goel on the part of Revenue.

63. Looking to these facts in its entirety, we do not find any manifest error or infirmity in the decision taken by ITSC being contrary to any provision of statute so as to warrant interference.

64. Even otherwise, Scope of judicial review against order passed by ITSC is extremely limited. Court would not be justified in re-appreciating findings based on record. In *Jyotendrashinhji versus S.I.Tripathi (1993) 201 ITR 611/68 Taxman 59*, it was held, if the order of ITSC is contrary to any provision of Act or is directed on account of bias, fraud and malice, only then judicial review is permissible and not otherwise. Similar view was expressed *in Union of India & Ors.v.Ind-Swift Laboratories Ltd. (2011) 4 SCC 635* where Court said that an order passed by Settlement Commission could be interfered with only if said order is found to be contrary to any provisions of Act.

65. In the ultimate result, we are of the view that order of ITSC in the case in hand warrants no interference as there is no contravention of any provision of statute and ITSC has not committed any manifest error so as to warrant interference in writ jurisdiction under Article 226 of the Constitution of India.

66. Writ petition lacks merits and is dismissed.

67. No order as to costs.

(2016) 8 ILRA 686
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.08.2016

BEFORE

THE HON'BLE AMAR SINGH CHAUHAN, J.

Criminal Appeal No.- 63 Of 1985

Dev Dutt & Ors.

...Appellants
Versus

State Of U.P.

...Respondent

Counsel for the Appellants:

S.B. Johari, G.C. Saxena, Vinay Saran, Vinay Saxena

Counsel for the Respondent:

A.G.A.

Headnote:

This Criminal Appeal was filed against the judgment and order dated 15.12.1984 passed by the Special Judge, Budaun in S.T. No. 497 of 1981, whereby the appellants were convicted under Sections 399/402 IPC and Section 25(1)(a) of the Arms Act and sentenced to rigorous imprisonment.

Citation:

Shridhar Koeri Vs. State of Bihar, 2001 (43) ACC 5

Dudh Nath Pandey Vs. State of U.P., (1981) 2 SCC 166

Jaspal Singh Vs. State of Punjab, AIR 1991 SC 1548

State of Punjab Vs. Jagga Singh, AIR 1998 SC 3113

State of U.P. Vs. Punni, 2008 Cr.L.J. 1028 (SC)

Chhotey Singh and others Vs. State, 2004 (50) ACC 101

Result:

Appeal Allowed. Conviction and sentence set aside. Appellants acquitted. Bail bonds cancelled and sureties discharged. Appellants directed to comply with Section 437-A Cr.P.C.

Case Law discussed:

(Delivered by Hon'ble Amar Singh Chauhan, J.)

(Delivered by Hon'ble Amar Singh Chauhan, J.)

1. This criminal appeal has been filed by the appellants Dev Dutt and Hori against the judgement and order dated 15.12.1984 passed by the Special Judge, Budaun in ST No. 497 of 1981, under sections 399/402 IPC and 25 Arms Act, PS Rajpura, district Buduan whereby learned Judge convicted and sentenced the appellants to three years RI under section 399 IPC, two years RI under Section 402 IPC and two years RI under section 25(1)(a) of the Arms Act. However, all the sentences were directed to run concurrently.

2. The facts giving rise to the present appeal are that in the night of 26.8.1979, Shri D.P. Jual, Station Officer, police station Rajpura received a secret information that a gang of dacoits would assemble in the grove of Guava in the night in village Firojpur to commit dacoity at the house of Roop Kishore, Pradhan of the village Shahjahanabad. On the basis of this information, SO, D.P. Jual along with SI Yashbir Singh, SI Nand Kishore, some police constables and informer left for above grove. When the police party reached village Sameri, constables Harpal and Suresh Chander have been sent to call public witnesses. After some times, they returned with Ompal Singh, Kalloo Singh and Sipahi Singh residents of village Sameri. Two constables were sent to the house of Roop Kishore, the Pradhan of Shahjahanabad, in whose house dacoity was to be committed. The police party was divided into two groups. One group was headed by SO D.P. Jual while the other was headed by SI Yashbir Singh. Party headed by SO D.P. Jual took position in the north-west of the hut in the grove while other party took position in the north-east of the hut. At about 11.45 PM from the southern side three miscreants came and sat near the hut. One of them is alleged to have remarked that he had brought wine for their entertainment. After 15-20 minutes they were joined by three other miscreants and all of them started gaging or murmuring. It is also alleged that they were overheard saying that they should not drink much as it is likely to spoil their plan. Thereafter one of them went inside the hut and returned back after keeping the bottle of the wine in the hut. It is also alleged that they were over head saying that one of their companion namely Radhey was late in reaching there. It is further alleged that another dacoit was saying that he had seen the house of Roop Kishore, Pradhan and since they were sufficiently armed and they were sufficient in number they should go ahead with their plan without waiting for the arrival of Radhey. It is also alleged that after some time they were again overhead saying that they are getting late and they should go to commit dacoity. Thereafter, they got up to move away. On hearing the above talks SO D.P. Jual being satisfied that it was a gang of dacoits, he accordingly challenged them and asked them to surrender and VLP shots were fired. Police party apprehended three members of the gang namely Dev Dutt, Hori and Kunwar Pal while three others managed to run away.

3. On search being made of the apprehended accused, from the possession of Kunwar (now deceased) a gun (Ext. 1) and seven live cartridges (Exts. 2 to 8) along with a torch (Ext.9) were recovered. From the possession of the accused Dev Dutt, a pistol (Ext. 10) and three live cartridges (Exts. 11 to 13) were recovered, whereas from the possession of accused Hori, a pistol (Ext. 14) and four live cartridges (Ext. 15 to 18) were recovered. A bottle of wine was also recovered from the hut. Recovered articles were sealed and its recovery memo Ext. Ka-1 was prepared. Thereafter the apprehended accused were taken to the police station and a case was got registered against them.

4. After registration of the case and after seeking necessary permission of the District Magistrate, Budaun for prosecution of above accused under section 25(1)(a) of the Arms Act, they were challaned and separate charge sheets were filed against them.

5. Charges under sections 399/402 IPC and 25(1)(a) of the Arms Act were framed against accused Dev Dutt and Hori.

6. To bring home the guilt of the accused, the prosecution has examined as many as four prosecution witnesses.

7. PW 1 is SI Nand Kishore, who is an eye-witness of the incident. He deposed that on 26.8.1979 he was posted as SI at police station Rajpura. On that date on the information of the informer that a gang of dacoits will assemble at the grove of guava at about 11.30-12.00 in the night and commit dacoity in the house of Pradhan of village Shahjahabad. On the basis of said information this witness along with SO D.P. Jaul and requisite force left for village Firojpur. This witness also called the public witnesses namely Ompal Singh, Sipahi Singh and Kalloo Singh and apprehended the accused there. From the possession of the accused Dev Dutt, Hoti and Kunawar Pal arms and ammunition (Ext. 1 to 18) were recovered and recovery memo (Ext. Ka-1) was prepared and thereafter all above-mentioned apprehended accused were brought to the police station and a case was registered.

8. PW 2 is Moin Uddin, the investigating officer of the case. He deposed that after the case was entrusted to him for investigation, he recorded the statements of the witnesses. On the pointing out of the SO D.P. Jaul, he inspected the spot and prepared site plan (Ext. Ka-4) and after completion of the investigation, he submitted the charge sheet against the accused under section 399/402 IPC, Ext. Ka-5. He also submitted the charge sheet separately against the accused under section 25 of the Arms Act, which he proved as Ext. Ka 6 to Ka-8 and obtained sanction for the prosecution of the aforesaid accused under section 25 of the Arms Act from the District Magistrate, Budaun, which he proved as Ext. Ka 9 to 11.

9. PW 3 is S.O, D.P. Jaul. He deposed that on 26.8.1979 he was posted as Station Officer, police station Rajpura. He corroborated the statements of PW 1 and stated that accused Dev Dutt, Hori and Kunwar Pal were arrested from the grove of village Firojpur where they had assembled to commit dacoity at the house of Roop Kishore of Village Shahjahanabad and they were making preparation to commit dacoity. He further deposed that from the apprehended accused gun, pistols, cartridges and torch were recovered (Ext. 1 to 18).

10. PW 4, Sipahi Singh is also an eye witness of the incident. He corroborated the statements of PWs 1 and 3. He further stated that he was present when accused Dev Dutt, Hori and Kunwar Pal were arrested along with firearm weapons and cartridges.

11. After close of prosecution evidence, the statements of accused persons were recorded under section 313 Cr.P.C., in which they have stated that they have falsely been implicated in the

case due to enmity with the police. However, in defence, they have also produced three defence witnesses.

12. DW 1 is Buddhi Singh. He deposed that he is the resident of village Firojpur. In his village, only he owns a grove of guava and from his grove no gang of dacoits was ever apprehended by the police of police station Rajpura.

13. DW 2, Jaswant Singh, stated that in his presence accused Hori was taken away by the two police constables from his house on the pretext that Station Officer had called him. This witness further deposed that next day when he went to the police station, he was informed that Hori had been challenged because he had a connection with one Radhey who was also a dacoit and since he did not help the police in apprehending Radhey, he was falsely implicated in the present case.

14. DW 3 is Jaivir Singh. He deposed that accused Dev Dutt was picked up from his house by one sub-Inspector at about 8.00 or 8.30 PM on the pretext that he would sent him back from the police station in the morning. This witness further deposed that later on, he learnt that accused Dev Dutt had been falsely implicated in the present case.

15. The learned lower court, after perusing the record and hearing the counsel for the parties, convicted the appellants as stated herein-above.

16. Being aggrieved and dissatisfied with the findings of conviction recorded by the learned Special Judge, Budaun, the accused-appellants have preferred this appeal questioning the impugned order.

17. Heard Shri Pradeep Mishra, holding brief of Shri Vinay Saran, learned counsel for the appellants and learned Additional Government Advocate for the State-respondent and perused the trial court record.

18. Learned counsel for the appellants contended that sections 399/402 IPC will not be attracted in this case. The appellants have falsely been implicated in the present case because of their enmity with the police. Learned counsel for the appellants further submits that there are contradictions in the testimony of the witnesses. Only one public witness namely Sipahi Singh has been examined who appears to be a stock witness of the police. Nothing has been recovered from the possession of the appellants and the recovery have been planted on the appellants and recovered weapons were not sent for forensic laboratory for examination.

19. While supporting the impugned judgement, learned Additional Government Advocate contended that the findings of fact recorded by the trial court is based on evidence, which was clear, cogent and convincing. Hence, the appeal deserves to be dismissed.

20. In the present case, the allegations against the appellants are that they have assembled together in the grove of guava in village Firojpur and were planning to commit dacoity in the house of Roop Kishore, Pradhan of the village, which is punishable under section 399/402 IPC.

21. For better understanding, Sections 399 and 402 IPC are reproduced herein under:

"**399.** Whoever makes any preparation for committing dacoity, shall be punished with imprisonment for a term which may extend to ten years, and shall also be liable to fine.

402. whoever at any time after the passing of this Act, shall be one of five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine."

22. In order to prove the charge under sections 399/402 IPC, it is necessary for the prosecution to prove that five or more persons have assembled with the intention to commit dacoity, which is punishable under section 402 IPC, whereas for proving the offence under section 399 IPC, it is necessary for the prosecution to prove that some additional steps have been taken in the course of preparation to commit dacoity. In the present case, the allegations as well as the evidence led by the prosecution is that Station House Officer, PS Rajpura received a secret information from the informer that a gang of dacoits would assemble in the grove of guava in village Firojpur in the night to commit dacoity in the house of Roop Kishore, Pradhan of the village Shahjahanabad. Accordingly police reached the spot and apprehended only three accused namely Dev Dutt, Hori and Kunwar Pal while three accomplices managed to escape. Despite there being sufficient number of police officials present at the spot, how three accused managed to escape is a question, which the prosecution has failed to give answer and neither any step has been taken by the police to apprehend the remaining accused nor the police constables, who chased the accused were examined so as to establish the charge under section 402 IPC, i.e. assembly to commit dacoity.

23. Hon'ble Supreme Court in the case of *Shridhar Koeri Vs. State of Bihar, 2001 (43) ACC 5* has held that the mere fact that the accused was arrested on the spot and some articles including fire arms were recovered from his possession would not be sufficient to prove the charge that he had assembled for making preparation for commission of dacoity.

24. Learned counsel for appellants contended that there are major discrepancies or inconsistency in the evidence of prosecution witnesses; that police witness Sipahi Singh is the stock witness of the police and cannot be relied upon and that the trial Court had discarded the evidence of defence witnesses wrongly.

25. On perusal, I find that there are some contradictions in the statements of PWs. PW 1-SI Nand Kishore in his evidence has stated that police party on receiving secret information went up to Babrala in a Bus and the witnesses of public were joined by the police party from bus stand Rajpura, Whereas PW 3-Inspector D.P. Jual stated that the police party went to the place of incident on foot. Further according to PW 3-Inspector D.P. Jual, public witnesses joined the police party at

village Sameri and not at the bus stand as stated by PW 1. PWs 1 and 3 have stated that the accused were tied with rope while they were taken to the police station, whereas PW 4 has stated that the accused were tied with a cloth and not with a rope.

26. As regards contention of the learned counsel for the appellants that only one public witness namely Sipahi Singh has been examined who is said to be stock witness of the police, I find that in the FIR three persons namely Ompal Singh, Kalloo Singh and Sipahi Singh have been mentioned as public witnesses, but only Sipahi Singh has been examined by the prosecution as PW 4. Sipahi Singh has admitted that he had earlier given evidence for the police in a case under the Excise Act and also in another case under sections 399/402 IPC. Therefore, it cannot be denied that above witness is not the stock witness.

27. It is also contended that defence evidence was discarded or disbelieved by the trial court because witnesses were resident of the same village of the accused. DW 1 is Buddhi Singh. He stated that in his village only he owns a grove of guava and from his grove, no gang of dacoits was ever apprehended by the police. DW 2, Jaswant Singh, has stated that in his presence accused Hori was taken away from his house because he had a connection with Radhey, who was also dacoit and since he did not help the police for apprehending said Radhey and police had a motive for false implication.

28. It is a matter of fact that DW 1, Buddhi Singh is the grove holder and investigation is silent on this point for the reason better known to the investigating officer. The evidence of the grove holder regarding assembly of the dacoits cannot be disbelieved by saying that no suggestion was given to the prosecution witnesses that grove from where accused were apprehended belongs to DW 1 Buddhi. For assessment or evaluation of evidence of defence witness, separate yardstick cannot be applied, but the efforts are being made by the trial court to discard the defence evidence illegally.

29. Hon'ble Supreme Court in the case of ***Dudh Nath Pandey Vs. State Of U.P. (1981)2 SCC 166*** has held that defence witnesses are entitled to equal treatment with those of the prosecution. And, courts ought to overcome their traditional, instinctive disbelief in defence witnesses. Quite often, they tell lies but so do the prosecution witnesses.

30. The prosecution case in hand, suffers from infirmity as neither any firing was said to be done by the miscreants assembled with deadly weapon nor the person in whose residence dacoity was to be committed was examined. All these things such as inconsistency, discrepancy and infirmities throw a cloud or doubt on genesis of the case for which appellants are entitled to be acquitted after getting benefit of doubt (***Chhotey Singh and others Vs. State, 2004(50) ACC 101***).

31. Learned counsel for the appellants argued that the recovery has been planted on the appellants and the recovered items were not sent to Forensic Laboratory for ascertaining as to whether the weapons recovered were in working condition or not. He has placed reliance on the

case law of **Jaspal Singh Vs. State of Punjab, reported in AIR 199 SC 1548**, in which it has been observed:

"Admittedly, no evidence was led by the prosecution to prove that the gun was in working condition and that the cartridges, which were found from the person of the appellants were live cartridges. Neither ASI Balbir Singh had stated so nor any report from an expert was obtained to establish that the gun was in working condition and that five cartridges were live. What was found in the gun were two empty and not live cartridges and, therefore, it was not proper to presume that it was in working condition. In absence of any evidence to that effect, the conviction of the appellants under both these aforesaid sections cannot be upheld."

32. Further, reliance has been placed on the case law of **State of Punjab Vs. Jagga Singh, AIR 1998 SC 3113**, wherein, Hon'ble Supreme Court observed as under:

"Though the evidence of PW 1, HC Baldev Singh and PW 3, Basant Singh establishes that the respondent was found in possession of one 12 bore DBBL gun and found live cartridges, there is no satisfactory evidence to show that the said gun and the cartridges were sent for examination by the Central Forensic Scientific Laboratory. There is no report from the Forensic Scientific Laboratory nor any other evidence to prove that the said gun was in a working condition or that the said cartridges were live cartridges..... Therefore, in absence of any evidence to show that the respondent was found in possession of one .12 bore DBBL gun in a working condition and four live cartridges, the respondent cannot be convicted."

33. In the case of State of **UP Vs. Punni, 2008 Cr.L.J 1028 (SC)**, Hon'ble Supreme Court held that dacoits were arrested without any resistance or struggle and contents in the FIR that police had received information from an informer was not supported by the sub-Inspector. The accused were held entitled to acquittal.

34. In view of what has been indicated herein above, I am of the opinion that the prosecution has miserably failed to prove the case against the appellants beyond reasonable doubt. Recovery of pistols and cartridges from the appellants are also doubtful in the absence of any CFSL report and benefit of doubt is to be given to the appellants.

35. Accordingly, the appeal is allowed. The impugned judgement and order dated 15.12.1984 passed by the Special Judge, Budaun is set aside. The appellants Dev Dutt and Hori are acquitted of the charges levelled against them. The appellants are on bail. Their bail bonds are cancelled and sureties are discharged. The appellants are directed to comply with the provisions of section 437-A Cr.P.C.

36. Let a copy of this order be sent to the court concerned for compliance.

(2016) 8 ILRA 693
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.08.2016

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Appeal No.- 1099 Of 2005

Smt. Shanti Devi

...Appellant

Versus

State Of U.P.

...Respondent

Counsel for the Appellant:

B.R.J. Pandey, Amar Nath Tiwari, Arvind Kumar Srivastava, Ramendra Nath Tewari, V.P.S. Kushwaha, V.S. Kushwaha

Counsel for the Respondent:

Government Advocate (Shri J.K. Upadhyay, Kumari Meena, Ms. Manju Thakur, A.G.As.)

Headnote:

Penal Code, 1860 — Sections 302, 201 — Murder and causing disappearance of evidence — Appeal against conviction — Case based entirely on circumstantial evidence — Alleged illicit relationship as motive — Recovery of dead body at pointing out of accused — No proof of presence of accused at place of occurrence at relevant time — Chain of circumstances incomplete — Benefit of doubt — Acquittal.

The appeal was directed against the judgment and order dated 03.02.2005 passed by the learned Additional Sessions Judge (Fast Track Court), Sonbhadra in Sessions Trial No. 81 of 2002, whereby the appellant was convicted under Sections 302 and 201 IPC and sentenced to life imprisonment with fine under Section 302 IPC and five years' rigorous imprisonment with fine under Section 201 IPC, sentences to run concurrently.

The prosecution case rested wholly on circumstantial evidence. The circumstances relied upon were: (i) alleged screaming of the deceased from the house, (ii) alleged presence of the appellant in the house at the relevant time, (iii) suspicion arising from freshly plastered courtyard and blood-stained articles, (iv) alleged illicit relationship between the appellant and her brother-in-law as motive, and (v) recovery of the dead body at the pointing out of the appellant.

Held, that in cases based on circumstantial evidence, the prosecution must establish each circumstance beyond reasonable doubt and the chain of circumstances must be so complete as to exclude every hypothesis except that of guilt of the accused. The vital link of presence of the appellant inside the house at the time of occurrence was not established by cogent and reliable evidence. The testimony of prosecution witnesses did not conclusively prove her presence at the relevant time. The alleged motive of illicit relationship was also not satisfactorily proved.

Further held, that in the absence of proof of the accused's presence at the scene of occurrence, the chain of circumstances was incomplete. Where there is a break in the chain of circumstances, the accused is entitled to benefit of doubt. The trial court erred in recording conviction on the basis of conjectures and misappreciation of evidence.

Result: Appeal allowed. Judgment and order of conviction and sentence dated 03.02.2005 set aside. Appellant acquitted of charges under Sections 302 and 201 IPC and directed to be released forthwith, unless required in any other case.

(Delivered by Hon'ble Bala Krishna Narayana, J. and Hon'ble Arvind Kumar Mishra-I, J.)

(Delivered by Hon'ble Bala Krishna Narayana, J.
&
Hon'ble Arvind Kumar Mishra-I, J.)

1. The arguments of this case concluded on 11.08.2016.

2. We then made the following order:-

"Heard Shri Amar Nath Tiwari learned counsel for the appellant and Shri J.K. Upadhyay, Kumari Meena as well as Ms. Manju Thakur, learned A.G.As. for the State.

We will given reasons later but we make the operative order now.

The appeal is allowed. Impugned judgment and order dated 3.2.2005 passed by the Additional Sessions Judge, (F.T.C.) Sonebhadra, in Session Trial No. 81 of 2002 (State Vs. Shanti Devi) convicting the appellant under sections 302, 201 I.P.C. is hereby set aside. The appellant is acquitted of all the charges framed against her. Appellant is in jail. She shall be released forthwith unless and until she is wanted in any other case.

There shall be no order as to cost."

3. Here are the reasons:-

The present criminal appeal has been preferred by the appellant Shanti Devi against the judgment and order of conviction dated 03.02.2005 passed by the Additional Sessions Judge, Fast Track Court, Sonebhadra, in Sessions Trial No.81 of 2002 arising out of Case Crime No.16 of 2002 (State Vs. Shanti Devi) under Sections 302, 201 IPC, Police Station Pannuganj, District Sonbhadra, whereby she has been convicted under Sections 302, 201 IPC and sentenced to life imprisonment coupled with fine of Rs.2000/- on the first count and five years rigorous imprisonment coupled with fine of Rs.1000/- on the second count, in default of payment of fine, she will have to suffer additional imprisonment for two years and one year, respectively. Both the sentences shall run concurrently.

4. Heard Sri Amar Nath Tiwari, learned counsel for the appellant, Sri J.K. Upadhyay, Kumari Meena as well as Ms. Manju Thathur, learned AGAs for the State and perused the record.

5. The facts of this case as discernible from record appear to be; that in this case, the first informant Sangeeta wife of Paras Kushwaha, resident of Village Lauvari, Police Station Pannuganj,

District Sonbhadra, lodged written report on 05.02.2002 regarding death of Santosh, husband of the appellant with the allegation that yesternight, she was sleeping at her home when she heard some noise from the house of Prasad Bhatt situated to the southern side of her house at a distance of 100 yards, where Santosh, Ashok and Shanti Devi (accused-appellant) wife of Santosh usually resided. Prasad Bhatt had gone somewhere to meet his son. It was around 8:00 to 9:00 p.m., Santosh was screaming loudly "uncle save me",-whereupon she came out of her house and went to the backyard of house of Prasad Bhatt and heard some thumping noise as if someone is digging the earth. She waited for a while when digging sound continued, she got scared of digging/thumping sound, therefore, she came back to home and slept. Next day morning, she woke up around 7:00 am and the sun had risen. She told about this incident to one Chandra Shekhar (of the village) that there was some hue and cry in the house of Santosh at night. Santosh shrieked two or three times. Today, whereabouts of Santosh are not known. Raja Ram son of Chandra Shekhar asked the wife of Santosh about his (Santosh) whereabouts, whereupon she informed that Santosh had gone to take care of her mother and from there he will move to 'Nanihal' where he will drive tractor. In the meanwhile, co-villagers Lallu, Ram Chander, Narayan, Bachcha and Mangaru etc. arrived on the spot. They also enquired from the appellant whereupon the appellant said whether they have come for committing dacoity in her house. The villagers saw fresh cow dung paste in Osari (courtyard) of the house, one blood stained 'Gamchha' partially burnt and blood stained ashes thrown outside the house which generated apprehension regarding death of Santosh. The appellant in connivance with her Devar (brother-in-law) Ashok has murdered Santosh and they have caused disappearance of the dead body. Ashok was sighted at his house in the morning but he absconded after seeing the villagers. Report be lodged and appropriate action be taken. This written report is Ext. Ka-1.

6. Relevant entries regarding contents of the first information report was made in the Check FIR at Crime No.16 of 2002 under Sections 302, 201 IPC, Police Station Pannuganj, District Sonbhadra on 05.02.2002 at 11:05 a.m. Check FIR is Ext. Ka-12

7. Thereafter investigation ensued. Investigation was taken over by the Investigating Officer who inspected the place of the occurrence and made inquiry from the appellant Shanti Devi who told him that she in connivance with her Devar (brother-in-law) Ashok have murdered Santosh and have buried his body inside the room of the house. Thereafter, dead body of the deceased Santosh was recovered at the pointing out of the appellant from southern side room of the house. After recovery of the dead body, recovery memo was prepared on the spot and it was signed by the appellant and the witnesses namely Ramji Yadav and Sangeeta. This recovery memo is Ext. Ka-4

8. The Investigating Officer also took simple and blood stained soil from the place of the recovery of the dead body and also blood stained ashes and blood stained piece of 'Gamchha'. Recovery memo was prepared which is Ext Ka-10 Thereafter, inquest report of the deceased Santosh was prepared by the Investigating Officer. Inquest report reveals that process commenced around 1:15 p.m. and ended at 2:30 p.m. on 05.02.2002. Inquest report is Ext. Ka-5. In the opinion of-inquest witnesses-it was thought proper to send the dead body for post mortem examination so that cause of death could be ascertained properly.

9. Thereafter relevant papers were prepared for sending the dead body for post mortem examination which paper are; Police Form 13 Challan of dead body Ext. Ka-6, Challan Nash Ext. Ka-7, Specimen Seal Ext. Ka-8, letter to Chief Medical Superintendent, District Hospital Sonebhadra Ext. Ka-9. Post mortem examination on the dead body of the deceased Santosh was conducted by Dr. R.C. Yadav, at District Hospital Sonebhadra on 06.02.2002 at 1:45 p.m. wherein following ante mortem injuries were noted:

1. Incised wound 7 $\frac{1}{2}$ cm x brain deep on right side of head, 5 cm post to ear, obliquely towards upper part of neck. Margins are regular and clean.
2. Incised wound 6 cm x .5 cm x brain deep just below injury no.1. Margins same.
3. Incised wound 6 cm x $\frac{1}{2}$ cm x brain deep just below the injury no.2. Margins same.
4. Incised wound 7 cm x .5 cm x bone deep 1 cm below injury no.3 towards lower part of neck. Margins same.
5. Incised wound 4 cm x $\frac{1}{2}$ cm x muscle deep on upper part of neck, 4 cm below right ear of bone. Margins clean and regular.
6. Incised wound 12 cm x $\frac{1}{2}$ cm x trachea and carotid and jugular and vessel deep on right side of neck. Transversely placed 2 cm below the injury no.5. Margins are same.
7. Peeling off skin on area of 7 cm x 6 cm on right shoulder.
8. Abrasion and contusion on back of right shoulder.
9. Incised wound 10 cm x $\frac{1}{2}$ on right side on face of muscle deep from right angle of mouth towards right ear. Margins are clean and regular.
10. Incised wound 7 cm x $\frac{1}{2}$ x tendon deep front of wrist towards outward right palm. Margins regular and clean.
11. Incised wound of 4 cm x $\frac{1}{2}$ cm x tendon deep of left palm. Margins same.
12. Amputation of left index finger from its base except some skin tags.
13. Incised wound 6 cm x $\frac{1}{2}$ cm x muscle deep on right side of back 10 cm above illiac waist. Margins same.
14. Incised wound 4 cm x $\frac{1}{2}$ cm x skin deep on upper and between both buttock. Margins same.

15. Incised wound 5 cm x ½ cm x muscle deep on left wrist on front side. Margins same.

16. Peeling off skin of front of left ring finger.

17. Incised wound 6 cm x ½ cm x muscle deep on outer side of right knee joint. Margins same.

18. Incised wound 5 cm x ½ cm x bone deep on outer of right leg, 3 cm below the right knee joint. Margins same.

19. Incised wound 3 cm x ½ x tendon deep on upper right foot 6 cm away to right ankle. Margins regular and clean.

20. Partial amputation of 4th toe of right foot.

21. Contusion depressed 7 cm x 1 cm in front of neck, 1 cm below injury no.6. Circumference of neck is 34 cm.

10. Cause of death was opined to be shock and haemorrhage due to ante mortem injuries. Duration of death was said to be one and half day. This post mortem examination report is Ext. Ka-14.

11. The Investigating Officer also sent the aforesaid blood stained soil and piece of Gamchha, simple soil, red pant, shirt, underwear etc. for chemical examination, report whereof dated 25.09.2002 was obtained and placed on record, which is Ext. Ka-16. The Investigating Officer also prepared site plan of place of occurrence which is Ext. Ka-11. After completing investigation, Investigating Officer PW-7, S.S.I. Umesh Pratap filed charge sheet against the appellant at Case Crime No.16 of 2002 under Sections 302, 201 IPC. Charge sheet is Ext. Ka-15.

12. Thereafter the case of the appellant was committed to the court of Sessions from where it was made over for trial to the learned Additional Sessions Judge, Sonebhadra who heard the appellant on point of charge and after recording his satisfaction regarding prima facie case for framing charge under Section 302, 201 IPC, framed charge under the aforesaid sections of IPC. Charges were read over and explained to the appellant who denied charges and opted for trial.

13. Consequently, the prosecution was asked to adduce its testimony, whereupon the prosecution produced in all seven witnesses. Brief reference of the same is as hereunder:

14. Smt. Sangeeta PW-1 has lodged the first information report. Ram Chander PW-2, Lallu Prasad PW-3, Ram Raj PW-4. They are witnesses of fact. Hari Murti Singh PW-5 is Investigating Officer. He has detailed various steps which he took in completing the investigation. He has also proved Check FIR and entries made in the relevant GD as Ext. Ka-12 and Ext. Ka-13, respectively.

Dr. R.C. Yadav PW-6 has conducted post mortem examination on the dead body of the deceased Santosh on 06.02.2002 and he has proved the same Ext. Ka-14. Umesh Pratap Singh PW-7 is subsequent Investigating Officer. He has also detailed steps taken during investigation. He filed charge sheet against the appellant.

15. Thereafter, evidence for the prosecution was closed and statement of the appellant was recorded under Section 313 Cr.P.C. wherein she has termed her implication in this case falsely and stated that at the time of the occurrence, she was not present at her home but she had gone to the house of her 'Chachiya' father-in-law at Laxmanpur where villagers informed her about murder of her husband whereupon she came to the village then she was arrested by the police and taken to the police station.

16. Learned trial court after hearing both the sides on merit and considering the material on record passed the aforesaid judgment and order of conviction and sentence.

17. Consequently, this appeal.

18. Sri A.N. Tiwari, learned counsel for the appellant has contended that this is a case purely based on circumstantial evidence and chain of circumstances is grossly incomplete and various vital links of the incident are missing. It is settled principle of law that in the case of circumstantial evidence, motive has got to be proved satisfactorily and all hypothesis of innocence of the accused should be excluded and the chain of circumstances or various links of evidence should be so complete as to rule out involvement of any other person in the commission of the offence other than the accused.

19. Learned counsel for the appellant has further claimed that there is no evidence on record regarding presence of the appellant inside her house on the day of the occurrence. For the sake of argument, if it is admitted that the first informant arrived at the backyard of the house of the deceased Santosh even then she heard screaming sound of the deceased Santosh only. She had no occasion to take extra interest in lodging of the first information report and she has not made it clear as to how she alone was interested in getting the first information report lodged. The whole prosecution story is full of loophole and contradiction which does not inspire confidence. The appellant had no motive to commit murder of her own husband. The hypothesis of guilt of the appellant is not established to the exclusion of others. The motive of illicit relationship between the deceased Santosh and the appellant has not been established by cogent evidence. Not a single prosecution witness has established the presence of the appellant inside the house at the time of the occurrence. In such a view, the trial court was not justified in acting on bald assumption and presumption and particularly, presumption of presence of the appellant inside the house at the time of the occurrence. The trial court erroneously based conclusion of guilt which is outcome of misreading of evidence and circumstances.

20. Learned AGA while refuting the aforesaid arguments has submitted that no doubt, it is a case of circumstantial evidence but all the relevant facts and vital links of chain and circumstances have been satisfactorily proved and chain of circumstances is so complete as to leave aside every hypothesis of innocence of the appellant. It was the appellant alone who committed crime. It was upon the appellant to have established her plea of 'alibi' which she grossly failed. There is evidence of fact that some screaming sound was heard by the first informant. She informed about the incident the very next day morning to co-villager

Chandra Shekhar who sent his son Ram Raj to the house of Shanti Devi (accused-appellant) and he enquired about whereabouts of Santosh (deceased). Shanti Devi gave evasive reply and some fresh cow dung paste was seen in 'Osari' (courtyard) of the house which gave apprehension of death of husband of the appellant that he has been murdered and his dead body buried inside the house. In fact hypothesis of this case/fact is deeply rooted in the confessing oral statement of the appellant when the appellant herself confessed to have committed the crime. The dead body of the deceased Santosh was recovered from southern side room of her house at her pointing out by the Investigating Officer Hari Murti Singh, PW-5. Therefore, charge has been rightly proved against the appellant and conviction against the appellant recorded by the trial court is justified. Motive for committing crime has been proved as illicit relationship between brother-in-law (Devar) of the appellant and the appellant herself.

21. Before we proceed further and scrutinize evidence, facts and circumstances of the case, we may record with ample ease that it is a case based on circumstantial evidence. There is no eyewitness account testimony of fact of murder. The very foundation of this case is rooted in the first information report lodged by Sangeeta PW-1 wherein allegations have been made regarding fact that yesternight on 4/5.02.2002, it was around 8:00 to 9:00 p.m. when she was asleep in her house situated at a distance of 100 yard from the house of the appellant, she heard some screaming sound of the deceased Santosh urging for protection, whereupon the first informant went towards backyard of Santosh's house where she heard some repeated thumping sound which lasted for quite some time and it appeared that someone was digging the soil. At this, the first informant got scared, came back home and slept.

22. Next morning, on 05.02.2002 when she woke up, she informed about yesternight episode to one co-villager Chandra Shekhar at 7:00 a.m. whereupon Chandra Shekhar sent his son Ram Raj to the house of the appellant Shanti Devi where he enquired about whereabouts of Santosh but the appellant Shanti Devi gave evasive reply. In the meanwhile, a few villagers also arrived at the house of the appellant where they sighted fresh cleanliness done in the southern side room of 'Osari' (courtyard) whereupon they became apprehensive that Santosh has been killed. Thereafter the first information report was lodged at 11.05 a.m. at Police Station Pannuganj, District Sonbhadra.

23. Obviously, there are certain circumstances in the form of vital facts and links of this case. Firstly-screaming sound of deceased Santosh, secondly-presence of the deceased inside the house around 8:00 to 9:00 p.m. in the night of 04.02.2002 along with the appellant, thirdly-digging of soil inside the house, fourthly-illicit relationship between the appellant and Ashok-Dever-(brother-in-law) of the appellant during night of 04.02.2002 inside the house, fifthly-recovery of dead body of Santosh at the pointing out of the appellant Shanti Devi.

24. We have carefully scanned testimony of witnesses of fact namely Sangeeta PW-1, Ram Chander PW-2, Lallu Prasad PW-3 and Ram Raj PW-4 and we are constrained to observe that none of them have stated anything in their testimony which may even whisper about presence of the appellant at the relevant point of time of the occurrence inside the house when screaming sound of the deceased was repeatedly heard by Sangeeta PW-1.

25. We may record our appreciation regarding testimony of this witness-Sangeeta PW-1-wife of Paras Kushwaha who is witness of fact of hearing of screaming sound voice of deceased Santosh from the house-the place of occurrence. After hearing the screaming sound of Santosh, she rushed to the house of the appellant and she heard repeated thumping sound from backyard of the house of the appellant which looked as if someone was digging the earth. On the point of occurrence, there is no other reflection except as above. In so far as the fact of presence of the appellant Shanti Devi at the time of the occurrence is concerned that it synchronized with screaming sound of Santosh is altogether missing. In this view of the matter, presence of the appellant Shanti Devi at the relevant point of time inside the house has not been proved by any cogent testimony of the prosecution witnesses of fact. Even no circumstance fair or otherwise has been brought forth that may lead us to infer her presence at that point of time inside her house.

26. At this stage, we may also record our satisfaction regarding testimony of the other prosecution witnesses. In this context, Ram Chander PW-2 has been produced who is witness to fact of recovery of dead body of the deceased from inside house of the deceased.

27. Lallu Prasad PW-3 has been produced to establish fact of illicit relationship between the appellant and Ashok and also presence of the appellant inside the house at the time of occurrence but he himself has stated in examination-in-chief that some altercation used to take place among the deceased Santosh, Ashok and the appellant Shanti Devi but he could not assign any cause for such quarrel. However, he has testified that the deceased Santosh was telling him that Ashok is interested in keeping his wife with him. This much will not itself establish the fact of existence of illicit relationship between the appellant Shanti Devi and Ashok. In his cross-examination, this witness has testified that he did guess work while he stated that the appellant was present in her house at the time of the occurrence. In this regard, he is improving his testimony for the first time in court, he has made such statement before the court first time which fact he has accepted in his cross-examination. He has not given any such type of statement to the Investigating Officer. In this view of the matter, PW-3 loses credibility and is not worthy of credence as his testimony is embellished and found to be improving, for the reason best known to the prosecution.

28. Ram Raj PW-4 as discussed above is witness of fact that he went to the house of the appellant on 05.02.2002 and enquired about the deceased Santosh from his wife (the appellant). He also sighted, in the presence of co-villagers, some newly done cleanliness work-in Osari (courtyard) of the house of the appellant and blood stained ashes thrown outside the house, which gave rise to apprehension that Santosh has been murdered. Apart from that particular factual aspect of the case, he has not testified on any other material aspect of the case.

29. We have also discussed the role of Investigating Officer, Hari Murti Singh PW-5. Dr. R.C. Yadav PW-6 who conducted post mortem examination on the cadaver of the deceased Santosh on 06.02.2002. He discovered as many as twenty one ante mortem injuries on various parts of the body of the deceased. Cause of death has been shown to be shock and haemorrhage as a result of ante mortem injuries. Duration of death was stated to be one and half day. He has also opined that death of the deceased might have been caused around 8:00 to 9:00 p.m. on 4/5.02.2002. Thus time of death ranges between 8:00 to 9:00 p.m. on 4/5.02.2002. Thus presence of appellant at that point of time inside her house is the most vital link of the chain of circumstances.

30. However, one aspect of the case is quite relevant which appeared in cross examination of doctor witness (PW-6) that partially digested food was present in the stomach of the deceased Santosh but it has not been made clear as to how and when the deceased took meal, although this aspect of the case has got not much relevance in assessing veracity of this case. Therefore, no further discussion need be made on this point by us.

31. The overall outcome of testimony of the prosecution witnesses of fact on record cumulatively fails to establish presence of the appellant on the spot. Even circumstances neither point out presence of the appellant on the spot nor is the same inferable from facts proved by the prosecution. We may conveniently record that principles involved in the matter of cases based on circumstantial evidence have been elaborated in the case of Sharad Birdhichand Sardar Vs. State of Maharashtra (1984) 4 SCC page 16, wherein Hon'ble Apex Court has laid down certain principles regarding the case based on circumstantial evidence which are enumerated hereinbelow:

1. The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely "may be" fully established.

2. The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say they should not be explainable on any other hypothesis except that the accused is guilty.

3. The circumstances should be conclusive nature and tendency.

4. They should exclude every possible hypothesis except the one to be proved and,

5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act have been done by the accused.

32. Thus circumstances pointed out that facts established should be consistent only with hypothesis of guilt of the accused should exclude every hypothesis except one said to be proved and the chain of evidence should be so complete as not to leave any reasonable ground for the conclusion consistent with innocence of the accused and must show that in all human probability, the accused committed crime. Only when all links in chain of circumstances/evidence are complete in themselves then false plea or false defence may be called into aid.

33. Here in this case, plea of alibi has been taken in the statement of the appellant recorded under Section 313 Cr.P.C. that she was away from her house and was at the relevant point of time at the house of her "Chachiya" father-in-law. This aspect of the case is required to be dealt with at this stage by us, particularly on fact of presence of the appellant inside the house (place of occurrence) at the relevant point of time of the occurrence. Obviously, the prosecution evidence regarding presence of the appellant at the relevant point of time inside the house is woefully wanting that the accused was present at that time inside the house. Here links of chain in form of circumstances/evidence in the absence of presence of the appellant

inside the house are miserably incomplete and this is center point of entire controversy as to who committed murder and in absence of establishment of fact of presence of the appellant inside the house, the vital factual link regarding presence of appellant at the time of incident is missing. When this is legal and factual position in respect of missing of vital link of evidence (presence) regarding the appellant then answer supplied under Section 313 Cr.P.C. and statement given by the appellant that she was "elsewhere" is sufficient to generate doubt, particularly on the fact that she and she alone was perpetrator of crime. Meaning thereby that in the absence of establishment of presence of appellant on the spot (inside) no criminality can be fastened upon her.

34. We may also conveniently record that possibility of some other person committing the offence in the absence of the appellant cannot be ruled out. The presence of another person, the appellant at the relevant point of time of the occurrence around 8:00 to 9:00 p.m. on 04.02.2002 can be reasonably drawn. Thus the factual link of chain is grossly incomplete. Obviously in this case there is break in chain of circumstances and the break is vital. In such type of cases law is well settled that benefit of doubt shall be given to the accused. In this regard, pertinent reference may be made of the case of State of Maharashtra Vs. Annappa Bandu Kavatage (1979) 4 SCC page 715, wherein Hon'ble Apex Court has held that in circumstantial evidence case whenever there is a break in the chain of circumstances, the accused is and will be entitled to the benefit of doubt. There is a snap in the chain of circumstances, therefore, the present appellant is legally entitled to benefit so created in her favour. If the prosecution established fact of presence of the appellant inside the house at the relevant point of time then the plea of "alibi" taken by the appellant would have been required to have been proved reasonably on her behalf, but in this case the prosecution has failed to establish fact of her presence inside the house then the presumption of presence of the appellant inside the house will be imaginary and legally not conceivable. The plea of alibi may look false but because of failure of prosecution to establish fact of her presence it has got relevance, for the reasons aforesaid and will always be read in favour of the appellant under facts and attendant circumstances of this case. We know that man may tell a lie but circumstances do not. Here in absence of missing links of chain and circumstances, we are of the firm opinion that benefit of doubt arises in this case in favour of the appellant.

35. Learned trial court while appreciating evidence, facts and circumstances of the case on record probably misread the same and erroneously recorded finding of conviction and awarded sentence against the appellant which is legally not sustainable.

36. These are the reasons upon which we set aside the impugned judgment and order of conviction dated 03.02.2005 passed by the Additional Sessions Judge, Fast Track Court, Sonebhadra, in Sessions Trial No.81 of 2002 arising out of Case Crime No.16 of 2002 (State Vs. Shanti Devi) under Sections 302, 201 IPC, Police Station Pannuganj, District Sonebhadra.

37. Let a copy of this judgment/order be certified to the court concerned for its information and necessary follow up action.

(2016) 8 ILRA 703
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.08.2016

BEFORE

THE HON'BLE AMAR SINGH CHAUHAN, J.

Criminal Appeal No.- 1778 Of 2011

Lalit Kumar

...Appellant
Versus

State of U.P. & Anr.

...Respondents

Counsel for Appellant:

R.K. Pandey, Siddharth Singhal

Counsel for Respondents:

Government Advocate, Amit Daga, Pankaj Govil

Facts:

The appellant challenged the alleged compromise filed by opposite party Nand Kishore in Execution Case No. 11 of 2009 concerning the decree from Land Acquisition Reference No. 132 of 1994. The appellant claimed that the compromise was fabricated and sought action under section 340 Cr.P.C. The executing court dismissed the application as neither the decree holder (Guru Ratan Pal Singh) nor the counsel (Dinesh Singh) substantiated their affidavits.

Issues:

Whether a prima facie case under section 340 Cr.P.C. could be entertained when affidavits denying the compromise were on record but the deponents did not appear for cross-examination.

Headnote:

Appeal against the order dated 17.02.2011 of the Additional District & Sessions Judge, Procedural History: Court No. 9, Bulandshahar in Criminal Misc. Case No. 51 of 2010 (State vs. Nand Kishore) under section 340 Cr.P.C., whereby the appellant's application for initiating proceedings against alleged forgery and cheating was rejected.

Affidavits are not evidence under the Evidence Act and cannot be relied upon without cross-examination.

Section 340 Cr.P.C. proceedings require that the court be satisfied of expediency and presence of a false affidavit or evidence before initiating inquiry.

In the present case, the compromise was verified and accepted by the court and became part of the decree; any dispute can be challenged only through civil remedies.

The executing court's dismissal of the section 340 Cr.P.C. application was correct.

Result:

Appeal **dismissed**. No order as to costs.

Case Law Discussed:

Arun Dhawan & Anr. vs. Lokesh Dhawan, 2015 (188) Comp. Cases 161

Kuldeep Kapoor vs. Susanta Sengupta, 2006 (126) DLT

B.K. Gupta vs. Damodar H. Bajaj & Ors., 2001 (42) ACC 1074
(Delivered by: Hon'ble Amar Singh Chauhan, J.)

(Delivered by Hon'ble Amar Singh Chauhan, J.)

1. Appellant Lalit Kumar has preferred this criminal appeal against the order dated 17.2.2011, passed by the Additional District & Sessions Judge, Court No. 9, Bulandshahar in Criminal Misc. Case No. 51 of 2010 (State vs. Nand Kishore) under section 340 Cr.P.C. whereby the application of the appellant moved under section 340 Cr.P.C. was rejected.

2. Brief facts which giving rise to this appeal are that the land situated in village Dungarpur Rilakha, Kasba Dankaur, Tehsil Sikandrabad, District Gautam Budh Nagar belonging to the Khalsa Sanyukt Sahkari Khet Samiti Limited (hereinafter referred to as the 'Society') was acquired by the Notification dated 02.12.1991 published on 03.01.1992 in favour of Krishi Utpadan Mandi, Dankaur and award was passed. The said Society was not satisfied with the award and chose to prefer Land Acquisition Reference (in short 'L.A.R.') before the court of District Judge, Bulandshahar which was registered as LAR No. 132 of 1994 and the court of Additional District & Sessions Judge, Court No. 9, District Bulandshahar vide its judgement and order dated 30.1.2009 passed the award in favour of the said Society.

3. Guru Ratan Pal Singh as president of the said Society has filed execution proceeding against the said order before the court which was registered as Execution Case No. 11 of 2009 (Guru Ratan Pal Singh vs. State of U.P. & others). In pursuance of resolution dated 16.11.2005, the Society executed assignment deed dated 20.2.2009 in favour of the appellant Lalit Kumar as Secretary of Raj Hospital, who was permitted to get himself impleaded in the execution case. It was resolved that outcome of the LAR No. 132 of 1994 the decree may be transferred to the above trust for a sum of Rs. 2,50,000/-.

4. During pendency of the execution in pursuance of assignment deed dated 13.9.2002 opposite party no. 2 Nand Kishore filed alleged compromise which stated to have been signed by the Advocate Dinesh Singh as well as counsel for the decree holder and counsel for opposite party no. 2 whereby it has been resolved that decretal amount of the award shall be equally divided between the appellant and opposite party no. 2 Nand Kishore. After getting verification and accepting the compromise, the executing court directed the name of the opposite party no. 2 Nand Kishore to be substituted in place of Guru Ratan Pal Singh.

5. Therefore, appellant moved application under section 340 Cr.P.C. with prayer that necessary proceeding be initiated against the responsible person as the alleged act come within the purview of offence of cheating.

6. After hearing the appellant and perusing the record of the application under section 340 Cr.P.C., application was dismissed by the executing court on the ground that the Guru Ratan Pal Singh. The decree holder and Advocate Dinesh Singh, counsel for the appellant did not make

themselves present for examination and also to substantiate the affidavit said to be filed by them during the existence of factum of compromise as such prima facie case is not made out to proceed as per section 340 Cr.P.C.

7. Feeling aggrieved by the said order appellant filed this appeal.

8. I have heard Sri Siddharth Singhal, learned counsel for the appellant, Sri Pankaj Govil, learned counsel for the opposite party no. 2, learned Additional Government Advocate for the State and perused the material available on record.

9. The main point of consideration is whether court below could have proceeded to dismiss the application merely for the reason that Guru Ratan Pal Singh and Dinesh Singh did not appear to give their statements especially with an affidavit filed by the said person were already on record and the court below was in possession of the entire record and whether prima facie case is made out to proceed as per section 340 Cr.P.C. against the respondent.

10. It is submitted by the appellant that the alleged compromise is stated to have been executed under the signature of the advocate Dinesh Singh from one side and from other advocate from the side of opposite party no. 2 Nand Kishore. The court below has discarded the affidavit filed by the Advocate Dinesh Singh with respect to denying the existing of factum of entering any such compromise by saying that he did not appear to substantiate the affidavit. Opposite party no. 2 has come up with a fabricated piece of document i.e. compromise dated 30.10.2009 whereby the opposite party no. 2 Nand Kishore claimed himself to be entitled for half of the decretal amount. It is further submitted that the statement of witnesses are not required to be considered under section 340 Cr.P.C. Learned counsel for the appellant has relied upon the case **law Arun Dhawan and another vs. Lokesh Dhawan, 2015 (188) Comp. Cases 161** in which it has been held that embargo as laid down by sections 195(1)(b)(i)&(ii). Criminal Procedure Code applies only where forgery has taken place after document has been filed. Even if a document was forged prior to institution of legal proceedings, Court will have jurisdiction to entertain an application under section 340 of the Code if the document has been produced in Court proceedings. The appellant further submitted that no person shall be allowed to tamper any evidence resulting in creating hurdles in administration of justice as has been observed in case of **Kuldeep Kapoor vs. Susanta Sengupta, 2006 (126) DLT**.

11. Per contra learned counsel for opposite party no. 2 made objection inter alia on the ground that registered assignment deed dated 13.9.2002 was in favour of Kailash Chand (father of appellant) and Nand Kishore (opposite party no. 2) equally for the consideration of Rs. 2,37,400/-. The opposite party no. 2 on the basis of the assignment deed filed the compromise for substitution/mutation of his name for half part of the decree in the said execution and the compromise after being duly verified and accepted became the part of the award. The only remedy available to the appellant is to challenge the said compromise decree before the competent court. The affidavit filed by counsel for the appellant, Dinesh Singh, Advocate could neither be substantiated nor none came before the court concerned to deny the compromise. Even the decree

holder Guru Ratan Pal Singh also did not come forward to deny the compromise. The proceeding under section 340 Cr.P.C. is barred by the Section 195(1)(b) Cr.P.C. It is well settled law that section 195(1)(b) Cr.P.C. bars the cognizance of offence committed on a document "subsequent to its production or giving in evidence in proceeding of court". If the alleged imputed act was committed before its production in proceeding of court i.e. if a document said to be forged was filed in proceeding of court, the ordinary procedure of cognizance will apply.

12. In this case appellant as well as opposite party no. 2 Nand Kishore in pursuance of assignment deed got mutated in place of decree holder Guru Ratan Pal Singh with the resolution that both the persons shall get fruits of the decree equally divided between the appellant and opposite party no. 2 Nand Kishore. The decree holder Guru Ratan Pal Singh and Dinesh Singh, counsel for the appellant who signed the compromise neither make themselves present for pressing affidavit nor denying the existence of the compromise. The advocate Dinesh Singh who represent appellant is said to file an affidavit with respect to denying the existence or the factum of entering into compromise did not make available before the court in spite of direction of the concerned court to substantiate the affidavit. So far as the admissibility of the affidavit is concerned affidavit in chief cannot be appreciated without cross examination and the objection as evidence qua the credibility, relevancy, adequacy, the witness being interested partisan, truthfulness/falsehood, conspiracy are subject matter of final disposal only after cross examination. Besides affidavits are not included in definition of evidence as per section 3 of the Evidence Act.

"This affidavit has no evidentiary value. Firstly, the affidavit is not an evidence within the meaning of Sees. 1 and 3 of the Evidence Act and, secondly, the affidavit cannot destroy or take away the rights on the suit property which were gifted to the party concerned. Combined reading of Section 1 and definition of expression 'evidence' under Section 3 makes it clear that affidavit is not an evidence. Section 1 and 3 reads as follows:

"1. Short title, extent and commencement,-- This Act may be called the Indian Evidence Act, 1872. It extends to whole of India (except the State of Jammu and Kashmir) and applies to all judicial proceedings in or before any Court, including Courts-martial, other than Courts-martial convened under the Army Act. the Naval Discipline Act or the Indian Navy (Discipline) Act, 1934 or the Air Force Act but not to affidavits presented to any Court or Officer, nor to proceedings before an arbitrator;

And it shall come into force on the first day of September, 1872".

"3. Interpretation clause :-- In this Act, the following words and 'expressions are used in the following senses, unless a contrary intention appears from the context:

"Evidence" - Evidence means and includes-

(1) All statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

(2) all documents produced for the inspection of the Court; such documents are called documentary evidence".

21. It may be seen that affidavits are not included in Section 3 of the Evidence Act. An affidavit cannot be used as evidence unless law specifically permits certain matters to be proved by affidavit. The reason is that the deponent of an affidavit is not subject to cross-examination for the declarations made in such affidavit."

13. The Hon'ble Apex Court in **B.K. Gupta vs. Damodar H. Bajaj and others, 2001 (42) ACC 1074** observed that there are two conditions, on fulfilment of which a complaint can be filed against a person under section 340 Cr.P.C. who has given a false affidavit or evidence in a proceeding before a court. The first condition being that a person has given a false affidavit in a proceeding before the court and, secondly, in the opinion of the court it is expedient in the interest of justice to make an inquiry against such a person in relation to the offence committed by him.

14. In the case in hand pursuant to the assignment registered deed the compromise filed by the parties and after being verified, it was accepted and become a part of the decree which can only be challenged by seeking a civil remedy before appropriate forum. The impugned order is speaking one and does not call for interference.

15. In view of the above discussion, there is no merit in this appeal. It is **dismissed** accordingly.

16. There is no order as to cost.

Criminal Appeal No.- 1862 Of 1982

Sant Ram Pandey & Ors.
State

**...Appellants
Versus
...Respondent**

Counsel for the Appellants:

Sri P.N. Misra, Sri Rajesh Singh (**Amicus Curiae**)

Counsel for the Respondent:

Learned A.G.A.

Procedure:

Appeal against the judgment and order dated 31.07.1982 passed by the II Additional Sessions Judge, Basti in Sessions Trial No. 204 of 1976, Sessions Trial No. 304 of 1976 and Sessions Trial No. 19 of 1980, arising out of Case Crime No.18 of 1976, under Sections **395/397 IPC and Section 25 Arms Act**, Police Station Parasrampur, District Basti, whereby the accused-appellants Sant Ram Pandey, Ram Lautan and Jhinkoo Lal were convicted and sentenced to **five years' rigorous imprisonment each under Section 395 IPC**.

Case Law Discussed:

Babul Musahar vs. State of Bihar, 1990 CrI.J. (NOC) 65 (Patna).

Puttan alias Kamal Prasad vs. State of U.P., AIR 1992 SC 1032 : 1992 Cri.L.J. 1122.

Raj Kishore Singh vs. State of Bihar, AIR 1971 SC 1058.

Budhsen and another vs. State of U.P., AIR 1970 SC 1321.

Headnote:

Identification in test identification parade is not substantive evidence and can only be used for corroboration. Where the accused were allegedly known to the witnesses earlier, the test identification parade was conducted after considerable delay without explanation, and no independent corroborative evidence or reliable recovery of looted property was proved, conviction cannot be sustained merely on the basis of such identification.

In the present case, the alleged recovery witnesses and the Investigating Officer were not examined and the recovery of looted articles was made after a long delay. The evidence of identification was weak and unreliable. Hence, the prosecution failed to prove the participation of the appellants in the dacoity beyond reasonable doubt.

Result:

Appeal **allowed**. Conviction and sentence of the appellants **Ram Lautan and Jhinkoo Lal under Section 395 IPC set aside** and they are **acquitted**.

Proceedings against **Sant Ram Pandey abated** due to his death during pendency of the appeal.
(Delivered by Hon'ble Amar Singh Chauhan, J.)

(Delivered by Hon'ble Amar Singh Chauhan, J.)

1. The present appeal has been preferred against the judgement and order dated 31.7.1982, passed by II Additional Sessions Judge, Basti in Sessions Trial No. 204 of 1976, Sessions Trial No. 304 of 1976 and Sessions Trial No. 19 of 1980 (State vs. Sant Ram Pandey and others), arising out of Case Crime No. 18/1976 under sections 395/397 and 25 of Arms Act, Police Station Parasrampur, District Basti whereby the accused-appellants Sant Ram Pandey, Ram Lautan and Jhinkoo Lal have been convicted and sentenced to undergo 5 years R.I. Each under section 395 IPC.

2. So far as the case of appellant no. 1 Sant Ram Pandey is concerned there is report of the Chief Judicial Magistrate, Basti mentioning that the appellant Sant Ram Pandey has died. Therefore, the case against the appellant Sant Ram Pandey stands abated.

3. The facts giving rise to the present appeal are that an application was moved by the complainant Badri Prasad son of Ram Sunder, resident of village Reharwa, hamlet of Basthanwa, Police Station Parasrampur, District Basti which was addressed to the Station House Officer, Parasrampur, District Basti on 29.3.1975. He states that on 19.2.1976/1.3.1976 he was sleeping in his tubewell kothri which situates at a short distance from his main door. The elder brother Ram Dayal was sleeping in the Osara and the women were sleeping inside the house and an earthen Dhibri was burning inside the house. At about 1.30 A.M. 10-12 dacoits came to his house and started to break the door. His brother Ram Dayal and the women were beaten by the dacoits, who were armed with country made pistol, lathi, danda and axe and looted the house hold property. The complainant also got awakened by the noise of the breaking open and the alarm raised by the members of his family. When he raised alarm Gauri Shankar Singh, Murli Singh, Ram Dutt, Bhaggal, Ram Samujh, Bipat, Puddan and other persons came to his house along with their torches and lathis. Seeing the increasing number of the villagers the accused fled away with the looted properties towards north. Ram Dayal and others sustained injuries. On 1.3.1976, the complainant Badri Prasad prepared a written report and lodged the same at Police Station Parasrampur where it was entered at Check FIR No. 15 vide Exts. Ka-16.

4. On the basis of the aforesaid report, a case was registered against the accused-appellants as Case Crime No. 15 of 1976 under sections 395/397 which was entered in GD vide report no. 7 on 1.3.1976 at about 8.10 A.M. at Police Station Parasrampur, District Basti. After the registration of the case, the injured persons were sent to district hospital Basti for medical examination.

5. The investigation of the case was entrusted to the Station House Officer Sri D.P. Singh, Police Station Parasrampur, basti. He inspected the place of occurrence and recorded the statement of witnesses. On 2.3.1976, the I.O. went to village Nedula where he ascertained that the broken boxes are lying by the side of Manorama river which belong to the complainant. He gave the same

in the supurdagi of Badri Prasad vide Ext. Ka 29. On 4.3.1976, the I.O. received information by an informant that a person is coming from village Majhgawa side. On the pointing out of the informant the said person was waylaid and one country made pistol and the two live cartridges were recovered from the right fold of his trousers. The accused Sant Ram Pandey was taken to the Police Station Parasrampur where a case under section 25 of the Arms Act, 1959 was registered as case crime no. 18 at check FIR No. 18 on 4.3.1976 (Ext. Ka 30) and G.D. No. 10 (Ext. Ka 31). He confessed his guilt and was involved in dacoity. The I.O. went to village Anbha and arrested the accused Ram Lautan. He also made a disclosure statement and stated that he can give out some articles looted in the dacoity committed at the house of Badri Prasad. These articles were sealed in a bundle vide Fard Ext. Ka 25. Thereafter the police personnel reached the house of accused Jhinkoo Lal where he was arrested and he also accepted his involvement in the dacoity. In his house a petromax was recovered. The accused-appellants and the articles recovered from them were taken to the Police Station Mankapur.

6. The test identification parade of accused Ram Lautan and Jhinkoo Lal was held on 28.4.1976 at District Jail Basti. It was got conducted by the Sub-divisional Magistrate, Harraiya vide test identification memo Ext. Ka 23. Accused Ram Lautan was identified by witnesses Badri, Indramati, Ram Dutt and Bhaggal Ram. Accused Jhinkoo Lal was identified by witnesses Badri Prasad, Indramati and Gauri Shankar.

7. The I.O. after getting sufficient material, filed charge sheet against the accused-appellants Ram Lautan and Jhinkoo Lal under sections 395/397 IPC vide charge sheet Ext. Ka 42.

8. The identification of the properties was held on 22.7.1977 which was conducted by Sri Madhukar Divedi vide identification memo Ext. Ka 14. Articles were identified by witnesses Badri Prasad, Smt. Surpata, Smt. Indramati and Gauri Shankar. On 17.9.1977, Sri Bharath Mishra submitted charge sheet Ex. Ka 15 against accused Sant Ram, Ram Lautan, Somai and Sahebodin under section 412 IPC.

9. To bring home the guilt of the accused, the prosecution has examined P.W-1 Badri Prasad, P.W-2 Smt. Indramati, P.W-3 Smt. Surpata, P.W-4 Ram Dutta, P.W-5 Ram Dayal, P.W-6 Gauri Shankar Singh, P.W-7 Bharath Mishra and P.W-8 Vijay Bahadur Singh.

10. All of the aforesaid witnesses have on oath stated that an armed dacoity was committed at the house of Badri Prasad in the intervening night of 29.2.1975/1.3.1976 at 1.30 A.M. It is also proved by the injury reports Exts. Ka 17 to Ka 20, Ram Dayal has on oath stated that he sustained injuries noted in Ext. Ka 17 in the course of the commission of the said dacoity. Similar is the statement of Murli Singh whose house was also ransacked and looted by the dacoits. Smt. Marraji is the mother of the complainant. She also sustained injuries during the course of the commission of the dacoity. Thus, it is well established that an armed dacoity was committed at the house of Badri Prasad in the intervening night of 29.2.1976/1.3.1976.

11. Since the appellant Sant Ram has died during the pendency of the appeal the only question which falls for determination is whether the accused-appellant no. 2 Ram Lautan and appellant no. 3 Jhinkoo Lal participated in the commission of the said dacoity. The accused Ram Lautan has examined under section 313 Cr.P.C. in which he has stated that witnesses were knowing him from before and, therefore, they identified him at the test identification parade at District Jail, Basti. The accused further alleged that he is married at the house of one Bhageloo of village Nedula. The complainant Badri had no good terms with his in-laws. He, therefore, falsely implicated him. Accused-appellant Jhinkoo Lal has also denied the charges. He has stated to have been arrested from his house. The accused further alleged to have been shown to the witnesses before the test identification parade. He further alleged that he used to serve one Sri Ram Pradhan. He left his work and, therefore, Shri Ram got him falsely implicated. He has tendered no oral or documentary evidence in his defence.

12. The learned IIInd Additional Sessions Judge, Basti after perusing the record and hearing the counsel for the parties came to the conclusion that prosecution had established his charge under section 395 IPC against the appellants and, therefore, convicted and sentenced them, as has already mentioned herein above vide judgement and order, hence this appeal questioning the said judgement.

13. Feeling aggrieved, the accused-appellants Ram Lautan and Jhinkoo Lal have come up in this appeal.

14. Heard Sri Rajesh Singh, Amicus Curiae for the appellants and learned Additional Government Advocate for the State.

15. It is submitted by Amicus Curiae for the appellants that the accused-appellants are not named in the First Information Report. Their names came in the light of confessional statement of the co-accused Sant Ram before the Police. The appellants were well known from before the occurrence. There is no recovery relating to the dacoity as alleged. Identification parade was held after two months of their arrest. There is sole evidence of identification parade which is not corroborated by the independent evidence.

16. The case in hand, it has come in the evidence that PW2 Smt. Indramati has stated to have seen and identified the accused Ram Lautan in the light of burning Dhibri and torch. In her cross-examination, the witness stated that she had identified Ram Lautan as he was the most black man in the parade. On the basis of this statement, I find the basis to discredit her statement on the ground that she identified the accused Ram Lautan as he was the most black man in the parade. It was not denied by the prosecution that Ram Lautan is married at the house of one Bhageloo of village Nedula. The complainant Badri had no good terms with his in-laws. Nothing has come in the statements of prosecution witnesses Badri Prasad, Smt. Indramati and Ram Dutt that Ram Lautan was armed with any deadly weapon. The accused Ram Lautan has also been charged under section 412 of Indian Penal Code. According to the prosecution, on the pointing out of the accused, on 4.3.1976, one black woolen blanket, one pink silkan Sari, one child bush shirt, one brass Gagra

and Thali of Phool were recovered from his house, on 22.7.1977 after considerable delay which was not explained. The property was said to be recovered in the presence of witnesses Sita Ram and Jai Mangal. None of the aforesaid witnesses have been examined. Even the Investigating Officer D.P. Singh to whom disclosure statement is alleged to have been made by the accused, has not been examined by the prosecution. The prosecution witness P.W.-8 Vijay Bahadur Singh has stated that no recovery was made in his presence and his signature was obtained by the police on a plain paper. In this case, looted property in dacoity was said to be recovered more than one year after the dacoity. The presumption of participation in dacoity was not allowed to be raised as observed in the case of **Babul Musahar vs. State of Bihar, 1990 CrI.J. (NOC) 65 Patna**. This presumption can also be applied to graver offences e.g. murder and dacoity. Its scope in the Illustration (a) to Section 114 of Evidence Act which reads as follows:

114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustration:

(a) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.

17. Prosecution claimed the complicity of both of these accused persons only on the basis of the result of the Test Identification Parade which was conducted on 28.4.1976. The T.I. Parade was held near about two months of arrest but delay was not explained. It was held by Hon'ble Apex Court in the case of **Puttan alias Kamal Prasad vs. State of U.P., AIR 1992 SC 1032, 1992 Cri.L.J. 1122** that in absence of any plausible explanation for the inordinate delay had no evidence forthwith.

18. Test identification report in jail is not a substantive piece of evidence but it can only be used as corroborative evidence and could not be of much evidentiary value as held by the Apex Court in case of **Raj Kishore Singh vs. State of Bihar, AIR 1971 SC 1058**.

19. Hon'ble Supreme Court in case of **Budhsen and another vs. State of U.P., AIR 1970 SCC 1321** observed that the evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances he came to pick out the particular accused person and the details of the part which the accused played in the crime in question with reasonable particularity. The purpose of a prior test identification, therefore, seems to be to test and strengthen the trustworthiness of that evidence. It is accordingly, considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceeding. There may, however, be exceptions to this general rule, when, for example, the court is

impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration.

20. Moreover, after incident on 4.3.1976, the Investigating Officer received the information by an informant that a person possessed of country made pistol and two live cartridges is coming from Majhgawa side. After collecting the independent witness, the said person was waylaid. At about 7.00 a.m. a person who subsequently disclosed his name as Sant Ram Pandey came over there by cycle Avon make frame no. 123846. One country made pistol and two cartridges were recovered from the right fold of his trousers. The cycle of which handle was of another ATLAS cycle held by him was recovered which is said to have been looted in the dacoity committed at the house of the complainant but nothing has come in the evidence that said make Avon cycle was looted in the dacoity. On the confessional statement of this co-accused, the case was opened. All these circumstances through cloud on the genuineness of the investigation. So far as case against the Jhinkoo Lal is concerned nothing has come in the statement of the prosecution witness that he was armed with any deadly weapon. The recovery of petromax on his pointing out was said to be made in the presence of the witnesses Thanedar Singh and Sita Ram but none of the witnesses had been examined by the prosecution. S.I. D.P. Singh to whom disclosure statement was made by the accused, was not examined. It is also not denied by the informant Badri Prasad that the accused-appellant was not used to serve one Sri Ram, Pradhan of his village and on being left his work, Sri Ram got him falsely implicated. This fact shows that the accused was well known from before the occurrence.

21. Learned Additional Sessions Judge also found that there is no evidence on record to bring the charge under section 412 IPC against the accused-appellant.

22. In the case in hand there is solitary identification report prepared in jail to connect the appellants with the crime. It has come in the evidence that the accused were known to the witnesses. Neither any injury was said to be caused by the appellants nor any looted property was recovered from the possession of the accused-appellants. Test Identification Parade by itself cannot form the basis of conviction. Therefore, it is not justified to maintain conviction.

23. For the reason mentioned here-in-above, the criminal appeal is **allowed**. The conviction and sentence of the appellants namely Ram Lautan and Jhinkoo Lal under section 395 IPC are hereby set aside and appellants are acquitted of alleged charge levelled against them. Since the appellants are on bail, their bail bonds, if any, are cancelled and sureties stand discharged.

24. The appellants are directed to comply with the provisions of section 437-A Cr.P.C.

25. Let a copy of the order be sent to lower court for compliance.

(2016) 8 ILRA 714
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.08.2016

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Appeal No.- 7740 Of 2006
&
Connected With Other Cases

Ashwani Dubey

...Appellant
Versus

State Of U.P

...Respondent

Counsel for the Appellant:

Sri Rajrshi Gupta; Sri Umesh Chandra Mishra; Sri Brij Raj; Sri Dilip Kumar; Sri Rajiv Lochan Shukla; Sri Bhishm Pal Singh; Sri S.K. Gupta; Sri Yogish Kumar Saxena; Sri Arvind Kumar Yadav; Sri Rajendra Joshi

Counsel for the Respondent:

Sri J.K. Upadhyay, A.G.A.; Kumari Meena, A.G.A.; Government Advocate

Procedure:

These criminal appeals were filed against the judgment and order dated 28.11.2006 passed by the Special Judge (D.A.A.) Act, Etawah in Special Sessions Trial No. 79 of 2004 (State of U.P. vs. Usha Gupta and others), whereby the appellants were convicted under Section 364A IPC and Section 27 of the Dacoity Affected Areas (D.A.A.) Act and sentenced to life imprisonment with fine.

Headnote:

Where prosecution fails to prove the essential ingredients of Section 364A IPC, namely demand for ransom and threat to cause death or harm, conviction under Section 364A cannot be sustained. In absence of reliable evidence regarding ransom demand, the offence would fall within the ambit of Section 365 IPC (kidnapping with intent to secretly and wrongfully confine).

In the present case, the prosecution evidence did not establish any demand of ransom by the accused persons nor any threat of death linked with such demand. The alleged payment of money by the informant was found unreliable due to material improvements and contradictions in testimony.

The evidence on record only proved that the victim was taken away and kept in wrongful confinement. Hence, the conviction under Section 364A IPC was liable to be altered to one under Section 365 IPC.

Result:

Appeals **allowed in part**. Conviction of the appellants under Section 364A IPC set aside and altered to Section 365 IPC. Sentence of life imprisonment modified to **seven years' imprisonment with fine**. As the appellants had already undergone the modified sentence, they were directed to be **released forthwith**, if not wanted in any other case.

(Delivered by Hon'ble Bala Krishna Narayana, J.)
(Hon'ble Arvind Kumar Mishra-I, J. concurring)

(Delivered by Hon'ble Bala Krishna Narayana, J.
&
Hon'ble Arvind Kumar Mishra-I, J.)

1. Heard Sri Rajrshi Gupta, learned counsel for the appellants, Sri J.K. Upadhyay and Kumari Meena, learned A.G.A. for the State.

2. These three criminal appeals have been preferred by the appellants, Ashwani Dubey, Usha Gupta, Kallu, Neelam, Shyam alias Radhey Shyam and Raja Yadav alias Anurudh Yadav alias Raja Bhaiya against the judgement and order dated 28.11.2006 passed by the learned Special Judge (D.A.A.) Act, Etawah in Special Session trial no. 79 of 2004 (State of U.P. vs. Usha Gupta and others), by which all the appellants have been convicted under Section 364A I.P.C. and section 27 Dacoity Affected Areas (D.A.A.) Act and sentenced to life imprisonment and fine of Rs. 10,000 each and in default of payment of fine one year R.I.

3. The facts of the case are that one Shivam son of Updesh Babu Mishra who had gone to attend Bhagwatpath in Friends Colony pandal near Ramnagar, Etawah with his parents on 09.05.2004 went missing from there on the same day at about 7 p.m. during "Prasad Vitran". A missing report in this regard was lodged by the PW1, Updesh Babu Mishra at Police Station-Civil Line, district-Etawah on 10.5.2004 at 8:30 p.m. Thereafter on the basis of a written complaint given by the father of the missing boy on 18.05.2004 at about 14:15 p.m., Case Crime no. 130 of 2004 was registered at Police Station-Civil Line, district-Etawah against the appellants and one Meera Gupta who died during the trial. The prosecution case as spelt out in the F.I.R. dated 18.05.2004 (Ext.Ka-2) is that the son of the informant PW1, Updesh Babu Mishra had gone missing from Bhagwatpath Pandal, Friends Colony, Etawah on 09.05.2004 where he had gone with his parents, with regard to which a missing report was lodged by PW1 at the same police station stating therein that he suspected either his son had lost his way or had mistakenly gone with someone else. He further stated in the F.I.R. that when he did not find his son in Friends Colony and the other nearby localities of the city he went in his search to Ashok Nagar where he met one Sri Amar Nath Tiwari, s/o not known, resident of Ashok Nagar near Tiwari Hospital who told him that on 09.05.2004 at about 7:00 p.m. he had seen his son Shivam with Usha Gupta, Meera Gupta, daughter of Sri Ramchand Gupta and Gopeshwar alias Sonu son of Rajkumar Tiwari, Raja Yadav, Anirudh Yadav son of Sri Bharat Singh Yadav, Sri Ashwani Kumar Dubey son of Umashankar Dubey sitting in a white Maruti van bearing registration no. DL 26-A 8462 at Bharsana crossing from where they had gone towards Bharsana. He also stated that although he was related to the missing boy but he did not inform his parents as he was not aware that the boy had been kidnapped. The chek F.I.R. (Ext.Ka10) and the G.D. entry (Ext.Ka9) were prepared by constable, Mahesh Pal Singh, PW8. The investigation of the case was entrusted to PW7 Chatrapati Singh, S.H.O. of Police Station-Civil Line who recorded the statement of Updesh Babu Mishra and prepared the site plan of the spot at the behest of PW1 after inspecting the same (Ext.Ka-8). Thereafter the investigation was transferred

to PW6 S.H.O, Ramesh Singh Rathod who continued with the search of the missing boy and after completion of investigation submitted charge sheets Ext.Ka-5, Ext.Ka-6 and Ext.Ka-7 under Sections 364A, 368, 120B, 216A I.P.C. and section 10/12 (D.A.A.) Act against Usha Gupta and other accused. Since the offences enumerated in the charge sheet were triable by Court of session, the case was committed to the Court of session for trial of the accused thereafter the matter was transferred to the court of Special Judge (D.A.A.) Act. Charge was framed against all the accused under Section 364A I.P.C. and 16/12 Dacoity Affected Areas (D.A.A.) Act. The accused on being produced before the Court denied the charges framed against them and claimed trial.

4. The prosecution in order to prove its case examined as many as eight witnesses namely, PW1 Updesh Babu, PW2 Smt. Pushpa Mishra, PW3 Amarnath, PW4 Shivam (victim), PW5 Dr. Shailendra Tiwari, PW6 Inspector, Ramesh Singh Rathod, PW7 S.I., Chatrapati Singh and PW8 Maheshpal Singh. All the accused in their statements under Section 313 Cr.P.C. denied the prosecution case and stated that they had been falsely implicated due to local enmity.

5. Learned trial Judge after considering the submissions advanced by learned counsel for the parties and scanning the evidence on record convicted the appellants and awarded them the aforesaid sentences.

6. Learned counsel for the appellants in all the appeals has vehemently submitted that the prosecution having failed to adduce any evidence for proving that the victim was either kidnapped by the appellants with the intent of committing his murder or for ransom, the conviction of the appellants under Section 364A I.P.C. can not be sustained. He next submitted that inordinate and unexplained delay of more than nine days on the part of the complainant PW1 in lodging the F.I.R. although the complainant PW1 claimed that the identity of the so-called kidnappers was disclosed to him by his father-in-law, PW3 Amar Nath Tiwari on the very next day of the kidnapping and even before lodging the missing report by him yet he strangely chose to file a missing report instead of a named F.I.R, which clearly indicates that the entire prosecution as spelt out in the F.I.R. is false and concocted and the appellants were falsely implicated in the present case by PW1 as on after thought after due deliberations. The four witnesses of fact examined on behalf of the prosecution PW1, PW2, PW3 and PW4 are vacillating in their testimonies. Their testimonies are at variance to their statements recorded before the investigation and embellished with improvements. He also submitted that the prosecution having failed to prove its case against the appellants beyond all reasonable doubts, they are entitled to acquittal.

7. In the alternative he submitted that even if, the entire prosecution case which is full of loop wholes and contradictions and the testimonies of the witnesses of fact examined on behalf of the prosecution during the trial are taken to be gospel truth, the offence, if any proved to have been committed by the appellants from the evidence on record does not travel beyond section 365 I.P.C. and hence recorded conviction of the appellants and the sentence awarded to them deserve to be altered.

8. Per contra, Sri J.K. Upadhyay, learned A.G.A. refuting the submissions made by learned counsel for the appellants submitted that the prosecution having fully proved the charge framed against the appellants by leading cogent evidence, their conviction is not liable to be set aside or modified in view of the submissions made by learned counsel for the appellants. He further invited our attention on page 16 of the paper book and referred to the cross-examination of PW3, in which he has stated that on the assurance of appellant, Usha Gupta he had paid a sum of Rs. 1,51,000/- (Rs. One lac fifty one thousand) to the appellant Kallu, son of Ram Chandra Gupta for arranging his meeting with Nirbhay Gujjar for negotiating the release of his son and hence the submission of appellants' counsel that there is no evidence of demand of ransom is without any basis. These appeals lack merit and are liable to be dismissed.

9. We have very carefully considered the submissions made by learned counsel for the parties, scanned the entire lower court record and perused the impugned judgement.

10. The twin questions, involved for our consideration in these three criminal appeals, inter-alia, are that whether the prosecution has been able to prove its case against the appellants beyond all reasonable doubts, and that whether even if the prosecution case is accepted unequivocally to be true the conviction of the appellants recorded by the trial court under Section 364A can be sustained and the same is liable to be altered to one under Section 365 I.P.C.

11. We have very carefully scanned the evidence of PW1, PW2, PW3 and PW4, the four witnesses of fact examined on behalf of the prosecution but none of them have deposed that the appellants had kidnapped the victim, Shivam either for ransom or with the intention of committing his murder. It is true that PW1 on page 16 of the paper book has stated in his cross-examination that he had paid a sum of Rs.1,51,000/- (Rs. One lac fifty one thousand) to the appellant Kallu at the behest of Usha Gupta for arranging his meeting with Nirbhay Gujjar for negotiating the release of his son and appellant Kallu had arranged his meeting with Nirbhay Gujjar who on meeting PW1 had warned him in case he insisted on the prosecution of Usha Gupta and Meera Gupta who were innocent in the case of his son's kidnapping, his son Shivam would be killed. He also stated that Nirbhay Gujjar had initially demanded Rs. 1,00,000,00 (Rs. One crore) as ransom for releasing his son but later the demand of ransom was reduced to Rs. 5,000,00/- (Rs. Five lacs) and when he had gone to meet Nirbhay Gujjar along with Kallu he had not seen any of the other accused there. But strangely the aforesaid facts do not find any mention in his statement recorded under Section 161 Cr.P.C. and by stating the aforesaid facts for the first time before the trial court he has attempted to make material improvements in the prosecution case. Further it is noteworthy that PW1 divulged neither the time nor the day on which or the place where he had made the payment of sum of Rs.1,51,000/- (Rs. One lac fifty one thousand) to appellant, Kallu and for the aforesaid reasons, we do not find the evidence of PW1 on the point of payment of ransom reliable. PW2, Pushpa Mishra who is the mother of the victim is witness of the victim going missing from the Bhagwatpandal in Friends Colony, Etawah alone. She had neither seen the appellants kidnapping the victim nor she deposed that any ransom was demanded. As far as PW3 who is the real maternal grandfather of the victim, Shivam and who was the first person to have seen the victim with the accused on the day he had gone missing and on whose information the appellants were nominated as accused in the F.I.R.

lodged by the PW1 is concerned, although he in his evidence tendered during the trial supported the prosecution case but later he had filed his affidavit before the trial court and proved the same as Ext.Ka-1, in which he totally denied the prosecution case and for the aforesaid reason his evidence is of no help to prosecution for proving its case against the accused-appellants.

12. Now we proceed to scrutinize the evidence of the star witness in this case, PW4, kidnappee Shivam. PW4, who on the date of incident was about six years old and on the date of recording his evidence aged about eight years. He in his examination-in-chief stated that Sonu Bhaiya, Raja Bhaiya, Ashwani Bhaiya, Meera Bua and Usha Bua had taken him away from the Bhagwatpandal where he had gone with his parents and at that time it had become slightly dark. Sonu Bhaiya had told him that his father was calling him. He further deposed that he knew Sonu Bhaiya whose house was near his house and he used to go to play in his house where Raja Bhaiya and Ashwani Bhaiya also used to come. He knew Usha Bua and Meera Bua who were next door neighbours of Sonu Bhaiya. He also deposed that he was taken away from Bhagwatpandal to a forest where he was handed over to Nirbhay Gujjar who sported a beard and had long hair, he lived with him for about 4-5 months. As a result of police firing one day the culprits escaped and although he had lost his way but he met two persons in a field, to whom he referred to as 'Bhaiyas' who took him to Etawah Railway Station and asked him his name and address but he told him that he did not know his address but he knew the name of his school on which they took him to his school. But since his school was closed, they took him to the Principal's residence and handed him over to the Principal. He also testified that there were about fifty men and two women in the gang of the person with long hair and beard. The name of one of them was 'Mucchar' but he did not know the names of the others. The names of the two girls of his gang were Neelam and Sarla. PW4 has also not testified that any ransom was demanded by the appellants for his release or any injury was caused to him by them or he was threatened with death in case his father failed to pay the ransom.

13. The victim's version about his escape from the clutches of Nirbhay Gujjar deposed by him in his evidence remained uncorroborated and no effort was made by the I.O. to ascertain the veracity of the facts stated by the victim in this regard. It appears that neither any effort was made by the Investigation Officer to trace out the two strangers who had left the victim, Shivam in the custody of the Principal of his school and to ascertain their identities nor the Principal of the victim's school was interrogated by him at any stage of the investigation. The aforesaid glaring omissions on the part of the I.O. reflect the lackadaisical manner in which the investigation in this case was conducted by him.

14. The remaining witnesses namely, PW5 Dr. Shailendra Tiwari, PW6 Ramesh Singh Rathore and PW8 Mahesh Pal Singh examined on behalf of the prosecution are formal witnesses. The testimonies of the fact witnesses produced by the prosecution for proving the charge framed against the appellants under Section 364A I.P.C. at the most can be taken to be confined to the extent of kidnapping with an intent to confine the victim secretly and wrongfully. There is no iota of evidence against the appellants even faintly showing that they had either demanded or were involved in demanding any ransom.

15. The prosecution has failed to prove the demand of ransom by the accused or payment of ransom money to any accused which is a necessary ingredient to constitute an offence under Section 364A I.P.C. Cumulative reading of the testimonies of prosecution witnesses of fact leads only to one inference that the case falls within the ambit of section 365 I.P.C. rather than one under Section 364A I.P.C. A demand of ransom if, any, was made by Nirbhay Gujjar alone as deposed by PW1, Updesh Babu Mishra but strangely Nirbhay Gujjar was never nominated as an accused in this case. It will be useful to extract Section 365 I.P.C. herein below :

"365. Kidnapping or abducting with intent secretly and wrongfully to confine person.--Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

16. Thus, upon a thorough marshaling of the facts of this case and thread bare scrutiny of the evidence on record, we have no hesitation in holding that the prosecution has miserably failed to prove by any cogent evidence that the appellants after kidnapping the victim, Shivam had made any demand of ransom for releasing him or any ransom money was paid to them or they had extended any threat to commit his murder in case the demand of ransom was not fulfilled. Thus the prosecution having failed to establish the necessary ingredients for convicting an accused under Section 364A I.P.C., the recorded conviction of the appellants and the sentence awarded to them under Section 364A I.P.C. by the trial court vide impugned judgement and order can not be sustained and are accordingly scored out. The conviction of the appellants is converted to one under Section 365 I.P.C. and the life sentence awarded to them is palliated to seven years imprisonment and a fine of Rs. 1000/- each and in default of payment of fine 6 months additional imprisonment.

17. All the appeals stand **allowed** in part. The judgement and order dated 28.11.2006 passed by the learned Special Judge, Dacoity Affected Areas (D.A.A.) Act, Etawah in special session trial no. 79 of 2004 (State of U.P. vs. Usha Gupta and others) is modified accordingly in this case.

18. All the appellants are in jail since 24.11.2006 and it is apparent that they have already served out the sentence of seven years imprisonment awarded to them by us after converting their conviction under Section 364A I.P.C. to one under Section 365 I.P.C. and the period of 6 months additional imprisonment which they would have been required to undergo in case of default of payment of fine of Rs. 1000/- each has also been undergone by them and hence they are not required to make any payment of fine.

19. The appellants shall be released forthwith, if they are not wanted in any other case.

20. There shall be however no order as to cost.

(2016) 8 ILRA 720
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.08.2016

BEFORE

THE HON'BLE HARSH KUMAR, J.

Criminal Misc. Bail Application No.- 29519 Of 2015

Sanni Malik @ Sanni Jaat

...Applicant

Versus

State Of U.P.

...Opposite Party

Counsel for the Applicant:

N.K. Srivastava, Rajesh Kumar Sharma

Counsel for the Opposite Party:

Govt. Advocate, Sushil Shukla

Procedure:

Application for bail in S.T. No. 53 of 2015, arising out of Case Crime No. 682 of 2011, under Sections 364-A, 120-B, 34 IPC, Police Station Sector-20, Noida, District Gautam Budh Nagar.

Citation:

Relied on: CBI Vs. Vijay Sai Reddy, (2013) 7 SCC 452; Y.S. Jagan Mohan Reddy Vs. CBI, (2013) 7 SCC 439.

Headnote:

Bail in a case of kidnapping for ransom cannot be granted where the applicant approaches the Court with false statements and concealment of material facts. Filing an incorrect copy of the victim's statement, falsely asserting absence of criminal history, and taking a false plea regarding lack of knowledge of proceedings amounts to an attempt to mislead the Court and procure bail by fraud. In considering bail, the Court must evaluate the nature and gravity of the accusation, criminal antecedents of the accused, likelihood of tampering with evidence, and larger public interest. Where the accused has criminal antecedents, was absconding for a long period, and has attempted to misguide the Court, the discretion of bail should not be exercised in his favour.

Result:

Bail Application **Rejected.**

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

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

1. Heard Sri N.K. Srivastava, Sri Rajesh Kumar Sharma, learned counsel for the applicant, Sri Sushil Shukla, learned counsel for the first informant, learned AGA for the State and perused the record.

2. Learned counsel for the applicant contended that the applicant is not named in F.I.R. and has been falsely implicated on the basis of disclosure statement of co-accused persons; that as per prosecution case, a missing report was given by Smt. Sonia wife of Kapil Gupta (hereinafter referred as **K.G.**) on 22.9.2011 at 1:45 p.m., stating that her husband **K.G.** left his office F-37, Sector-6, Noida at about 7:00 p.m. on 21.9.2011 for his residence at 349 Sector-15A, Noida by his black colored Mercedes Car No.H.R. 99TEMP 01319 but did not reach home; that the above missing report was converted into case crime no.682 of 2011 when the missing person **K.G.** returned home on 24.9.2011; that the first informant in her statement under section 161 Cr.P.C. has stated that on 22.9.2011 at about 10:30 p.m., a call was received at mobile no.9871576860 of her Jethani Purnima from mobile no.9811055733 of her husband who informed that he has been kidnapped and asked for making arrangements of Rs.5 crores, as ransom money, failing which the kidnappers will cause his death and on his another call, when she asked him of his welfare, the phone was disconnected and again her husband called Vijay on his mobile no.9810103577 inquiring about the arrangements of Rs.5 crores, if have been made as above; that it has also been stated by the first informant that the kidnappers also talked her on mobile of Vijay and told her to hand over the ransom amount in two bags under the denomination of currency notes of Rs.1000/- and to come alone else upon informing the police even the dead body of her husband will not be traced/recovered; that it has further been stated by first informant that she sought permission from the kidnappers to come with driver, as she will not be able to come alone and when she reached the desired place with the ransom amount of Rs.5 crores in the midnight, she was further called to keep two bags on the ground and leave, and when she was returning back, in the light of vehicle seen three miscreants, who emerged out from the sugarcane fields and taken away the two bags full of currency notes worth Rs.5 crores back to sugarcane fields; that in the statement of kidnapped **K.G.** under section 161 Cr.P.C. at Annexure No.3 from page 23 to 25, he has narrated the story of his kidnapping and has given the names of miscreants, who were allegedly calling each other and made demand of Rs.15 crores as ransom and did not agree to reduce the demand below from Rs.5 crores; that the above kidnapped person has stated that after covering his eyes, he was dropped at Noida near Sector-15A of his residence and could reach home at about 8:00 p.m. and that he was released after taking ransom amount of Rs.5 crores.

3. Much emphasis has been given by learned counsel for the applicant on above statement of **K.G.** filed at Annexure No.3, submitting that the kidnapped person/victim has given the names of various miscreants, but did not name the applicant, as stated in para 9 of the affidavit to the bail application and so the case of applicant is clearly distinguishable; that the name of applicant has come for the first time in the confessional statement of co-accused Kapil, Vinay and Anshul (filed at Annexure No.5), upon their arrest in police party encounter under section 307 IPC on 12.10.2011 (after a period of 20 days of incident); that there is virtually no evidence against the applicant, who is a student and was studying in B.B.A. from Hemwati Nandan Bahuguna Garhwal University, Deharadun as regular student, and copy of his mark sheet has been filed at Annexure No.6; that moreover on the date of incident of kidnapping of **K.G.**, the applicant was at Dehradun and during a visit to Market with uncle Ravindra Malik, he met with an accident sustaining serious injuries on his face and nose and was admitted in Government Hospital at Deharadun, as mentioned in para 13 of the affidavit to bail application; that getting information of accident of applicant, his father

shifted him to M.G. Hospital & Trauma Centre, Meerut, where he remained admitted for 6 days for treatment of fracture; that the father of applicant is a defence personal and due to unwanted harassment by police, he obtained compulsory retirement; that the entire prosecution story is false, concocted and highly improbable; that nothing incriminating has been recovered from the possession of applicant and the amount of ransom money is alleged to have been recovered from other persons; that the applicant was implicated in case crime no.703 of 2011, under section 147, 148, 149, 307, IPC and case crime no.121 of 2011, under sections 364-A IPC, in both of which, he has been granted bail by this Court vide orders dated 9.9.2015 and 30.10.2015 passed in Criminal Misc. Bail Application Nos.32631 of 2015 and 33031 of 2015, respectively, copies of which were produced for perusal during arguments; that the applicant undertakes that he will not make misuse the liberty of bail; that the applicant is in custody since 18.12.2014.

4. Learned AGA as well as learned counsel for the first informant vehemently opposed the prayer of bail and contended that the applicant has moved bail application with absolutely false and incorrect allegations and concealing the true facts; that the applicant has deliberately filed a false and incorrect copy of statement of the kidnapped "**K.G.**" at Annexure No.3 to the affidavit and has made a specific allegations in para 9 of the affidavit to bail application maliciously and mischievously that he did not name applicant as one of the miscreants and further dishonestly and deliberately with malafide intention to misguide the Court for procuring bail, in the statement of **K.G.** left some space "BLANK with dots" between the names of co-accused persons "Kapil" and "Sumit" at page 24; that the correct and complete copy of statement of kidnapped **K.G.** has been filed at Annexure No.4 to the counter affidavit filed by first informant, wherein at page 21, there is clear mention of names of "Monu" and "Sanni" at above dotted space between the names of "Kapil" and "Sumit"; that thus the applicant has not only left the space with dots in statement of **K.G.** at Annexure No.3, malafidely and mischievously, but has also dared to make specific false averments in para 9 of the affidavit to the bail application, that the kidnapped person did not disclose the name of applicant as one of the miscreants; that the above concealment has been made deliberately, mischievously and with mala fide intentions with an attempt to play fraud on the Court for procuring the bail; that similarly in para 29 of the affidavit given in support of bail application, it has been clearly mentioned that applicant has no criminal history, while apart from this case, the applicant is involved in as many as three more cases, including those of heinous crimes under sections 307 and 364-A IPC, detailed in para 18 of the counter affidavit and on being caught for making false statement and mischievous concealment, he has claimed to have obtained bail in above cases during pendency of his bail application; that apart from above, the applicant has also made a false plea of alibi in para 13 of the affidavit and in order to support above false plea of alibi, has forged and fabricated the documents with regard to his injuries allegedly sustained in accident in Dehradun Market, at the time when **K.G.** was kidnapped in Noida; that the medical reports at Annexure No.7 are false and do not support the above false plea of alibi; that the father of applicant being an influential person, has obtained a prescription (Outdoor Patient Ticket) of applicant by exercising his influence and further to strengthen the above false plea of alibi, got him admitted to L.L.R.M., Medical College, Meerut and obtained false medical reports in order to make a ground for getting his worthy criminal son released on bail; that the medical reports are self contradictory and do not show applicant's admission in Dehradun Hospital rather only reference has been

obtained thereon; that the medical report at page 45 A-8 showing "Linear undisplaced fracture in left temporo-parietal region" is against the allegation in para 13 about alleged injuries on face and nose; that the applicant is alleged to have fallen forward getting his face and nose injured and under any imagination of medical jurisprudence, on falling of a person with the face on ground there can be no probability of sustaining even linear fracture in left temporo-parietal region; that the applicant continued to abscond for a long period of three years and despite putting reward over his head and issuance of process under sections 82 & 83 Cr.P.C., his arrest could be made only by Special Task Force, from the State of Madhya Pradesh; that the averments made in para 15 of the affidavit to bail application dated 19.7.2015 about having no knowledge of the incident in question are absolutely false and in contradiction to the fact that the applicant had filed a Writ Petition No.24330 of 2011 before this Court for quashing of F.I.R., which was dismissed vide order dated 22.12.2011, copy filed at Annexure No.18 to the counter affidavit and it is yet one more attempt to misguide the Court and denying knowledge of case upto 2015 inspite of fact of having complete knowledge since lodging of F.I.R. in 2011; that the role of applicant is fully identical and is not distinguishable from his associates, the other co-accused, namely, Sandeep, Pushpendra @ Pintu, Braham Singh, Anshul Sharma and Sajeew Kumar, whose bail applications have been rejected on merits vide orders dated 5.9.2012, 5.9.2012, 22.4.2013, 24.9.2015 and 5.7.2016, passed in Criminal Misc. Bail Application Nos.14342 of 2012, 21567 of 2012, 8117 of 2012, 6936 of 2015 and 9236 of 2013, respectively copies of which have been filed as Annexure No.17 to the counter affidavit and of order dated 5.7.2016 produced for perusal during hearing; that the second bail application of co-accused Pushpendra @ Pintu was also rejected by this Court vide order dated 8.11.2013 passed in Criminal Misc. Bail Application No.9359 of 2013 while the third bail application of co-accused Anshul Sharma was rejected by this Court vide order dated 24.9.2015 passed in Criminal Misc. Bail Application No.6936 of 2015, copies of which have been filed collectively at Annexure No.17 to the counter affidavit; that the trial is in progress and if the applicant is released on bail, he will certainly make misuse the liberty of bail and will disappear/underground; that the recovery of entire amount of Rs.5 crores paid as ransom, has been recovered from the associates of applicant while he managed to escape and obtained some fabricated medical reports in order to make a false plea of alibi; that the applicant is not a student, rather is involved in criminal activities since before the crime in question; that the bail application of applicant is misconceived and is liable to be rejected.

5. Upon hearing the parties counsel and perusal of record, I find that the bail has been sought mainly on the following grounds viz.(i) the applicant is not named in F.I.R., (ii) he was not named by kidnapped person **K.G.**, (iii) plea of alibi that at the time of incident in District Gautam Budh Nagar (Noida) he met with an accident at District Dehradun sustaining multiple injuries on nose and face, (iv) he could not appear before the Court for a period of 3 years, because prior to 18.12.2014, he had no knowledge of the case, and that (v) he is a student and has no criminal history.

6. In a case of kidnapping on the point no.(i), the fact of applicant having been not named in F.I.R. is immaterial and on point no.(ii) as far as the medical reports which are alleged to have been obtained in support of false plea of alibi, since correctness of above report is to be decided by trial court upon evidence adduced during trial, so no opinion is being expressed. However on point

nos.(ii), (iv) and (v), the averments made in affidavit given in support of bail application are apparently false and incorrect on face of the record and have been found to be wholly wrong and incorrect. In view of submissions made at Bar, I am of the considered view that on above points deliberate false statements have been made by and on behalf of applicant (i) by filing incorrect copy of statement of kidnapped **K.G.** at Annexure No.3 to the affidavit, concealing the correct statement with an attempt to misguide the Court and procure bail by playing fraud on Court (ii) by giving false statement that the applicant has no criminal history while he has criminal history of heinous offences including one more case of similar nature under section 364-A IPC to his credit and (iii) by giving yet another false statement of having no knowledge of proceedings upto 18.12.2014 despite the fact that he had filed writ for quashing of F.I.R. of this case which was dismissed vide order dated 22.12.2011, since when he remain absconding and the plea of having no knowledge of the proceedings is palpably wrong.

7. It is settled principle law as has been laid down by the Apex Court in catena of judgments as well as in **(2013) 7 SCC 452, C.B.I. Vs. Vijay Sai Reddy** and **(2013) 7 SCC 439, Y.S. Jagan Mohan Reddy Vs. C.B.I.**, that the relevant grounds for consideration for grant of bail are "(a) nature of accusation and evidence (b) severity of punishment which conviction will entail (c) character and circumstances which are peculiar to accused (d) reasonable possibility of securing presence of accused at trial, (e) reasonable apprehension of witnesses being tampered with, and (f) larger interests of public/State and other similar consideration etc.

8. It is pertinent to mention that admittedly the applicant is a person of criminal antecedents and case crime no.703 of 2011, under sections 147, 148, 149, 307 IPC and case crime no.121 of 2011, under sections 364-A IPC (similar heinous offence), are to his credit and despite his securing bail in above cases, in view of his involvement in similar nature of crimes since before the present case crime no.682 of 2011, under section 364-A IPC, there is no reason to believe that in case of release, he will not be further involved in similar or other offences and will not tamper the prosecution evidence or that his release will be in larger public interest, rather there is every likelihood of misuse of liberty of bail by the applicant as well as of his absconding in order to delay and defraud the trial. Hence in view of the submissions made by learned counsel for the parties, complicity of accused, severity of punishment, deliberate wrong submission of facts with concealment of true facts by the applicant, as mentioned above, I find that applicant has not come with clean hands and has not acted fairly rather has made an attempt to procure bail by concealment of true facts and playing fraud on the Court. In view of the facts and circumstances, considering the seriousness of matter and repeated false statements of applicant on various points, without commenting the on the merits of the case, I do not find it a fit case for bail. The bail application of applicant **Sanni Malik @ Sanni Jaat** in S.T. No.53 of 2015, case crime no.682 of 2011, under sections 364-A, 120-B, 34 IPC, PS. Sector 20 Noida, District Gautam Budh Nagar, is liable to be rejected and is **rejected** accordingly.

(2016) 8 ILRA 725
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.08.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 46128 Of 2015

Veer Singh

...Applicant

Versus

State Of U.P.

...Opposite Party

Counsel for the Applicant:

Surendra Prasad Mishra, Prayogendra Pal Singh

Counsel for the Opposite Party:

Govt. Advocate

Headnote:

Bail application under Section 439 Cr.P.C. in Case Crime No. 2006 of 2015, under Section 376 I.P.C. and Section 3(1)(12) of the SC/ST Act, Police Station Adampur, District J.P. Nagar—Applicant not named in the F.I.R.—Identity alleged to have surfaced after about two and half months of the incident—Victim an aged lady of about 60 years—Statement under Section 164 Cr.P.C. narrates forcible sexual assault coupled with robbery—Accused identified subsequently by victim and her son on spotting him, leading to arrest—Non-holding of Test Identification Parade explained as accused was seen after occurrence—Gravity and perversity of offence emphasized—Court held that considering the nature and gravity of accusation and supporting material, no case for bail is made out—Bail rejected—Observations confined to disposal of bail application and not to affect merits of trial.

Case Law discussed:—

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. This application has been filed seeking the release of the applicant on bail in Case Crime No.2006 of 2015, u/s 376 I.P.C. and Section 3 (1) (12) SC/ST Act, Police Station-Adampur, District-J.P. Nagar.

2. Learned A.G.A. has filed counter affidavit on behalf of State which is taken on record.

3. Heard learned counsel for the applicant and learned A.G.A.

4. Perused the record.

5. Submission of counsel for the applicant is that the complicity of the applicant surfaced after about two and half months of the incident. The applicant was not nominated in the F.I.R. and applicant was not known to the victim from before. There is no proper identification parade organized by the police. Therefore, he should be released on bail.

6. Learned A.G.A. has opposed the prayer for bail and has submitted that the victim is an old lady of about 60 years in age, who was going on foot while the applicant picked her up, gave her lift and then subsequently ravished her. Attention was drawn to the statement of the victim given before the Magistrate in which she has narrated the incident, which also indicates that during the time of this unnatural offence the victim lady was begging for mercy all the time, implored the applicant, tried to tell the applicant about her advanced stage and that she was like his mother, but all her importuning and imploring did not yield any result and the applicant not only raped the victim, but also took away the money which was carried by her. Further submission is that the applicant was not known to the victim from before the incident. He was not nominated by name either by the victim or by the first informant, who was her son, which indicates that neither the first informant nor the victim had any axe to grind against the applicant and there is absolutely no reason to falsely implicate the applicant in the crime. It has been further pointed out that during the course of investigation the victim and her son happened to see the applicant at some place and that is how she happened to identify the applicant and then the information was given to the police whereupon the applicant was apprehended. With regard to not organizing the identification parade, it has been submitted by learned A.G.A. that as the accused applicant was spotted by the victim and her son and the information with regard to the whereabouts of applicant was furnished to the police by the victim herself on which the applicant was arrested, therefore, there was no more justification left for arranging the identification parade as the same would not have carried any great evidentiary value. Identification parades carry weight only in the cases where the identifying the witness does not get or is provided with any opportunity to see the accused any time after the occurrence. Submission is that in the present set of circumstances as are involved in this case the purpose or the object to arrange the identification parade had already got lost because of the applicant having been seen by the victim on subsequent occasions after the occurrence. Further submission is that the crime in question reflects extreme perversity of the applicant who allowed his carnal instincts to blind him so completely that he could dishonour an aged old lady of 60 years. Such kind of savagery displayed by the applicant is sufficient to bracket him in the category of incorrigible delinquents beyond redemption. Only a mentally sick person can display such kind of abhorrent immoral deviation. Submission is that the gravity of the offence involved in the case does not call for any liberal view in the matter.

7. Looking to the nature of offence, its gravity and the evidence in support of it and the overall circumstances of this case, this Court is of the view that the applicant has not made out a case for bail. Therefore, the prayer for bail of the applicant is rejected.

8. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merits of the case.

(2016) 8 ILRA 727
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.08.2016

BEFORE

THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Criminal Revision No.- 828 Of 2016

Mahesh Chand	...Revisionist
	Versus
State Of U.P. & Anr.	...Opposite Parties

Counsel for the Revisionist:
Anand Kumar Singh

Counsel for the Opposite Parties:
G.A.

Headnote:

Negotiable Instruments Act, 1881 — Section 138 — Cheque dishonour — Conviction by Magistrate affirmed in appeal — Matter compromised during pendency of criminal revision — Compounding of offence at revisional stage — Accused willing to deposit 15% of cheque amount as per guidelines of Supreme Court — Court permitted compounding subject to deposit of 15% of cheque amount with State Legal Services Authority — No coercive action to be taken against revisionist till next date.

Where the revisionist, convicted under Section 138 N.I. Act and whose appeal had been dismissed, filed a joint affidavit with the complainant during pendency of criminal revision stating that the dispute had been amicably settled and the complainant had received the cheque amount along with compensation, the High Court held that the offence under Section 138 N.I. Act is compoundable even at the revisional stage. Following the guidelines laid down by the Supreme Court in **Damodar S. Prabhu v. Sayed Babalal H.**, the Court directed the revisionist to deposit **15% of the cheque amount** as costs with the State Legal Services Authority for permitting compounding. Till the next date of listing, **no coercive action** was directed to be taken against the revisionist in compliance of the conviction order of the lower court.

Case Law discussed:

Damodar S. Prabhu v. Sayed Babalal H.

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. Heard counsel for the revisionist, counsel for opposite party no. 2 and AGA for opposite party no. 1, and perused the record.

2. Revisionist was convicted under section 138 of N.I. Act and was sentenced for imprisonment of one year and Rs. 70,000/- as fine by judgement dated 25.2.2011 of ACJM, Court

No. 2, Meerut. Against said judgement, Criminal Appeal no. 114 of 2011, Mahesh Chand Vs. Nand Kishor Sharma was preferred, which was dismissed by judgement dated 31.1.2016 of Additional Sessions Judge, Court No. 15, Meerut. Against these judgements revisionist had preferred present criminal revision.

3. At the time of hearing of revision, joint affidavit has been filed by revisionist Mahesh Chand and opposite party no.-2/ complainant Nand Kishore Sharma that they have settled their dispute outside the court by compromise; and in terms of said compromise complainant Nand Kishore Sharma had received Rs. 70,000/- in lieu of his cheque (of Rs.50,000/-) for dishonour by which prosecution has been carried out on his behalf. When it was enquired by the court as to whether such matter may be compromised in revision, the counsel for the revisionist cited **Damodar S. Prabhu v. Sayed Babalal H., (2010) 5 SCC 663** in which Hon'ble Apex Court has given certain guidelines which are as under:

"21. With regard to the progression of litigation in cheque bouncing cases, the learned Attorney General has urged this Court to frame guidelines for a graded scheme of imposing costs on parties who unduly delay compounding of the offence. It was submitted that the requirement of deposit of the costs will act as a deterrent for delayed composition, since at present, free and easy compounding of offences at any stage, however belated, gives an incentive to the drawer of the cheque to delay settling the cases for years. An application for compounding made after several years not only results in the system being burdened but the complainant is also deprived of effective justice. In view of this submission, we direct that the following guidelines be followed:

THE GUIDELINES

(i) In the circumstances, it is proposed as follows:

(a) That directions can be given that the Writ of Summons be suitably modified making it clear to the accused that he could make an application for compounding of the offences at the first or second hearing of the case and that if such an application is made, compounding may be allowed by the court without imposing any costs on the accused.

(b) If the accused does not make an application for compounding as aforesaid, then if an application for compounding is made before the Magistrate at a subsequent stage, compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount to be deposited as a condition for compounding with the Legal Services Authority, or such authority as the Court deems fit.

(c) Similarly, if the application for compounding is made before the Sessions Court or a High Court in revision or appeal, such compounding may be allowed on the condition that the accused pays 15% of the cheque amount by way of costs.

(d) Finally, if the application for compounding is made before the Supreme Court, the figure would increase to 20% of the cheque amount."

"25. The graded scheme for imposing costs is a means to encourage compounding at an early stage of litigation. In the status quo, valuable time of the Court is spent on the trial of these cases and the parties are not liable to pay any Court fee since the proceedings are governed by the Code of Criminal Procedure, even though the impact of the offence is largely confined to the private parties. Even though the imposition of costs by the competent court is a matter of discretion, the scale of costs has been suggested in the interest of uniformity. The competent Court can of course reduce the costs with regard to the specific facts and circumstances of a case, while recording reasons in writing for such variance. Bona fide litigants should of course contest the proceedings to their logical end."

4. Counsel for the revisionist informs that in compliance of abovementioned guidelines of Hon'ble Apex Court, revisionist is ready and willing to deposit 15% of cheque amount for compounding the matter. Considering facts and circumstances of this matter, this request is accepted. The revisionist is directed to deposit 15% amount of cheque in question which is Rs. 7,500/- in this court which will be remitted in the account of State Legal Services Authority, Lucknow.

5. List on 22.8.2016.

6. Till the next date of listing, no coercive action will be taken against revisionist in compliance of conviction order of lower court.

(2016) 8 ILRA 730
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.08.2016

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

First Appeal No.- 525 Of 1983
&
First Appeal No.- 534 Of 1983

Sachchey Ram & Anr.

...Appellants

Versus

State Of U.P.

...Respondent

Counsel for the Appellants:

J.C. Srivastava, P.N. Tripathi, Pankaj Dubey, Y.K. Sinha, Y.D. Sharma

Counsel for the Respondent:

U.S. Awasthi

Procedure:

Land acquisition — Reference under Section 18 of the Land Acquisition Act, 1894 decided by District Judge, Ghaziabad by judgment dated 30.11.1981 awarding compensation @ Rs.6/- per square yard — Against which First Appeal filed before High Court seeking enhancement of compensation.

Citation:

Relied on:

Kanwar Singh and others v. Union of India, (1998) 8 SCC 136

Chiman Lal Hargovinddas v. Special Land Acquisition Officer, (1988) 3 SCC 751

Bhupal Singh v. State of Haryana, (2015) 5 SCC 801

New India Assurance Co. Ltd. v. Hilli Multipurpose Cold Storage Pvt. Ltd., 2016 (1) Supreme 319

Headnote:

Land acquisition — Determination of market value — Market value of acquired land has to be determined with reference to the date of publication of notification under Section 4 of the Land Acquisition Act — Subsequent acquisitions or compensation determined in respect of lands acquired many years later cannot be relied upon for determining the market value — Comparable sale instances prior to acquisition and surrounding circumstances indicate that the market value of the land acquired in the year 1976 would not exceed Rs.20/- per square yard after making deductions for development and largeness of area — Therefore, compensation awarded by the reference court requires enhancement.

Result:

Appeals **allowed** — Market value of the acquired land determined at **Rs.20/- per square yard** — Appellants held entitled to compensation at the said rate along with **statutory benefits and interest** after adjusting compensation already received.

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Facts and controversy involved in the above noted two first appeals are similar and, therefore, both the appeals are decided together, treating the First Appeal No.525 of 1983 as leading appeal.

2. Heard Sri Y.D. Sharma, learned counsel for the appellants, learned Standing Counsel for the State-respondents and Sri Shivam Yadav, learned counsel for the respondent No.2.

3. Sri Y.D. Sharma, learned counsel for the appellants submits that this Bench is bound by the Division Bench judgment in view of the law laid down by the Hon'ble Supreme Court in the case of New India Assurance Co. Ltd. Vs. Hilli Multipurpose Cold Storage Pvt. Ltd., 2016 (1) Supreme 319 (para-14) and as such the appellants are entitled for compensation @ Rs.297/- per square yard as was granted by the Division Bench by order dated 11.02.2012 passed in First Appeal No.564 of 1997, Khazan and others Vs. State of U.P., judgment dated 31.07.2014 passed in First Appeal No.297 of 2002, Dhanesh Kumar Vs. State of U.P. and other connected appeals, and judgment dated 25.02.2014 passed in First Appeal No.202 of 2009, Govind Vs. State of U.P. and others, and other connected appeals.

4. Learned Standing Counsel supports the impugned judgment.

5. Learned counsel for the respondent No.2 submits that the compensation is awarded on the market value of the acquired property as on the date of acquisition as per provisions of the Land Acquisition Act, 1894. He submits that the submission of learned counsel for the appellants that same market value as determined in respect of the acquisition of the year 1992-93 should be applied to the acquisition made in the year 1976, is wholly misconceived and without reference to any provisions of the Act or the Rules.

6. Despite opportunity afforded to the parties by order dated 17.05.2016 to file written submission within three days, no written submissions have been filed by the parties.

7. I have carefully considered the submissions of the learned counsel for the parties and perused the record.

Brief Facts of the Case:-

8. An area of 382 bighas 4 biswas land of village Morna, Pargana and Tehsil Dadri, District Ghaziabad (now Gautam Buddhnagar) was acquired for planned industrial development for New Okhla Industrial Development Authority (for short 'NOIDA') by Notification dated 01.06.1976 under Section 4(1) of the Land Acquisition Act, 1894 (hereinafter referred to as 'the Act'), which was followed by Notification under Section 6(1) of the Act dated 16.09.1976. The possession was taken on 28.10.1976. The award was passed by the Special Land Acquisition Officer (New Okhla, Ghaziabad) on 02.05.1977. A reference under Section 18 of the Act was made which was registered

as Land Acquisition Reference No.240 of 1977, Kale Vs. State which was decided by the Court of District Judge, Ghaziabad by judgment dated 30.11.1981. First Appeal No.525 of 1983 arises from this judgment.

9. Similarly, Land Acquisition Reference No.228 of 1977 was made, which was also decided by the court of District Judge, Ghaziabad by judgment dated 30.11.1981 which is impugned in First Appeal No.534 of 1983.

10. Before the court below, the appellants claimed compensation @ Rs.9/- per square yard (Rs.27,000/- per bigha) which was considered by the court below in the impugned judgment as under:

"The parties gave a joint statement to the effect that the evidence produced in L.A.R. No.224/77 be also read in these cases.

P.W.1 Rati Ram has deposed about the location of the acquired land. According to him village Morna is at a distance of one mile from Gharauli Dairy Farm Colony Delhi and one-and-a-half mile from Intermediate College Sadar Sarai. Moreover, the colonisers were active in the area and developed colony M/s Dhar Gupta and Association had sold plot no.39 of this colony to Smt. Khem Lata for a consideration of Rs.7500/-. In the circumstances the acquired land had considerable scope for development and should be treated as potential building site. The compensation will have to be awarded accordingly.

It has been argued that the land of adjoining villages, viz, Barola, Harola Makhanpur, Chaudha, Sardarpur, Suthari, Raghunathpur was also acquired for NOIDA and the S.L.A.O. awarded compensation upto Rs.20,000/-, Rs.18,315/-, Rs.16,260/- and Rs.24,450/- per bigha vide copies of awards Exs 1 to 6 respectively. The land of these villages is of the same type as the land in question, therefore, there appears to be no justification for differential treatment.

Reliance has also been placed on the judgment dated 17.11.81 in L.A.R. No.192/77 in which I have awarded compensation at the rate of Rs.6/- per square yard (Rs.18,125/- per bigha). The acquired land in that case was also of the village Morna. There is no good reason why this rate should not be applied to the land in question. I, therefore, hold that the claimants are entitled to compensation at the rate of Rs.6/- per square yard for their acquired land. The issues are decided accordingly."

11. Copy of the award filed along with the paper book shows that some sale deed instances were filed before the S.L.A.O. which are summarised as under:

Date of Sale Deed	Plot No.	Area	Amount
1. 28.05.1975	282 & 283	1 bigha 6 biswas	Rs.6000/-

2. 22.08.1975 128 & 129 3 bighas 6 biswas Rs.34000/-
10 biswansis
3. 136 & 137 1 bigha 15 biswas Rs.16000/-

12. In the ground No.2 of the memorandum of appeal, the appellants have made a claim for compensation of the acquired land @ Rs.9/- per square yard. They took ground that M/s. Dhar Gupta Associates had sold the plot No.39 to Smt. Khemlata for a consideration of Rs.7500/- for an area of 200 square yard which works out to Rs.37.50 per square yard. The appellants have not disclosed the situation of the aforesaid plot and the date on which it was sold. It has also not been disclosed that how far was Sri Nagar Garden Colony from village Morna. Thus, the claim of the appellants for compensation has to be judged from the materials available on record.

13. While the sale deed instances noted by the S.L.A.O. shows land value between Rs.5000/- to Rs.10000/- per bigha about a year prior to the date of acquisition, the P.W.-1 RatiRam has deposed that in a developed colony M/s Dhar Gupta and Associates had sold plot No.39 measuring 200 square yard to one Smt. Khemlata for a consideration of Rs.7500/- per bigha, which comes to Rs.37.50/- per square yard. It gives an indication about the market value of the acquired land to be not more than Rs.20/- per square yard after deduction towards development cost etc. and largeness of the acquired area.

14. In the case of Kanwar Singh and others v. Union of India, (1998) 8 SCC 136 (Paras 9,10 and 11), Hon'ble Supreme Court rejected the contention of the claimants to award same rate of compensation, as was awarded to the claimants of the adjoining villages and held as under :

"9. The contention of appellants' counsel that the appellants deserved to be awarded the same rate of compensation as it was awarded to the claimants of village Masoodpur and Mahipalpur, in the present facts and circumstances of the case, is not tenable. If we go by the compensation awarded to claimants of adjoining village it would not lead to the correct assessment of market value of the land acquired in the village Rangpuri. For example village 'A' adjoins village 'B', village 'B' adjoins village 'C', village 'C' adjoins village 'D', so on and so forth and in that process the entire Delhi would be covered. Generally there would be different situation and potentiality of the land situated in two different villages unless it is proved that the situation and potentiality of the land in two different villages are the same. The High Court in the present case has found that the situation and potentiality of land in village Malikpur Khoi are different than that of village Masoodpur, This finding of the High Court is based on correct appreciation of evidence on record and does not call for interference. Another reason why the High Court declined to rely upon the judgments referred to above was that the sale instances relating to village Malikpur Khoi were available for determining the market value of the land acquired in village Malikpur Khoi and, as such, there was no need to rely upon the judgments which related to acquired land of different villages. Yet another reason why the two judgments referred to by learned counsel for appellant cannot be relied upon for assessing the market value of acquired land in village Malikpur Khoi was that RFA No. 567/90 filed by the Union of India

relating to the grant of compensation in respect of land in village Masoodpur was dismissed summarily, as the only challenge in the appeal was in respect of grant of interest to the claimants which matter was already settled by the Supreme Court. In fact, the High Court had adversely commented upon the working of the Land Acquisition Department of Delhi Administration in not challenging the market value of the land acquired in village Masoodpur as assessed by the Additional District Judge, in Regular First Appeals although the court fee to that effect was paid. In this connection, it is relevant to reproduce the finding of the High Court, which runs as follows:-

"Before leaving the judgment, we are constrained to make a few observations regarding the working of the land Acquisition Department in Delhi Administration and contest of these appeals by the counsel for Union of India. Although an appeal filed by the Union of India against the judgment of the ADJ in LAC 186/91 is pending in this court, this fact was not brought to our notice by the counsel for Union of India. This decision of the ADJ in LAC 186/81 has been substantially relied upon by another ADJ in LAC 15/81. When the appeal against the said decision of the ADJ in LAC 15/81 came before (RFA 567/90) the only question pressed by the counsel for Union of India was in regard to the payment of interest after the amendment in the Land Acquisition Act in 1984. But when we found that the dismissal of the said appeal by the Division Bench was relied upon in Hoshiar Singh V. Union of India, we sent for the file. What is discovered on the file is shocking. The Union of India had purchased stamp worth Rs. 1,19,300. Obviously, the intention was to file an appeal against the quantum of compensation awarded by the ADJ. However, the grounds of appeal mostly relate to the payment of interest in terms of the Amending Act of 1984. The appeal memo was drafted by Mr. Gulab Chandra, Advocate, who also appeared before us in RFA 567/90. Since the questions regarding payment of interest after the Amending Act of 1984 are now fully settled by the decisions of the Supreme Court and since that was the only question argued before us by the counsel for the Union of India, the appeal was dismissed by us we had not noticed at that stage that a stamp of Rs.1,19,300 was affixed by the Union of India. This was only discovered now. The purchase of stamp worth Rs. 1,19,300 would show that the claim would be over a crore of rupees. The claimants have been benefited because Union of India did not argue the matter on compensation. Apart from the lack of interest and inefficiency in the Land Acquisition matters on behalf of the Land Acquisition Department, these facts raise grave suspicion about the credibility of the working of the said Department. We, therefore, direct that a copy of this judgment be sent to the Lt. Governor for appropriate action."

The judgment of the High Court in RFA No. 567 of 1990 was relied upon in Hoshiar Singh v. Union of India as there was no sale instance in respect of the land in village Mahipalpur available for assessing the market value of acquired land in the village Mahipalpur. It may be seen that in both the cases, the High Court had no occasion to examine the market value of acquired land in Villages Masoodpur and Mahipalpur and under such circumstances, it is not safe to rely upon two judgments of the High Court for arriving at the market value of the land in Village Rangpuri.

10. The High Court has considered the following sale instances in detail which were from the same village, viz., Rangpuri

Sl. No.	Ext. No	Description of document sale/Regn.	Date of Notification	Field No., area and Situation	Rate per Bigha Rs.
1	A-1	Deed of Sale	03/14/61	14 (2 bighas) Malikpur Kohi	25000
2	A-2	-do-	07/07/62	72 min (6 bis) -do-	4000
3	A-5	-do-	04/28/64	1587/1 (1 bigha) -do-	5000
4	A-2	-do-	10/26/62	1677 (4 bighas) -do-	344
5	R-1	Copy of Mutation	04/09/63	769,770 etc. (91 bighas & 1 bis) -do-	300
6	R-2	Deed of Sale	08/19/64	1637,1650,1651, 1652,1653/1& 1653/2 (24 bighas) -do-	500

and came to the conclusion that sale transaction with regard to Khashra No. 1587/1 is not genuine sale transaction and, as such, it cannot be relied upon for assessing the market value of the land acquired. **The High Court also found that the sale instances of the year 1964 at serial No. 4 and 6 which were nearer to the point of time of notification under Section 4 of the Act, are the best pieces of evidence for assessing the market value of the land acquired.**

11. After having considered the sale instances, the High Court assessed the market value of the land acquired @ Rs. 3000 per bigha. **The judgment of the High Court is neither perverse nor illegal and does not call for any interference, since it is based on correct appreciation of the evidence on record and proper application of law to the established facts. The appeals are, accordingly, dismissed but in the circumstances of the case, there shall be no order as to costs."**

(Emphasis supplied by me)

15. The view taken by this Court in determining the market value of the acquired land of village Morna, also finds support from the principles/guidelines settled by Hon'ble Supreme Court

in the case of **Chiman Lal Hargovinddas v. Special Land Acquisition Officer, Poona and another, (1988) 3 SCC 751** (Para 4) which is reproduced below :

"4. The following factors must be etched on the mental screen:

(1) A reference under section 18 of the Land Acquisition Act is not an appeal against the award and the Court cannot take into account the material relied upon by the Land Acquisition officer in his Award unless the same material is produced and proved before the Court.

(2) So also the Award of the Land Acquisition officer is not to be treated as a judgment of the trial Court open or exposed to challenge before the Court hearing the Reference. It is merely an offer made by the Land Acquisition officer and the material utilised by him for making his valuation cannot be utilised by the Court unless produced and proved before it. It is not the function of the Court to sit in appeal against the Award, approve or disapprove its reasoning, or correct its error or affirm, modify or reverse the conclusion reached by the Land Acquisition officer, as if it were an appellate court.

(3) The Court has to treat the reference as an original proceeding before it and determine the market value afresh on the basis of the material produced before it.

(4) The claimant is in the position of a plaintiff who has to show that the price offered for his land in the award is inadequate on the basis of the materials produced in the Court. Of course the materials placed and proved by the other side can also be taken into account for this purpose.

(5) The market value of land under acquisition has to be determined as on the crucial date of publication of the notification under Section 4 of the Land Acquisition Act (dates of Notifications under sections 6 and 9 are irrelevant).

(6) The determination has to be made standing on the date line of valuation (date of publication of notification under Section 4) as if the valuer is a hypothetical purchaser willing to purchase land from the open market and is prepared to pay a reasonable price as on that day. It has also to be assumed that the vendor is willing to sell the land at a reasonable price.

(7) In doing so by the instances method, the Court has to correlate the market value reflected in the most comparable instance which provides the index of market value.

(8) only genuine instances have to be taken into account. (Some times instances are rigged up in anticipation of Acquisition of land).

(9) Even post notification instances can be taken into account (1) if they are very proximate, (2) genuine and (3) the acquisition itself has not motivated the purchaser to pay a higher price on account of the resultant improvement in development prospects.

(10) The most comparable instances out of the genuine instances have to be identified on the following considerations:

(i) proximity from time angle,

(ii) proximity from situation angle.

(11) Having identified the instances which provide the index of market value the price reflected therein may be taken as the norm and the market value of the land under acquisition may be deduced by making suitable adjustments for the plus and minus factors vis-a-vis land under acquisition by placing the two in juxtaposition.

(12) A balance-sheet of plus and minus factors may be drawn for this purpose and the relevant factors may be evaluated in terms of price variation as a prudent purchaser would do.

(13) The market value of the land under acquisition has there after to be deduced by loading the price reflected in the instance taken as norm for plus factors and unloading it for minus factors.

(14) The exercise indicated in clauses (11) to (13) has to be undertaken in a common sense manner as a prudent man of the world of business would do. We may illustrate some such illustrative (not exhaustive) factors:

Plus factors

Minus factors

1. smallness of size

1. largeness of area

***2. proximity to a road
the Road***

2. situation in the interior at a distance from

***3. frontage on a road
frontage compared to depth***

3. Narrow strip of land with very small

***4. nearness to developed area
to be filled up***

4. lower level requiring the depressed portion

5. regular shape

5. remoteness from developed locality

***6. level vis-a-vis land under
acquisition***

***6. some special disadvantageous
factor which would deter a purchaser***

***7. special value for an owner
of an adjoining property to whom***

it may have some very special advantage

(15) *The evaluation of these factors of course depends on the facts of each case. There cannot be any hard and fast or rigid rule. Common sense is the best and most reliable guide. For instance, take the factor regarding the size. A building plot of land say 500 to 1000 sq. yds cannot be compared with a large tract or block of land of say 10000 sq. yds or more. **Firstly while a smaller plot is within the reach of many, a large block of land will have to be developed by preparing a lay out, carving out roads, leaving open space, plotting out smaller plots, waiting for purchasers (meanwhile the invested money will be blocked up) and the hazards of an entrepreneur. The factor can be discounted by making a deduction by way of an allowance at an appropriate rate ranging approximately between 20 percent to 50 percent to account for land required to be set apart for carving out lands and plotting out small plots. The discounting will to some extent also depend on whether it is a rural area or urban area, whether building activity is picking up, and whether waiting period during which the capital of the entrepreneur would be looked up, will be longer or shorter and the attendant hazards.***

(16) *Every case must be dealt with on its own fact pattern bearing in mind all these factors as a prudent purchaser of land in which position the Judge must place himself.*

(17) *These are general guidelines to be applied with understanding informed with common sense."*

(Emphasis supplied by me)

16. In First Appeal No.458 of 1984, Jagmal and others Vs. State of U.P. decided on 27.05.2016, this court determined compensation @ Rs.28.12 per square yard with respect to land of village Agahapur, Pargana and Tehsil Dadri, District Ghaziabad acquired by Notification published on 16.09.1976 under Section 4(1) of the Act.

17. The appellants have relied upon the judgments in the case of **Khajan** (supra), **Dhanesh Kumar** (supra) and **Govind** (supra) relating to some other villages in which market value of land acquired in much subsequent years was determined at Rs.297.00 per square yard. The said judgments have no relevance in the present set of facts for reasons that the acquisition in question was made in the year 1976 of lands of a different village. In the case of **Bhupal Singh Vs. State of Haryana, (2015) 5 SCC 801** Hon'ble Supreme Court specifically considered question of determination of market value and held that the fair market value of the acquired land is required to be determined under Section 23 of the Act on the basis of the market rate of the adjacent lands similarly situated to the acquired lands **prevailing on the date of acquisition or/ and prior to acquisition but not subsequent to the date of acquisition.** Para-27 of the aforesaid judgment is reproduced below:

*"27. As rightly argued by learned counsel for the respondent, **the fair market value of the acquired land is required to be determined under Section 23 of the Act on the basis of the market rate of the adjacent lands similarly situated to the acquired lands prevailing on the date of acquisition or/and prior to acquisition but not subsequent to the date of acquisition. In appropriate cases, addition of 10% per annum escalation in the prices specified in the sale deeds (if filed and relied on) in relation to adjacent similarly situated lands for fixing the market value of the acquired land may be permitted. Such is, however, not the case in hand. Here is the case where firstly, no sale deeds were filed by the appellants to prove the fair market value of the acquired land and secondly, what they now want this Court to do is to take into consideration the rate of those lands which were acquired ten years after the date of acquisition in question and then reduce the value of such land by 10% every year so as to determine the fair market value of the acquired land in question. In our view, such procedure for determination is not provided in the Act.**"*

(Emphasis supplied by me)

18. In view of the above discussions, both the appeals are allowed. The market value of the acquired land is determined at Rs.20/- per square yard. The appellants shall be entitled to compensation @ Rs.20/- per square yard along with statutory benefits and interest after deduction of the compensation already received by them. Deficiency in court fees shall be deducted and paid at the time of final computation of compensation.

(2016) 8 ILRA 740
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.08.2016

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

First Appeal No.- 739 Of 2013

Smt. Pooja

...Appellant
Versus

Virendra Kumar Singh & Ors.

...Respondents

Counsel for the Appellant:

Vinay Khare

Counsel for the Respondents:

Anurag Pathak

Headnote:

Civil Procedure Code, 1908 — Order XXI Rule 97, Order XXI Rule 35 — Objection by third party in execution — Wife of judgment-debtor claiming possession and adverse possession — Maintainability — Objector having no independent right, title or interest in property but claiming through judgment-debtor husband — Objection rightly rejected — Executing court cannot be obstructed by persons claiming under judgment-debtor — Repeated objections by husband and thereafter by wife to delay execution — Abuse of process of court — Appeal dismissed.

Where a compromise decree regarding house property had attained finality and execution proceedings were initiated, the husband of the appellant (judgment-debtor) unsuccessfully filed several applications and writ petitions to stall execution. Thereafter the appellant-wife filed objection in execution proceedings claiming ownership by adverse possession and contending that decree could not be executed against her. The Court held that the appellant had **no independent right, title or interest** in the disputed property and her possession, if any, was only through her husband who was already bound by the compromise decree. An objection under **Order XXI Rule 97 CPC** can be entertained only when the objector claims an independent right and not when the claim is derived from the judgment-debtor. Filing of repeated objections after failure of the judgment-debtor clearly indicated **abuse of the process of court** intended to delay execution of the decree. The executing court therefore rightly rejected the objection.

Appeal dismissed with costs.

Case Law Discussed:

Meghraj Sah v. Rajansi Lal & Ors., AIR 1958 Pat 546

Babulal v. Raj Kumar & Ors., AIR 1996 SC 2050

Brahmdeo Chaudhary v. Rishikesh Prasad Jaiswal, AIR 1997 SC 856

State of U.P. v. Mangilal Sharma, AIR 1998 SC 743

Gajanan v. Jayamma, AIR 2008 Kar 11

Jagdish Motilal Joshi v. Chandrapal Tulsiram Bhola, 2007 (1) ALLMR 764

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Vinay Khare, learned counsel for the appellant and Sri Anurag Pathak, learned counsel for the respondents.

2. On 21.07.2016, this appeal was heard and judgment was reserved noting the submissions of learned counsel for the parties as under:

"Heard Sri Vinay Khare, learned counsel for the appellant and Sri Anurag Pathak, learned counsel for the respondents.

This first appeal has been filed challenging order dated 13.09.2013 in Execution Case No.1 of 2012 passed by the court of Additional District Judge, Court No.5, Jalaun at Orai, whereby the application/ objection 21-C filed by the appellant, was rejected.

*Learned counsel for the appellant submits that the appellant is wife of one Sri Amit Kumar and is living separately and as such, the decree dated 13.08.2003 on the basis of compromise dated 11.08.2003 cannot be executed against her in respect of disputed properties under Order XXI Rule 97, C.P.C. In support of his submissions, he relies upon judgments in the case of **Meghraj Sah Vs. Rajansi Lal and others, AIR 1958 Patna 546 (paras-3 & 4), Babulal Vs. Raj Kumar and others, AIR 1996 SC 2050 (paras 4 & 5), Brahmdeo Chaudhary Vs. Rishikesh Prasad Jaiswal, AIR 1997 SC 856 (para-5) and State of U.P. Vs. Mangilal Sharma, AIR 1998 SC 743 (paras-7 & 10).** He also submits that the decree was not executable against the appellant even otherwise under Order XXI Rule 35, C.P.C. He further submits that the appellant cannot be evicted by way of execution of the decree in question.*

*Sri Anurag Pathak, learned counsel for the respondent submits that the appellant is an imposter and the objection being paper 21-C was filed by her in connivance with her husband who lost several round of litigation upto this court and thereafter, he had set up his wife, namely, the present appellant. He submits that the application/ objection 21-C was an abuse of process of court and, therefore, it was rightly rejected by the impugned order. He further submits that the impugned order has been passed by the court below in accordance with law and it does not suffer from any infirmity. He refers to several paragraphs of the counter affidavit and orders of this court passed in two writ petitions filed by the husband of the appellant. He relies upon a judgment of Karnatka High Court in the case of **Gajanan Vs. Jayamma, , 2008 AIR (Karnatka) 11 (para-16)** and the judgment of Bombay High Court in the case of **Jagdish Motilal Joshi Vs. Chandrapal Tulsiram Bhola, 2007 (1) ALLMR 764 (para-17).***

Judgment reserved."

3. I have carefully considered the submissions of learned counsel for the parties.

4. Briefly stated, facts of the present case are that the respondents No.2 & 3 are the mother and father of the respondents No.1, 4 & 5. Appellant is the wife of respondent No.4 and thus, daughter-in-law of respondents No.2 & 3. Fifth respondent Sri Anil Kumar Singh filed O.S. No.136 of 2000 to restrain the respondents No.1, 2, 3 and 4 from evicting him from the house property in question. The suit was contested by the parties but ultimately they entered into a compromise on 11.08.2003 and a decree in terms of compromise was passed on 13.08.2003 by the court of Additional District Judge, Fast Track Court-11, Jalaun at Orai in respect of the house property in question at Rajendra Nagar, Orai. According to the contesting respondents No.1, 2 & 3, all the respondents were put in possession in the respective portions but on legal advice an Execution Case No.61 of 2008 was filed by the respondents No.2 and 3 against the respondent No.4. The respondent No.4 filed an application under Section 151 C.P.C. in the aforesaid Execution Case for recall of the compromise decree. The application of the respondent No.4 (husband of the appellant) was rejected by the Additional District Judge vide order dated 27.08.2012. He challenged this order in **Writ-C No.48402 of 2012** which was dismissed by order dated 25.09.2012 as under:

"Heard Sri Sushil Kumar Dubey, learned counsel for the petitioner. Sri Anurag Pathak has appeared for respondents no. 2 to 5. Respondent no. 1 is represented by learned Standing counsel.

Respondent no. 2 Anil Kumar instituted a suit claiming share in the property of Shobha Singh being one of his sons. In the said suit a compromise was arrived at between the sons of Shobha Singh and the suit was decreed in terms of the compromise. Subsequently, petitioner applied vide application under Section 151 CPC for recall of the compromise decree on the ground that at the time of compromise he was not aware that respondent no. 2 was adopted by one Ranvir Singh and as such he has lost his right in the property of his natural father Shobha Singh. The said application has been rejected by the impugned order dated 27.8.2012 passed by the Additional District Judge.

Challenging the said order only submission advanced is that at the time of passing of the compromise decree petitioner had no knowledge that respondent no. 2 was given in adoption. The compromise is not disputed. It has been signed by the petitioner. A decree on the basis of the compromise has been passed in his presence and upon hearing the petitioner. Therefore, the said order decreeing the suit no. 136 of 2000 on the basis of compromise can not be recalled.

In view of the above, the court below has not committed any mistake in rejecting the application. The remedy, if any, of the petitioner lies elsewhere and not by asking for recall of the decree.

Petition dismissed."

5. Thereafter, the husband of the appellant (respondent No.4 in the present appeal) filed some more applications in the Execution Case including an objection under Section 47 C.P.C. which were rejected. Then, he filed a **Writ-C No.811 of 2014** challenging orders dated 21.10.2013,

19.03.2013, 24.05.2013 and order dated 06.07.2013. The aforesaid writ petition was dismissed by order dated 13.01.2014 as under:

"Heard Sri Anurag Sharma, learned counsel appearing for the petitioner. Sri Anurag Pathak has appeared for respondent no. 2.

It appears that suit no. 136 of 2000 was decreed on the basis of the compromise. Petitioner filed an application under Section 151 CPC for recall of the compromise decree and the said application was rejected and the order was upheld upto the High Court.

In pursuance of the said decree execution case no. 1 of 2012 has been initiated by Virendra Kumar Singh. In the said execution petitioner filed an application paper no. 27Ga-2 contending that the land on which the petitioner is having possession does not tally with the land in respect of which the suit was decreed. The said application has been rejected by one of the impugned orders dated 21.10.2013.

The executing court has held that in respect of the objections taken by the petitioner in the above application, the court has already taken decision earlier which has attained finality and therefore he can not be permitted to raise the identical objection again and again.

I find no illegality in the said order.

The aforesaid decree was also put in execution by Shobha Singh by means of Execution Case No. 61 of 2008. In the said execution petitioner raised objections under Section 47 CPC. The said objections have been rejected by order dated 19.3.2013. The said order is revisable and as such can not be permitted to be challenged directly by invoking the writ jurisdiction.

The third order which has been assailed by the petitioner in the order dated 24.5.2013 filed in Misc. case no. 10 of 2013 registered on the objection of the petitioner under Section 47 CPC. By the said order petitioner's application for summoning the original record of the suit has been rejected. It is purely an interlocutory order which does not adjudicate any rights of the parties and therefore requires no interference in exercise of writ jurisdiction.

The last order which has been impugned is the order dated 6.7.2013 which has been passed in Misc. Case No. 10 of 2013 rejecting the petitioner's application paper no. 25Ga to submit originals of the documents by which he has purchased the plot in dispute.

The submission of the originals of the documents in the execution is not necessary as the executing court can not go behind the decree. The verification/examination of the originals is the job of the court while hearing the suit. Therefore, filing of original is not necessary in execution.

In view of the above, there is no illegality in rejection of the aforesaid application also.

The writ petition is dismissed with the above observations."

6. It is also noteworthy that the respondent No.1 lodged an FIR against the appellant and the respondent No.4 on 25.11.2010 being Case Crime No.2235 of 2010 under Sections 379, 352, 448, 504, 506 I.P.C.

7. It is also relevant to note that after the husband of the appellant (respondent No.4) was unsuccessful as aforementioned, the appellant wife filed O.S. No.257 of 2013 for injunction against the contesting respondents. Her temporary injunction application 7-C-2 was rejected by the court of Civil Judge (S.D.) Jalaun at Orai by a detail order dated 30.10.2013.

8. During pendency of the aforesaid suit, the appellant filed an objection dated 24.07.2013 being paper No.21-kha in the Execution Case No.1 of 2012 claiming herself to be the owner of the disputed property by adverse possession. The objection was rejected by the impugned order dated 13.09.2013 passed by the court of Additional District Judge, Court No.5, Jalaun at Orai.

9. In the impugned order, the court below briefly discussed the facts and came to the conclusion that the appellant is abusing the process of the court and not allowing the execution of the decree on one ground or the other.

10. It is wholly undisputed that husband of the appellant (respondent No.4) holds a portion of the disputed property as owner in terms of the compromise decree dated 13.08.2003. Even if she has somehow occupied a portion of the disputed property, the same is based on the rights of her husband, namely, the respondent No.4 in the disputed property. The husband of the appellant filed several applications in the execution case so as to delay the execution of the decree but was unsuccessful upto the stage of the High Court. It is thereafter that the appellant filed O.S. No.257 of 2013 for injunction against the contesting respondents but her temporary injunction application being paper No.7-C-2 was rejected by the court of Civil Judge (S.D.), Jalaun at Orai by order dated 13.10.2013. The appellant also filed an objection in the execution case after rejection of multiple applications of her husband. The impugned order has been passed rejecting the objection of the appellant. All these facts clearly indicate that the court below has not committed any error of law or facts to come to the conclusion that the appellant has abused the process of the court and is making every effort on one ground or the other that the execution of the decree may not be proceeded. The appellant has no independent right in the disputed property. Her possession in the disputed property, at best, is based on the rights of her husband, namely, the respondent No.4.

11. The judgments relied by the appellant as aforementioned are on different set of facts and clearly distinguishable on the facts of the present case. In the case of **Gajanan** (supra), the Karnataka High Court held as under:

"16. Order 21 Rule 97 of CPC is applicable to only person who is claiming independent right, title and interest and not under the judgment debtor. The HRRP filed by the landlord against the dismissal of his case under Section 21(1)(h)(f) and (p) of the Rent Control Act, this Court in view of the provision of Section 70(2)(c) of the Rent Act had disposed of the HRRP. But as far as the relationship of the landlord and tenant arrived at by the HRC Court, is neither set aside nor the obstructer did challenge the said finding. If the obstructer is claiming under the judgment debtor, he has no right to maintain the application and in addition to this, though the obstructer alleges that the judgment debtor is not in talking terms with him, however the judgment debtor as well as the obstructer are represented by the same advocate, the Trial Court noticing the said fact held that these issues have already been decided and did not entertain the said application. Decree holder is fighting the litigation for eviction of tenant from 1990. Though the suit filed by the obstructer for declaration that he is tenant is dismissed and confirmed by this Court. The obstructer without having any independent right and being the son of the judgment holder debtor and having suffered findings in HRC case, is still resisting the decree. I do not find any justification to interfere with the order of the Executing Court. Accordingly, appeal fails and the same is dismissed."

12. In **Jagdish Motilal Joshi** (supra), the Bombay High Court held as under:

"17. The scope and nature of enquiry shall always depend on the nature of claim of source of title, which an objection pleads. Now on facts, this Court finds on showing by the objector that she has no independent status and enquiry of fact finding as to her status becomes wholly unnecessary. On her showing, she is an imposter to be an objector in disguise. It can be concluded on the very face of it that the objector is set up by the judgment debtor. Even as an independent trespasser during the pendency of suit, the objector does not have a claim against a rightful claiming who has a decree in his favour. Law, equality or any other known or newly emerged doctrine do not come to the rescue of the objector respondent No.2 herein."

13. In both the afore-noted judgments, the Karnataka High Court and Bombay High Court have held that objector who has no independent right, does not have a claim against the person, who has a decree in his favour.

14. In view of the above discussion, I do not find any infirmity or any illegality in the impugned order. The appeal is totally devoid of merit and, therefore, deserves to be dismissed.

15. In view of the aforesaid, the appeal is dismissed with costs.

(2016) 8 ILRA 746
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.08.2016

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.

Matters Under Article 227 No.- 2690 Of 2016

Abdul Ahmad

...Petitioner

Versus

Haq Nawaz Ahmad

...Respondent

Counsel for the Petitioner:

Sri Salil Kumar Rai

Counsel for the Respondent:

Sri Arpit Agarwal

Headnote:

Civil Procedure Code, 1908 — Order VI Rule 17 — Amendment of written statement — Withdrawal of admission — Eviction suit under Section 20(2)(a) of U.P. Act No.13 of 1972 — Defendant sought amendment after commencement of evidence to deny landlord-tenant relationship despite categorical admission in written statement — Amendment amounted to withdrawal of clear admission and was not merely explanatory or typographical correction — Such amendment, if allowed, would materially prejudice plaintiff — Trial Court justified in rejecting amendment application.

Article 227 of the Constitution of India — Scope of interference — Order rejecting amendment application — High Court held that refusal of amendment in present facts does not finally decide the lis between parties — Issue of landlord-tenant relationship still open to be decided on evidence — However, no ground made out to interfere with trial court's discretionary order rejecting amendment.

Landlord-Tenant Relationship — Admission in written statement — Defendant cannot be permitted to withdraw a categorical admission at stage of evidence through amendment of pleadings.

Petition **dismissed**. Defendant is, however, at liberty to dispute the landlord-tenant relationship by leading evidence and the trial court shall decide the suit independently without being influenced by observations made in the amendment order.

Case Law discussed:

Usha Balashaheb Swami & Ors. v. Kiran Apaso Swami & Ors., AIR 2007 SC 1663.

Sushil Kumar Jain v. Manoj Kumar & Anr., AIR 2009 SC 2544.

Shiv Shakti Coop. Housing Society v. Swaraj Developers, (2003) 6 SCC 659.

Transmarine Corporation v. Zensar Technologies Ltd., (2009) 10 SCC 750.

Sambhavnath Digambar Jain v. Mohanlal, (2003) 9 SCC 219.

Mukhtar Ahmad v. Sirajul Haq, 2006 (3) AWC 2182.

Manni Lal Gupta v. Waqf Haji Inayat Hussain, 2008 (2) AWC 1951.

Prem Bakshi v. Dharam Dev, AIR 2002 SC 559.

Heera Lal v. Kalyan Mal, AIR 1998 SC 618.

Arundhati Mishra v. Sri Ram Charitra Pandey, (1994) 2 SCC 29.
(Delivered by Hon'ble Mrs. Justice Sunita Agarwal)

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.)

1. By means of the present petition, the petitioner is challenging the order dated 23.01.2016 passed by the Additional District judge, Court no.1, Pilibhit in Small Causes Case No.03 of 2013 (Haq Nawaz Ahmad Vs. Abdul Ahmad). Brief facts giving rise to the present petition are:-

2. The SCC case no.03 of 2013 under section 20(2) (a) of U.P. Act No.13 of 1972 has been filed for eviction of the defendants on the ground of default in payment of rent and demanding arrears of rent. Written statement was filed by the petitioner on 08.04.2013, the suit has proceeded for evidence. At the stage of evidence an application under Order VI Rule 17 of the Code of Civil Procedure was filed on 03.11.2015 with a prayer to amend the written statement. The Court below has rejected the application on 23.01.2016 on the ground that the amendment has been sought in order to delay the proceedings and to avoid cross-examination of the plaintiff. It is further recorded by the Court below that by means of the amendment the petitioner seeks to withdraw the admission made by him in the written statement. Aggrieved by this order the present petition has been filed.

3. Learned counsel for the petitioner vehemently submits that there was no bar for the defendant to withdraw his admission, the amendment in the written statement stands on a different footing than the amendment in the plaint. The delay cannot be taken as a ground for refusal of prayer for amendment in the written statement. The amendment was necessary for deciding the real controversy between the parties in suit and moreover no prejudice will cause to the plaintiff on account of the amendment sought by the petitioner. The question of relationship of landlord and tenant between the parties is the real issue to be decided by the Court below. The suit is at the stage of evidence and as such the proviso to Order VI Rule 17 of the Code of Civil Procedure is not attracted. The plaintiff has enough opportunity to rebut the evidence led by the defendant.

4. He further submits that the rejection of the amendment application may not come in the way of the petitioner in raising the dispute regarding relationship of landlord and tenant at the time of final hearing in the suit. The tenant can resile from the relationship at any stage of the suit and for this reason the amendment could not have been rejected. Reliance is placed upon the judgement of Apex Court in *Usha Balashaheb Swami and Ors. Vs. Kiran Apaso Swami and Ors.* 1 and *Sushil Kumar Jain Vs. Manoj Kumar and Anr*, 2 in support of his above noted submission.

5. On the other hand, learned counsel for the respondent urged that the rejection of amendment application is a "case decided" within the meaning of Section 25 of the Provincial Small Causes Court Act, 1887 which is akin to Section 115 of the Civil Procedure Code. The rejection of amendment application refusing to allow the tenant to deny the landlord-tenant relationship is for the reason that the tenant cannot withdraw his admission in the written statement at the stage of evidence. On the issue of landlord-tenant relationship, now principle of estoppel would apply as the landlord-tenant relationship is established from the admission of the defendant in the written statement. The order of rejection of the amendment application, therefore, resulted in deciding the issue of landlord-tenant relationship between the parties, which would come within the meaning of expression "case decided" under section 25 of the Provincial Small Causes Court Act.

6. Against such order, only a revision is maintainable under the said provision. This petition under Article 227 of the Constitution of India is not maintainable as such. Reliance is placed upon the judgement of Apex Court in **Shiv Shakti Coop. Housing Society vs M/S. Swaraj Developers & Ors**,³ wherein it is held that wherein an order in favour of the parties applying for revision would give finality to the suit or other proceeding, the revision is maintainable. Further reliance is placed upon the judgement of Full Bench of this Court decided on 15.12.1967 in the case of **Rama Shanker Tiwari Vs. Mahadeo and others**⁴ to submit that the order refusing or allowing an amendment is a "case decided" within the meaning of Section 115 of the Civil Procedure Code. Further reliance is also placed upon the judgement of Apex Court in **Transmarine Corporation and others vs. Zensar Technologies Ltd and others**,⁵ **Sambhavnath Digambar Jain Vs. Mohanlal and others**,⁶ **Mukhtar Ahmad Vs. Sirajul Haq and others**,⁷ **Manni Lal Gupta Vs. Waqf. Haji Inayat Hussain and another**, ⁸.

7. On the merits of the order of rejection of the amendment application, it is submitted by the learned counsel for the respondent that the trial had commenced and the defendant has failed to establish before the trial Court that inspite of his due diligence, the matter which was sought to be pleaded by way of amendment could not be pleaded by him before the commencement of the trial i.e. at the time of filing of the written statement. The amendments are highly belated and have rightly been rejected by the trial Court.

8. In rejoinder, learned counsel for the petitioner placed reliance upon the judgement of Apex Court in the case of **Prem Bakshi and others Vs. Dharam Dev and others**,⁹ to submit that the order allowing the amendment application cannot be said to be have finally decided the case. It would not fall within clause (a) of sub-section (1) of Section 115 of Civil Procedure Code and, therefore, the petition under Article 227 of the Constitution of India is perfectly maintainable. He further submits that even otherwise, no prejudice has been caused to the plaintiff as he had opportunity to lead evidence so as to establish the landlord tenant relationship. Merely because the plaintiff has closed his evidence, it cannot be concluded that he would not get opportunity to say anything further. Even, otherwise the plaintiff has to establish that the landlord-tenant relationship between the parties exists and he is the actual landlord of the suit premises. For maintaining a suit for eviction of the tenant, the burden is upon the landlord to prove that there exists landlord tenant

relationship between the parties and the person whose eviction is sought is his tenant and he is entitled to the decree of eviction with respect to the premises in question.

9. Having heard learned counsel for the parties and perused the record. Before coming to the legal position relating to amendment of written statement, it would be useful to refer to certain dates and the pleadings of the parties on record.

10. In the eviction suit, a specific assertion has been made by the plaintiff/respondent in paragraph no.1 of the plaint that he is owner of the suit premises, the description of which has been given in the said paragraph. The defendant is his tenant at the rate of Rs.1500/- per month. In the written statement, a vague denial has been made with regard to the averments in paragraph no.1 of the plaint. Further in paragraph no.9, it is stated by the defendant/petitioner that he was in occupation of the suit premises as a tenant since 2002 at the rent of Rs.200/- normal per month. It is further stated that a lease deed was executed between the defendant and the father of the plaintiff. It is also stated that after death of father of the plaintiff, rent was being tendered to the plaintiff but no rent receipt was given.

11. In the amendment application filed on 03.11.2015, after paragraph no.15 of the written statement, the paragraph which is sought to be added as paragraph no.15-A is as under:-

"15अ- यह की वादी वाद पत्र में प्रश्नगत मकान का भू- स्वामी (Land Lord) नहीं है. उत्तरदाता प्रतिवादी ने प्रश्नगत मकान स्व तौहीद अहमद जो की प्रश्नगत मकान के (Landlord & Tenant) का कोई संबंध नहीं है जिस कारण उपरोक्त वाद श्रीमान जी के न्यायलय में चलने योग्य नहीं है, न्यायलय के उपरोक्त वाद सुनने का क्षेत्राधिकार प्राप्त नहीं है. वाद वादी सव्य निरस्त होने योग्य है."

12. Further paragraph no.15 of the written statement is also relevant for the present controversy and is quoted as under:-

"15.यह कि प्रश्नगत मकान का वादी तनहा स्वामी नहीं है जिस कारण वादी को उक्त वाद प्रस्तुत करने का कोई अधिकार नहीं है और वादी का वाद आदेश, नियम, सी. पी. सी. के प्राविधान से बाधित है"

13. The Court below after considering the amendments sought by the petitioner came to the conclusion that by means of the proposed amendment, admission in paragraph no.9 of the written statement is sought to be withdrawn by the defendant. Such amendments cannot be allowed as it would materially prejudice the plaintiff.

14. The lease deed executed between the parties has been brought on record, the landlord-tenant relationship is established from the record. This apart, the defendant has delayed the proceedings and did not cross examine the plaintiff for a sufficient long time. He is misusing the process of the Court and therefore, the amendment application has been rejected with a cost of Rs.250/-.

15. Having perused the above noted material on record, this Court finds that there is clear admission of the petitioner with regard to the landlord-tenant relationship between him and the plaintiff. He has made categorical statement in this regard in paragraph no.9 of the written

statement. Though the admission in paragraph no.9 of the written statement has not been withdrawn as the petitioner did not seek any such prayer in the amendment application, however, the averments in paragraph no.15-A which he sought to add in the written statement shows that he wants to plead that there was no landlord-tenant relationship between him and the plaintiff and, therefore, suit at the instance of the plaintiff could not be maintained. This amendment has been sought with further assertion that there was a typographical mistake in the written statement for correction of which, the amendments are necessary.

16. Looking to the pleading in paragraph no.9 and 15 of the written statement and paragraph no. 15-A of the amendment application, it cannot be said that the amendments are only in the nature of correction of typographical mistake occurred in the written statement. A categorical stand has been taken by the petitioner in paragraph no.9 of the written statement that there exists a lease deed establishing the relationship between the parties. The lease deed is also on record and the suit is at the stage of evidence. It is for the trial Court to decide on the basis of evidence of the parties as to whether there exists landlord-tenant relationship between them or not and further as to whether the petitioner is owner/landlord of the suit premises and can maintain the suit at his own instance.

17. All these question are still open to be decided by the trial Court on the basis of oral and documentary evidences of the parties. This Court without going into the merits of the pleadings of the parties specially in the written statement and the plaint comes to an irresistible conclusion that the amendments which the defendant wants to add are neither in the nature of inconsistent plea nor explanatory in nature. The amendments are in the nature of withdrawal of admission in the written statement that too after the evidence of the parties had commenced.

18. There is no quarrel about the proposition that the Court has to take a liberal view while dealing with the amendments of the pleadings and as far as possible shall lean in favour of the party who is seeking amendment. At the same time, while allowing such amendments in the written statement no inconsistent or alternative plea can be allowed which would displace the plaintiff's case and cause irretrievable prejudice. If the amendments seeks to withdraw an important admission made in the written statement, such amendments are liable to be rejected.

18A. Reference may be made to the Apex Court judgement in **Heera Lal Versus Kalyan Mal**,¹⁰ and similarly in **Arundhati Mishra v. Sri Ram Charitra Pandey**,¹¹, wherein the Apex Court has held that where the defendant had denied the title of the plaintiff and set up his title as an owner with regard to the suit property, he cannot be allowed to take a plea of adverse possession by way of amendment. Though the pleas based on title and adverse possession are mutually inconsistent but latter does not began to operate until the former is renounced. The defendant never renounced his title as an owner and therefore, he cannot assert the plea of adverse possession which was available to him at the time of filing of the written statement. There was no explanation for the belated plea and as such the Court had refused to accept and therefore, the Apex Court has held that the High Court has erred in allowing the appeal.

19. The judgements relied upon by learned counsel for the petitioner are distinguishable in the fact of this cases inasmuch as, in both the cases namely **Sushil Kumar Jain (supra)** and **Ushal Bala Saheb Swami (supra)** it is held by the Apex Court that the amendment in the written statement was not for withdrawal of admission rather keeping the amendment intact something more was sought to be added. The contradiction and the confusion in the written statement was sought to be clarified.

20. As far as the plea regarding the maintainability of the present petition is concerned, this Court is of the view that in the instant case, the refusal of amendment would not fall within the meaning of "case decided" under section 25 of the Provincial Small Causes Court Act. The lis between the parties namely the landlord tenant relationship is still to be decided by the Court below on the basis of evidence of the parties. The Court below has examined the plea of the parties only to reach a conclusion as to whether amendments are necessary or malafide. Any observation made by it regarding merits of the averments in the written statement is not going to affect the rival claim of the parties in the suit.

21. The reliance placed upon the above noted judgements of the Apex Court and of this Court placed by learned counsel for the respondent in support of his plea is also misplaced. So far as the Full Bench judgement of this Court in **Rama Shankar Tiwari (supra)** is concerned, the same relates to unamended section 115 of the Civil Procedure Code which stood amended by U.P. Act No.14 of 2002.

22. For all the above noted reasons, this Court is not inclined to interfere in the rejection order of the amendment application passed by the trial Court. It is, however, open for the petitioner/defendant to dispute the landlord-tenant relationship between him and the plaintiff by leading cogent evidence on his turn. It goes without saying that the issue of ownership of the plaintiff to the suit property and relationship of the parties are vital issues in a suit for eviction of the defendant on the ground of default in payment of rent. The trial Court shall, therefore, decide the suit independently without being influenced by any of the observation made above and also the observations made in the order dated 23.01.2016 passed on the amendment application.

23. With the above observations and directions, the petition is **dismissed**.

BEFORE

Misc. Bench No.- 9503 Of 2016

Madhuri Devi Vs. State of U.P. and others, Writ Petition No. 7590 (MB) of 2015 (Judgment dated 21.08.2015)

(Delivered by Hon'ble Ravindra Nath Mishra-II, J.)

(Delivered by Hon'ble Ravindra Nath Mishra-II, J.)

1. This petition seeks issuance of a writ in the nature of Certiorari quashing F.I.R./ Crime No.189 of 2015, under Sections 420, 467, 468, 471, 323, 504, 506, 120-B I.P.C., Police Station Mahanagar, District Lucknow.

2. Gist of the issue raised by the petitioner is recorded in order dated 3.5.2016. The order reads as under :

"1.This petition seeks issuance of a writ in the nature of certiorari quashing F.I.R./ Crime No.189 of 2015, under Sections 420, 467, 468, 471, 323, 504, 506, 120-B I.P.C., Police Station Mahanagar, District Lucknow.

2.The impugned F.I.R. has been read in extenso in court. Gist of the allegation is that the petitioner alongwith co accused, enabled forgery of a Will dated 6.1.2002 and benefit of that Will has been taken.

3.Learned counsel for the petitioner has pointed out that the chargesheet has already been filed against co accused Mahmood Ali, husband of the petitioner. The petitioner is sought to be arrested.In the chargesheet, however, the petitioner has not been depicted as absconding accused or that investigation in her regard is pending.

4.Issue notice to serve respondent no.4 returnable on 11.7.2016.

5.List this case on 11.7.2016.

6.Arrest of the petitioner shall remain stayed till the next date of listing. Petitioner is directed to join investigation.

7.Investigating officer is directed to file his affidavit as to under what circumstances, the petitioner is being approached, although, investigation has been concluded and the petitioner has not been shown as absconding accused.

8. We are issuing notice only on the limited issue that the petitioner has not been shown as an absconding accused in the chargesheet, yet is sought to be arrested."

3. Charge sheet bearing No. 02 of 2016 dated 14.2.2016 is available on record. As per the charge-sheet the only accused shown in the relevant column is Mehboob Ali. The column of absconding accused is vacant, thereby indicating that there is no other accused to be arrested or against whom investigation is pending. The gist of the investigation indicated on the front page of the charge-sheet also does not mention the petitioner as one of the accused.

4. After the above extracted order was passed, it appears that another charge-sheet has been prepared bearing No. 02A of 2016 dated 10.6.2016 in which the petitioner has been shown as the accused.

5. Section 173 of the Code of Criminal Procedure is explicit and details the information to be supplied to the Court in regard to the investigation conducted and concluded. Various columns of the Charge-sheet are provided in Form 339 provided under Regulation 122 of the U.P. Police Regulations. Form 339 appears to have been provided in context of provisions of Section 173 Cr.P.C.

6. The relevance of a charge-sheet and the information disclosed in the charge-sheet, for the accused, the victim/complainant as also the Court has been noticed in judgement dated 21.08.2015 rendered by this Court in Writ Petition No. 7590 (MB) of 2015: **Madhuri Devi Vs. State of U.P. And others**. The following has been held in this context:-

" 51. It needs to be mentioned that after completing investigation, the police officer is required to make a clear report in terms of provisions of S. 173 CrPC. The information required to be provided under sub section (2) of S.173 CrPC should be specific in its content,with relevant basis for its conclusion.

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55. At the point in time when report under S.173 CrPC is prepared, the investigation is concluded. The investigating officer has collected sufficient evidence indicating commission of offence (S.170 CrPC). The investigating agency knows what evidence has been collected indicating culpability of particular accused, and what offence has been committed by that accused. The report must categorise the offence committed by a particular accused, and the basis for so concluding. The supporting evidence , viz. statements of the witnesses recorded under S. 161 Cr.P.C. and the evidence collected through scientific means is to be appended with the report.

56. It is the right of every accused to know as to on what basis he is being prosecuted, so that he can prepare his defence. The summary of investigation must make all aspects clear, in the interest of transparency, and effective and fair trial.

57. In case the report (charge sheet) is prepared objectively, and summarised as observed herein above, it will assist the court in considering the evidence in context of the ingredients of the offence(s) committed by an accused and frame Charge(s), as required by law. This shall ensure fair, effective and speedy trial.

58. Likewise when no evidence is found against some accused or evidence collected in the course of investigation indicates he is innocent, and that person/ accused is not forwarded for trial, the report must clearly state the reasons for so concluding. This helps the court to adjudicate, if an application is filed for proceeding against that person/accused. The court can

refer to the basis, and reasons recorded by the investigating agency and decide whether to summon the said person as additional accused. This comes to the aid of the court while deciding application, if one is filed under Section 319 Cr.P.C also. This reduces the workload of the court and avoids unnecessary litigation.

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62. In the same context in case a closure report/final report is to be filed because there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate (S.169 CrPC), the investigating agency is required to file a reasoned report. The basis for saying that offence has not been committed must be stated. The relevant material must be placed on record. By doing this the credibility of the investigating agency is demonstrated, and the court is guided by the reasons given by the agency, when the report is challenged. If the reasons for filing such final report are available on record, the complainant is also informed why the case initiated by him has been cancelled. If however the reasons are not given in such report, or conclusion is based on surmises and conjectures, the complainant is aggrieved and such reports are challenged by way of filing protest petitions."

7. We are faced with a circumstance, wherein the petitioner was aware that in the charge-sheet (Annexure-7) she was not shown as an accused or absconding accused. The charge-sheet also did not disclose that investigation as regards the petitioner is pending. Under the Circumstances, the petitioner carried a genuine impression that she is not wanted or required in context of the criminal proceedings, at issue. Subsequently, however, the petitioner was sought to be arrested and therefore, she approached this Court.

8. The investigating officer, thereafter is stated to have undertaken further investigation. Affidavit dated 8.7.2016 sworn by Sri Devi Charan Gupta, Sub-Inspector, Police Station Mahanagar, District Lucknow indicates that even the petitioner has been found in association with her husband in committing the offence. It has been stated in concluding portion of the affidavit that on the basis of oral and documentary evidence even the petitioner is chargesheeted vide charge-sheet bearing No. 02A of 2016 dated 10.6.2016 for commission of offence under Sections 420, 467, 468, 471, 323, 504, 506 and 120B I.P.C. The affidavit, however, does not explain the exact role played by the petitioner in commission of the offence. The affidavit also does not furnish any legal explanation as regards non-mentioning the name of the petitioner in the earlier charge-sheet (Annexure-7) dated 14.2.2016 bearing No. 02 of 2016 (supra). It has merely been said that name of the petitioner and other accused was not mentioned in the relevant column of the charge-sheet on account of "human error".

9. Considering the peculiar facts of the case, vide order dated 11.7.2016, this Court directed the Circle Officer concerned to review the investigation and file his affidavit, particularly in regard to the alleged role played by the petitioner. The order reads as under:

"1. Short counter affidavit has been filed on behalf of investigating agency, in court, which is taken on record. It has been stated that chargesheet has been prepared.

2. The query raised vide order dated 3.5.2016, however, has not been answered.

3. Let the Circle Officer incharge of the concerned Police Station review the investigation and file his affidavit particularly in regard to the alleged role played by the petitioner. Specific evidence indicating culpability of the petitioner would be brought on record, in case any evidence is found.

4. An explanation would be furnished to the court as to under what circumstances, while chargesheet had been prepared not indicating pending investigation, under what circumstances at the present point in time, the petitioner is being harassed.

5. List this case on 11.8.2016.

6. Interim direction to continue till the next date of listing. "

(emphasised by us)

10. Short counter affidavit dated 11.8.2016 sworn by Sri Vishal Vikram Singh, Circle Officer, Mahanagar, District Lucknow has been filed in Court, which is taken on record. In the affidavit it has been stated that the petitioner is wife of Mehboob Ali Son of Late Ramjan Ali @ Paacho, resident of House No. 529/231, Rahim Nagar, Mahanagar, Lucknow. The Nikahnama and Marriage Card of the petitioner have been enclosed with the affidavit.

11. The evidence collected in the course of investigation, as per affidavit, indicates that Mehboob Ali is a relative of Nadir Ali, resident of House No. 529/225, Rahim Nagar, Mahanagar, District Lucknow. Nadir Ali apparently had no children. After death of Nadir Ali, Mehboob Ali got forged identity cards wrongly showing himself as son of Nadir Ali, also while mentioning his residence address as that of Nadir Ali with the intention to take unlawful possession of the property of Nadir Ali. As against the petitioner it has been alleged that the petitioner had knowledge of the facts and she got prepared Voter Identity Card, Ration Card and Aadhaar Card showing herself to be resident of House No. 529/225, Rahim Nagar, Mahanagar, Lucknow, which earlier belonged to Nadir Ali. Only on the strength of the said evidence, it has been concluded that the petitioner was in association with her husband Mehboob and has committed offences under Sections 420, 467, 468, 471, 323, 504, 506 & 120B I.P.C.

12. Considering the totality of the facts and circumstances of the case, it becomes evident that investigation was concluded on 14.2.2016 and charge-sheet bearing No. 02 of 2016 was prepared and finalized. There is not a whisper in the charge-sheet that the petitioner is an accused or an absconding accused. It is only subsequently in abuse of authority vested in the investigating officer that the petitioner was proceeded against. At this juncture, story developed by the investigating officer is to the effect that the

petitioner was in conspiracy with her husband and therefore has shown her address as House No. 529/225, Rahim Nagar, Mahanagar, Lucknow, which earlier was the address of Nadir Ali.

13. Even if the allegations made in the F.I.R. and the entire investigation conducted till date is accepted in its entirety, we are of the considered opinion that the petitioner has not committed any offence. The ingredients of committing offence are not satisfied, as against the petitioner, in so much as it is the husband of the petitioner who allegedly forged his identity so as to allegedly incorporate and change his address as House No. 529/225, Rahim Nagar, Mahanagar, Lucknow. The petitioner, admittedly had no role to play in the said incident of changing the address of Mehboob Ali. The petitioner being the wife of Mehboob Ali obviously was living with Mehboob Ali and, therefore, was required to reflect the same address as that of her husband. In such circumstances, it cannot be said that the petitioner has committed offence of cheating as defined under Section 415 I.P.C. read with Section 420 I.P.C.

14. So far as the provision of Section 467, 468 and 471 I.P.C. are concerned, it is not even the case of the prosecution that the petitioner indulged in forgery of any document, as defined under Section 463 I.P.C. read with Section 464 I.P.C.. The case of the investigating agency is that Mehboob Ali so as to usurp the property of Nadir Ali, took advantage of Nadir Ali being issue-less and therefore, changed his identity while showing his own address as that of Nadir Ali. Only the residential address has been changed. In such circumstances, by any stretch of imagination, it cannot be concluded that the petitioner has indulged in forgery of any document. In such facts and circumstances it is evident that provisions of Sections 467, 468 & 471 I.P.C. are not attracted vis-a-vis the petitioner.

15. So far as offences under Sections 323, 504 & 506 I.P.C. are concerned, there is no such allegation against the petitioner of which legal notice ought to be taken.

16. In view of the above considerations and discussion, we are of the view that continuance of proceedings against the petitioner are not warranted by law. The ingredients of the alleged offences are not satisfied. So as to secure ends of justice and so as to prevent abuse of process of the law, the petition against the petitioner deserves to be allowed.

17. Considering the facts and circumstances of the case, we hereby allow the petition only vis-a-vis the petitioner (Smt. Nisha Khatoon). The impugned FIR bearing Case Crime No. 189 of 2015, under Sections 420, 467, 468, 471, 323, 504, 506, 120-B I.P.C., Police Station Mahanagar, District Lucknow, a copy of which is contained in Annexure-1 to the petition, so far as it relates to the petitioner, is hereby quashed.

18. Before parting with the order, we must record that we are receiving a number of cases in which charge-sheet is filed. In the column of absconding accused none is shown. In the narration of facts in the charge-sheet it is not mentioned that investigation against a particular accused is pending. Subsequently, however, on the whims of the police officials proceedings are initiated against certain persons who are aliens to the charge-sheet. When explanation is sought by the Court, a lame excuse is given by the police officials that on account of 'human error', the relevant column in the charge-sheet vis-a-vis the absconding accused was not filled.

19. Investigation is conducted by a police officer in discharge of his statutory duty. The statute vis. provision of Section 173 Cr.P.C. and Form 339 provided under Regulation 122 of the U.P. Police Regulations details the columns to be filled by the investigating officer. The investigation report thereafter is required to be checked by the Circle Officer. Such lapses, as has been noticed in this case, clearly indicate misconduct on the part of, not only the investigating officer, but also the Circle Officer who has approved the charge-sheet. Such infirmities in the charge-sheet cannot be ignored while accepting 'human error' theory because they adversely affect the person who is subjected to investigation at any subsequent time, as the investigating officer chooses. Such infirmities also affect administration of criminal justice.

20. All the Superintendents of Police are required to take serious note of the law, as detailed in this judgment, and ensure that the investigating officers do not pick & choose the accused on their whims after charge-sheet is filed. We have come across cases in which even after months investigation was opened against certain persons without there being any indication that investigation is even pending against them.

21. Such conduct on the part of the investigating agency also confuses the Court. The Court accepts the charge-sheet and proceeds with trial on the premise that investigation is not pending. Subsequently, however, while trial is going on, some more accused are forwarded, in context of whom a second trial is required to take place in regard to the same incident.

22. Such conduct on the part of the investigating officers also causes trauma to the accused, who are subsequently confronted with the investigation. By such conduct, the investigation is kept in limbo which adversely affects administration of justice. Such practice on the part of investigating agency is deprecated and the police agencies are required to ensure that such practice is stopped altogether. In case such cases are found/detected, the police officer/official should be proceeded against with charge of misconduct of serious nature.

23. In the case in hand, we find that charge-sheet dated 14th February, 2016 was filed against Mahboob Ali. When the petitioner was proceeded against, the petitioner approached this Court. It is only thereafter that in June 2016 i.e. after 4 months it is proposed that the petitioner is also an accused. Charge-sheet dated 14th February, 2016, as noticed above, did not indicate at all that the petitioner is also an accused against whom investigation is pending. The trauma to which the petitioner has been subjected by the conduct of the investigating officer cannot be ignored by the writ-Court while accepting his explanation of 'human error'.

24. Under the circumstances, we hereby impose costs in the sum of Rs.15,000/- (Rupees Fifteen thousand) to be paid to the petitioner on or before 24th November, 2016. For the said purpose, an inquiry be ordered by the Senior Superintendent of Police, Lucknow so as to fix responsibility of the person from whose salary the cost amount would be deducted and paid to the petitioner.

25. Let a copy of this order be forwarded to the Director General of Police, U.P., Lucknow so that appropriate directions are issued and misleading charge-sheets are not filed in future.

(2016) 8 ILRA 759
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.08.2016

BEFORE

THE HON'BLE DR. DEVENDRA KUMAR ARORA, J.

Misc. Single No.- 210 Of 2014

Sharad Pathak

...Petitioner

Versus

State Of U.P.& Ors.

...Respondents

Counsel for the Petitioner:

Sanjay Misra, Advocate assisted by G.C. Verma, Advocate

Counsel for the Respondents:

C.S.C., Pankaj Patel, Addl. Chief Standing Counsel

Headnote:

Arms Act, 1959 — Sections 13 and 14 — Grant of arms licence — Refusal of licence — Grounds — Absence of threat perception — Whether valid ground — Application by legal heir for licence of firearm earlier held by father — Licensing authority rejecting application on ground that applicant wanted licence only for status — Legality.

Petitioner applied for grant of licence of a Double Barrel Gun earlier possessed by his grandfather and later by his father after his father's death. The District Magistrate rejected the application on the ground that there was no threat perception to the petitioner and the licence was sought merely for prestige.

Held, the licensing authority is required to exercise its power objectively in light of Sections 13 and 14 of the Arms Act. Refusal of licence can only be based on grounds contemplated under Section 14 such as prohibition under law, unsoundness of mind, unfitness of the applicant, or necessity for maintaining public peace and safety. Rejection merely on the ground that the applicant has no threat to life or seeks licence for status is not a statutory ground and reflects arbitrary exercise of power. The licensing authority cannot deny grant of licence on whims or fanciful considerations.

The impugned order dated 10.5.2013 passed by the District Magistrate, Sultanpur was therefore quashed and the matter was remitted to the District Magistrate to reconsider the petitioner's application and pass appropriate orders in accordance with law within three months.

Case Law discussed:

Ram Singh Yadav v. State of U.P.

Ram Prakash Srivastava v. Commissioner Jhansi Division

Chandraraj Tripathi v. State of U.P. and others

Result: Writ Petition Allowed.

(Delivered by Hon'ble Dr. Devendra Kumar Arora, J.)

(Delivered by Hon'ble Dr. Devendra Kumar Arora, J.)

1. Heard Sri G.C.Verma, Advocate assisted by Sri Sanjay Mishra, Advocate for the petitioner and Sri Pankaj Patel, Addl. Chief Standing Counsel for the State.

2. Feeling aggrieved by the order dated 10.5.2013 passed by the District Magistrate, Sultanpur whereby the application of the petitioner for grant of license of Double Barrel Gun, which was owned by the father of the petitioner during his life time, has been rejected.

3. In short the facts of the case are that the petitioner is a practicing Advocate of this Court and belongs to a reputed Brahmin family of district Sultanpur. The grandfather of the petitioner, namely, Pt Mahatma Prasad Pathak owned a Double Barrel Gun, which was later on transferred to the father of the petitioner, namely, Sri Som Prakash Pathak, who was the District Government Counsel (Civil) in Sultanpur. The father of the petitioner left for heavenly abode on 12.6.2009. Petitioner is the only son of his father and the real sister of the petitioner is married and there is no dispute of succession. Therefore, after the death of his father, the petitioner deposited the gun of his father at Madras Gun House and applied for grant of license vide application dated 30.6.2009.

4. When no action was taken for sufficient long time on the aforesaid application, the petitioner filed a Writ Petition No. 22 (MS) of 2013 before this Court wherein a direction was issued to the concerned authority vide order dated 1.2.2013 to examine the application of the petitioner and decide the same in accordance with law. Thereafter, the application of the petitioner has been rejected by the licensing authority vide impugned order dated 10.5.2013 on the ground that there is no threat of life to the petitioner and the petitioner wants the license just for his status.

5. Learned Counsel for the petitioner has submitted that Section-14 of the Arms Act deals with the ground on which license can be refused and the ground which has been taken in the impugned order is not covered under Section 14 of the Arms Act and as such the impugned order is nonest and shows the arbitrariness of the concerned authority.

6. On the strength of the decisions rendered in **Ram Singh Yadav Vs. State of U.P.**; 1993 ALR (23) 523, **Ram Prakash Srivastava Vs. commissioner Jhansi Division, Jhansi** [2002(20) LCD 414] and **Chandraraj Tripathi Vs. State of U.P. and others**; passed in Writ-C No. 65647 of 2013 decided on 10.12.2013, it has been argued that the impugned order being contrary to the provisions of the Arms Act, is not tenable in the eyes of law and is liable to be quashed.

7. In contrast, Sri Pankaj Patel, Addl. Chief Standing Counsel submitted that there is no illegality or infirmity in the impugned order and it has rightly been observed that the petitioner wants the fire-arm license just for the prestige sake and there is no threat to life or property of the

petitioner. During inquiry, the police authorities have not found any genuine need of the petitioner. It has further been argued that the petitioner has no fundamental right to have fire arm licence as alleged by him in the writ petition. It is a subjective satisfaction of the Licensing Authority to issue or refuse the grant of licence depending upon the gravity of threat. Therefore, no interference is warranted under Article 226 of the Constitution and the writ petition is liable to be dismissed.

8. Before dealing with the actual controversy involved in the writ petition, it would be apt to refer Section 13 and 14 of the Arms Act, which are relevant for the disposal of the present matter.

13. GRANT OF LICENCES

1. An application for the grant of a licence under Chapter II shall be made to the licensing authority and shall be in such form, contain such particulars and be accompanied by such fee, if any, as may be prescribed.

2. On receipt of an application, the licensing authority shall call for the report of the office in charge of the nearest police station on that application, and such officer shall send in his report within the prescribed time.

(2A) The licensing authority, after making such inquiry, if any, as it may consider necessary, and after considering the report received under sub-section (2), shall, subject to the other provisions of this Chapter, by order in writing either grant the licence or refuse to grant the same: Provided that where the officer in charge of the nearest police station does not send his report on the application within the prescribed time, the licensing authority may, if it deems fit, make such order, after the expiry of the prescribed time, without further waiting for that report.](3) The licensing authority shall grant---

(a) a licence under section 3 where the licence is required---

(i) By a citizen of India in respect of a smooth bore gun having a barrel of not less than twenty inches in length to be used for protection or sport or in respect of a muzzle loading gun to be used for bona fide crop protection: Provided that where having regard to the circumstances of any case, the licensing authority is satisfied that a muzzle loading gun will not be sufficient for crop protection, the licensing authority may grant a licence in respect of any other smooth bore gun as aforesaid for such protection; or

(ii) in respect of a point 22 bore rifle or an air rifle to be used for target practice by a member of a rifle club or rifle association licensed or recognized by the Central Government;

(b) a licence under section 3 in any other case or a licence under section 4, section 5, section 6, section 10 or section 12, if the licensing authority is satisfied that the person by whom the licence is required has a good reason for obtaining the same.

14. REFUSAL OF LICENCES

(1) Notwithstanding anything in section 13, the licensing authority shall refuse to grant---

(a) a licence under section 3, section 4 or section 5 where such licence is required in respect of any prohibited arms or prohibited ammunition;

(b) a licence in any other case under Chapter II,---

i. where such licence is required by a person whom the licensing authority has reason to believe---

1. to be prohibited by this Act or by any other law for the time being in force from acquiring, having in his possession or carrying any arms or ammunition, or

2. to be of unsound mind, or

3. to be for any reason unfit for a licence under this Act; or

ii. where the licensing authority deems it necessary for the security of the public peace or for public safety to refuse to grant such licence.

(2) The licensing authority shall not refuse to grant any licence to any person merely on the ground that such person does not own or possess sufficient property.

(3) Where the licensing authority refuses to grant a licence to any person it shall record in writing the reasons for such refusal and furnish to that person on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such statement.

9. A perusal of aforesaid clause (a) of sub-section (1) of Section 14 would thus indicate that a licence under-Section 3, Section 4 or Section 5 shall be refused where it is required in respect of any prohibited arms or prohibited ammunition. In any other case under Chapter-II, a licence shall be refused where the licensing authority has reason to believe that the person who requires a licence is prohibited by the Act or by any other law from acquiring, having in his possession or carrying any arms or ammunition; or that he is of unsound mind or unfit for any reason for a licence under the Act. Similarly, a licence shall be refused where the licensing authority deems it necessary for the security of the public peace or public safety to refuse the grant of such licence. In other words, the effect of Section 14 is to provide a catalogue of circumstances in which notwithstanding anything in Section 13, a licence shall be refused. Section 14 specifies the grounds when a licence shall be refused, but even otherwise, under Section 13, the licensing authority is duty bound to apply its mind to all the relevant facts and circumstances in determining as to whether the licence

should be granted or refused. In those cases which would fall within the ambit of Section 14, the licensing authority must necessarily refuse the licence.

10. Rule 51 of the Arms Rules, 1962 provides that every application for the grant of a licence shall contain all such information as is necessary for the consideration of the application. Rule 51-A provides that the application shall not suppress any factual information or furnish any false or wrong information in the application form. Every application for the grant of licence has to be in Form 'A' prescribed under the Rules. Part 'A' of Form 'A' requires a disclosure of the identity of the applicant, Part 'B' is for other particulars in relation to the applicant and Part 'C' is for particulars of the licence. Part 'C' requires a disclosure of the need for a licence and of claims for special consideration. In considering the grant of a licence, the authority is duty bound to consider such facts as may be personal to the applicant as well as the impact of the grant of the licence on the safety and security of others which may be impinged by the grant of the licence. Undoubtedly, the licensing provisions of the Act would require that the power which is vested in the competent authority to grant or refuse the grant of a licence must not be exercised arbitrarily or whimsically but for just and sound reasons.

11. In *Ram Prakash Srivastava's case [supra]*, the application for grant of licence was rejected by the licensing authority on the ground that the petitioner has not filed any proof regarding disposal of concerned fire arm and during the period 1980-1993, no incident has taken place which may come to help of petitioner that he require fire arm. This Court while quashing the order of refusal, observed that both the grounds taken by the licensing authority and the appellate authority are not in consonance to the provisions of Arms Act. Similarly, in the case of Gajendra Kumar[*supra*] the application was rejected as there was no threat or apprehension to the life and property of the petitioner. The Court while allowing the writ petition observed that the reasons given by the District Magistrate is beyond the scope of Sections 13 and 14 of the Arms Act.

12. In *Chandraraj Tripathi's case [supra]* the Court observed that the District Magistrate has wrongly interpreted the order dated 7.10.2013 passed by a Division Bench in Jitendra Singh vs. State of U.P. And others [W.P.No.3268(MB) of 2013]. According to the Division Bench no fresh licence would be granted under the Arms Act but will not include:

(a) applicants who have applied as an heir;

(b) applicants who are victims of crime; and

(c) applicants having genuine need of weapon in the opinion of the concerned District Magistrate.

13. In the instant case, the fact situation as indicated hereinabove , contention of learned counsel for the petitioner that respondent no.2 have found out a ground to reject petitioners' applications on getting annoyed of petitioners daring to approach this Court with complaint of inaction on their part, whereupon this Court mandated to pass final order within a specified time,

deserves to be accepted. The licensing authority in fact has tried to penalize the petitioner by rejecting his application on fanciful grounds overlooking the fact that the petitioner has no criminal antecedents and has applied for firearm licence, as his late grandfather was having a DBBL gun, which later on passed on to his father.

14. On examining the facts in entirety, I have no hesitation in observing that a cumulative and harmonious reading of Sections 13 and 14 leave no manner of doubt that an objective consideration is mandated on the part of licensing authority. He cannot deny grant of license to a person on his sheer whims, caprices, imagination etc. Consequently, the impugned order dated 10.5.2013 passed by the District Magistrate, Sultanpur is hereby quashed. The District Magistrate, Sultanpur is directed to re-examine the issue in the light of the observations made herein above and pass appropriate orders for grant of license to the petitioner within a maximum period of three months.

15. The writ petition stands allowed in above terms.

(2016) 8 ILRA 765
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.08.2016

BEFORE

THE HON'BLE SATYENDRA SINGH CHAUHAN, J.
THE HON'BLE ANIL KUMAR, J.

Service Bench No.- 124 Of 2013

Anil Kumar Garg **...Petitioner**
State Of U.P. **Versus**
...Respondent

Counsel for the Petitioner:

Om Prakash Srivastava, Virendra Kr. Dubey

Counsel for the Respondent:

C.S.C.

Headnote:

Para —

Departmental enquiry—Violation of principles of natural justice—Non-production of original documents—No opportunity of cross-examination—Charges treated as proved without leading evidence—Enquiry vitiated—Dismissal order quashed—Matter remitted for fresh enquiry from stage of reply to charge-sheet—Reinstatement to be considered by disciplinary authority.

Case Law discussed:

Chamoli District Co-Operative Bank Ltd. v. Raghunath Singh Rana & Ors., Civil Appeal No. 2265 of 2011

Sur Enamel and Stamping Works Pvt. Ltd. v. Their Workmen, (1964) 3 SCR 616

State Bank of India v. R.K. Jain, (1972) 4 SCC 304

State of Uttaranchal v. Kharak Singh, (2008) 8 SCC 236

ECIL v. B. Karunakar, (1993) 4 SCC 727

Radhey Shyam Gupta v. U.P. State Agro Industries Corporation Ltd., (1999) 2 SCC 21

Syndicate Bank v. Venkatesh Gururao Kurati, (2006) 3 SCC 150

Conclusion:

The Court held that the departmental enquiry against the petitioner was conducted in clear breach of the settled principles of natural justice. The department failed to prove the charges by leading evidence, did not produce original documents, and denied the petitioner opportunity to cross-examine witnesses. Consequently, the dismissal order dated 02.11.2012 and corrigendum dated 12.11.2012 were quashed. The respondents were directed to conduct a fresh enquiry from the stage of reply to the charge-sheet within four months, and the disciplinary authority was left free to consider reinstatement in accordance with law.

(Delivered by Hon'ble Satyendra Singh Chauhan, J.
&
Hon'ble Anil Kumar, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel.

2. Through this petition the petitioner has challenged the dismissal order dated 2.11.2012 communicated to the petitioner vide letter dated 8.11.2012 by means of which the petitioner has been dismissed from service while he was working on the post of Executive Engineer as well as corrigendum issued on 12.11.2012.

3. The facts in short giving rise to the present dispute are that the petitioner was appointed as Assistant Engineer (Civil) in PWD department on 5.12.1983. Thereafter, he was promoted on the post of Executive Engineer on 26.9.2006 and continued to work as Executive Engineer in PWD department at Jaunpur from 26.9.2006 to 23.11.2008. Vide order dated 21.11.2008, the petitioner was placed under suspension and thereafter he was served with a charge sheet on 3.8.2009. When the documents demanded by the petitioner were not supplied, he submitted interim reply. The enquiry officer conducted enquiry and submitted report on 23.3.2010 wherein it was found that no charge was established against the petitioner, but the enquiry officer further advised that a fresh charge sheet may be issued framing the charges in the correct manner. The petitioner filed Writ Petition No.1426 (SB) of 2009, Anil Kumar Garg Vs. State of U.P. and others, challenging the validity of the suspension orders dated 21.11.2008 and 13.7.2009. Said writ petition was finally disposed of vide order dated 12.10.2009 with a direction to the Disciplinary Authority to take a decision in the matter within a period of one month. It was also directed by this Court that in respect of second suspension order dated 13.7.2009, enquiry should be concluded within three months and decision shall be communicated to the petitioner within six weeks from the date of receipt of the report of the enquiry officer. The petitioner served certified copy of the order dated 12.10.2009 within the stipulated time but the enquiry was not concluded within a period of three months. When nothing was done, the petitioner again filed Writ Petition No.94 (SB) of 2010 and again challenged the suspension orders dated 21.11.2008 and 13.7.2009. The State Government passed order on 19.2.2010 exonerating the petitioner from all the charges relating to the first suspension order dated 21.11.2008. Enquiry report dated 23.3.2010 was also submitted exonerating the petitioner from all the charges in the matter pertaining to the second suspension order dated 13.7.2009 but with an advise to issue amended charges sheet. Writ petition No.94 (SB) of 2010 was finally decided by this Court on 27.4.2010. Certain clarification was also sought as there was typing error in the order dated 27.4.2010 and this Court passed order dated 7.7.2010 quashing the second suspension order dated 13.7.2009 and directed that the opposite party shall issue a charge sheet within a period of four weeks and complete the enquiry within three months thereafter. The petitioner informed the State Government about the order dated 27.4.2010 passed in Writ Petition No.94 (SB) of 2010. The petitioner served certified copy of the aforesaid orders dated 27.4.2010 and 7.7.2010 immediately after the orders were passed. The State Government passed order on 7.6.2010 that decision has been taken for amending the charge sheet and the petitioner was served with the amended charge sheet dated 8.6.2010 on 21.6.2010. The petitioner raised objection to the issuance of the amended charge sheet by means of letter dated 25.6.2010. The State Government passed order on 17.8.2010 stating that the enquiry shall continue against the petitioner as the earlier enquiry report was erroneous. The petitioner thereafter filed Contempt Petition No.2006 of 2010 in which notices were issued and then the State Government passed order reinstating the petitioner by

cancelling the second suspension order dated 13.7.2010. The petitioner thereafter moved a representation demanding 26 documents after receiving the amended charge sheet dated 8.6.2010 on 21.6.2010. The enquiry officer fixed first date of enquiry in pursuance to the amended charge sheet as 7.8.2010. As the photostat documents attached with the amended charge sheet were denied to the petitioner and they were also alleged to be fabricated documents, the petitioner made a request for summoning the original documents and for verification of the photostat copies of the documents attached with the charge sheet. In the enquiry proceedings dated 7.8.2010, as the objection made by the petitioner was not very clear that the relied upon documents were fictitious, fabricated and manipulated, the petitioner moved a fresh representation on 11.8.2010 bringing his objection on record. The presenting officer filed a reply on 26.8.2010 before the enquiry officer dealing with the representation of the petitioner dated 5.7.2010 and 11.8.2010. In response to the reply of the presenting officer dated 26.8.2010, the petitioner made a representation stating the relevancy of the documents demanded by him. The enquiry officer wrote a letter dated 31.12.2010 to 18 defence witnesses. The enquiry officer on the 5th date of enquiry i.e. 4.1.2011, accepted statements of 14 persons including the presenting officer Sri S.K. Goel, but the same were not recorded and neither any examination in chief was made nor the petitioner was afforded any opportunity to cross examine the witnesses. On the next date of enquiry i.e. 6.1.2011, the presenting officer Sri S.K. Goel was examined. The petitioner raised objection that Junior Engineer, who had allegedly received 33 Tankers was the material witness to accept or deny the charges. Similarly, the transport agency or the transporter was also a material witness to indicate as if the said 33 Tankers were ever transported from the refinery but the same was not received. The enquiry officer summoned Sri R.K. Prasad, Deputy Manager, Consumer Cell, Indian Oil Corporation Ltd., who appeared before the enquiry officer on 11.1.2011 and he clearly stated that the Indian Oil Corporation has not made any verification regarding signatures of the Junior Engineer who allegedly received supply. The next date of enquiry was fixed as 14.1.2011, on which date no enquiry was made but the enquiry officer and the presenting officer wrote proceedings discussing the evidence relied upon by the petitioner. The petitioner was asked to submit his defence in writing by means of letter dated 17.1.2011. The enquiry officer and the presenting officer concluded the proceedings and discussed the extraneous charges not shown in the charge sheet. The enquiry officer submitted enquiry report on 25.1.2011, which was served on the petitioner vide letter dated 28.2.2011. The petitioner was required to submit his representation within fifteen days. As the enclosures attached with the enquiry report were not supplied to the petitioner, therefore, he made a representation on 23.3.2011 for supplying the same. The petitioner was thereafter supplied the enclosures of the enquiry report on the instructions of the State Government on 25.4.2011. On 2.5.2011, the petitioner submitted representation to the enquiry report supplied through show cause notice. Thereafter, information was sought by the State Government from the U.P. Public Service Commission. The information of the U.P. Public Service Commission was received by the State Government and thereafter dismissal order dated 2.11.2012 has been passed.

4. Learned counsel for the petitioner submits that the enquiry has not been held by following the principles of natural justice. Comments, which were obtained by the enquiry officer from the presenting officer, were not supplied to the petitioner and the petitioner was asked to submit reply to the same. The petitioner submitted reply to the said comments and thereafter the

enquiry was concluded. No evidence was adduced to prove the charges before the enquiry officer. The enquiry officer presumed proving of the charges only on the basis of the comments of the presenting officer. Learned counsel submits that though date was fixed, but no enquiry was ever held as contemplated under law and neither the petitioner was given any opportunity to cross examine any of the prosecution witnesses. None of the witnesses were adduced from the side of the petitioner though there was specific denial of the documents, which were annexed along with the charge sheet saying they were forged and fabricated documents, but in spite of that no effort was made to get the documents proved in accordance with law. Learned counsel has placed reliance upon the judgment rendered by the Apex Court in the case of **Chamoli District Co-Operative Bank Ltd. through its Secretary/Mahaprandhak & Anr. v. Raghunath Singh Rana & Ors., Civil Appeal No.2265 of 2011** dated 17th May, 2016.

5. Learned Standing Counsel has submitted that enquiry officer has held the enquiry in accordance with law by following the principles of natural justice. He has fixed various dates and R.K. Prasad, Deputy Manager, Consumer Cell, Indian Oil Corporation Ltd. was also examined to prove the receiving by the Junior Engineer, but in the statement he made a specific statement that he does not recognize the signature of the Junior Engineer.

6. We have heard learned counsel for the parties and perused the record.

7. What should have been the process of holding the enquiry as contemplated under law after the amended charge sheet was issued to the petitioner. The petitioner has submitted reply to the amended charge sheet. He had also denied all the documents, which were filed along with the charge sheet in photostat form as being forged and fabricated. The petitioner demanded from the enquiry officer that the original documents be produced. The original documents were never produced. Comments from the presenting officer were obtained by the enquiry officer and the petitioner was asked to submit reply to the said comments. After reply submitted by the petitioner to the comments, the enquiry officer concluded the enquiry and assumed the charges to be proved against the petitioner. The petitioner in paragraph-36 of the writ petition pleaded as under:-

"36. That the enquiry officer did not fix any date requiring the presenting officer to prove the charges and the documents relied upon. The enquiry officer took all the charges already proved. The enquiry officer wrote a letter dated 31.12.2010 to 18 persons cited as defence witnesses. It was mentioned in the letter dated 31.12.2010 that the same is summoning letter in view of the demand of the petitioner for submitting his defence. 04.01.2011 was fixed as a next date for appearing all the 20 witnesses. A true copy of the letter dated 31.12.2010 written by the enquiry officer behind the back of the petitioner calling 20 persons from the list of defence witnesses without proving the charges and conducting any enquiry in this regard, is being filed herewith as Annexure No.25 to this writ petition.

8. Reply to paragraph-36 of the writ petition has been given in paragraph-69 of the counter affidavit, which reads as under:-

"69. That the averments contained in para 36 of the writ petition regarding the letter dated 31/12/2010 calling the witnesses and fixing the date 04/01/2011 are not disputed. However, the rest of averments made in para under reply are false and misleading hence, denied in view of the facts already referred hereinabove."

9. Once the opposite party has admitted the position as stated in paragraph-36 of the writ petition, then nothing remains to be elaborated and neither the opposite party can come forward to state that enquiry was held in accordance with law. Law in regard to holding of enquiry has been settled by the Apex Court in the case of Raghunath Singh Rana (supra) wherein it has been held as under:-

"19. The compliance of natural justice in domestic/disciplinary inquiry is necessary has long been established. This Court has held that even there are no specific statutory rule requiring observance of natural justice, the compliance of natural justice is necessary. Certain ingredients have been held to be constituting integral part of holding of an inquiry. The Apex Court in Sur Enamel and Stamping Works Pvt. Ltd. v. Their Workmen reported in (1964) 3 SCR 616 has laid down following:-

"... An enquiry cannot be said to have been properly held unless, (i) the employee proceeded against has been informed clearly of the charges levelled against him, (ii) the witnesses are examined - ordinarily in the presence of the employee - in respect of the charges, (iii) the employee is given a fair opportunity to cross-examine witnesses, (iv) he is given a fair opportunity to examine witnesses including himself in his defence if he so wishes on any relevant matter, and (v) the inquiry officer records his findings with reasons for the same in his report."

20. The Apex Court again in State Bank of India Vs. R.K. Jain and Ors., reported in (1972) 4 SCC 304 held that if an inquiry is vitiated by violation of principles of natural justice or if no reasonable opportunity was provided to the delinquent to place his defence, it cannot be characterized as a proper domestic inquiry held in accordance with the rules of natural justice. In paragraph 23, the following was laid down:-

".....As emphasised by this Court in Ananda Bazar Patrika (P) Ltd. v. Its Workmen, (1964) 3 SCR 601, the termination of an employee's service must be preceded by a proper domestic inquiry held in accordance with the rules of natural justice. Therefore, it is evident that if the inquiry is vitiated by violation of the principles of natural justice or if no reasonable opportunity was provided to a delinquent to place his defence, it cannot be characterized as a proper domestic inquiry held in accordance with the rules of natural justice....."

21. The Apex Court in State of Uttranchal & Ors. Vs. Kharak Singh reported in (2008) 8 SCC 236 had occasion to examine various contours of natural justice which need to be specified in a departmental inquiry. The Apex Court noticed earlier judgments where principles were laid down as to how inquiry is to be conducted. It is useful to refer paragraphs 9, 10, 11, 12, 13 and 15, which are to the following effect:-

".....9. Before analyzing the correctness of the above submissions, it is useful to refer various principles laid down by this Court as to how enquiry is to be conducted and which procedures are to be followed.

10. The following observations and principles laid down by this Court in *Associated Cement Co. Ltd. vs. The Workmen and Anr.* [1964] 3 SCR 652 are relevant:

"... ... In the present case, the first serious infirmity from which the enquiry suffers proceeds from the fact that the three enquiry officers claimed that they themselves had witnessed the alleged misconduct of Malak Ram. Mr. Kolah contends that if the Manager and the other officers saw Malak Ram committing the act of misconduct, that itself would not disqualify them from holding the domestic enquiry. We are not prepared to accept this argument. If an officer himself sees the misconduct of a workman, it is desirable that the enquiry should be left to be held by some other person who does not claim to be an eye- witness of the impugned incident. As we have repeatedly emphasised, domestic enquiries must be conducted honestly and bona fide with a view to determine whether the charge framed against a particular employee is proved or not, and so, care must be taken to see that these enquiries do not become empty formalities. If an officer claims that he had himself seen the misconduct alleged against an employee, in fairness steps should be taken to see that the task of holding an enquiry is assigned to some other officer. How the knowledge claimed by the enquiry officer can vitiate the entire proceedings of the enquiry is illustrated by the present enquiry itself.

..... It is necessary to emphasise that in domestic enquiries, the employer should take steps first to lead evidence against the workman charged, give an opportunity to the workman to cross-examine the said evidence and then should the workman be asked whether he wants to give any explanation about the evidence led against him. It seems to us that it is not fair in domestic enquiries against industrial employees that at the very commencement of the enquiry, the employee should be closely cross- examined even before any other evidence is led against him. In dealing with domestic enquiries held in such industrial matters, we cannot overlook the fact that in a large majority of cases, employees are likely to be ignorant, and so, it is necessary not to expose them to the risk of cross-examination in the manner adopted in the present enquiry proceedings. Therefore, we are satisfied that Mr. Sule is right in contending that the course adopted in the present enquiry proceedings by which Malak Ram was elaborately cross-examined at the outset constitutes another infirmity in this enquiry."

11) In *ECIL v. B. Karunakar* (1993) 4 SCC 727, it was held:

"(1) Where the enquiry officer is other than the disciplinary authority, the disciplinary proceedings break into two stages. The first stage ends when the disciplinary authority arrives at its conclusions on the basis of the evidence, enquiry officer's report and the delinquent employee's reply to it. The second stage begins when the disciplinary authority decides to impose penalty on the basis of its conclusions. If the disciplinary authority decides to drop the disciplinary proceedings, the second stage is not even reached.

While the right to represent against the findings in the report is part of the reasonable opportunity available during the first stage of the inquiry viz., before the disciplinary authority takes into consideration the findings in the report, the right to show cause against the penalty proposed belongs to the second stage when the disciplinary authority has considered the findings in the report and has come to the conclusion with regard to the guilt of the employee and proposes to award penalty on the basis of its conclusions. The first right is the right to prove innocence. The second right is to plead for either no penalty or a lesser penalty although the conclusion regarding the guilt is accepted. It is the second right exercisable at the second stage which was taken away by the Forty-second Amendment. The second stage consists of the issuance of the notice to show cause against the proposed penalty and of considering the reply to the notice and deciding upon the penalty. What is dispensed with is the opportunity of making representation on the penalty proposed and not of opportunity of making representation on the report of the enquiry officer. The latter right was always there. But before the Forty-second Amendment of the Constitution, the point of time at which it was to be exercised had stood deferred till the second stage viz., the stage of considering the penalty. Till that time, the conclusions that the disciplinary authority might have arrived at both with regard to the guilt of the employee and the penalty to be imposed were only tentative. All that has happened after the Forty-second Amendment of the Constitution is to advance the point of time at which the representation of the employee against the enquiry officer's report would be considered. Now, the disciplinary authority has to consider the representation of the employee against the report before it arrives at its conclusion with regard to his guilt or innocence in respect of the charges.

* * *

Article 311 (2) says that the employee shall be given a "reasonable opportunity of being heard in respect of the charges against him". The findings on the charges given by a third person like the enquiry officer, particularly when they are not borne out by the evidence or are arrived at by overlooking the evidence or misconstruing it, could themselves constitute new unwarranted imputations. The proviso to Article 311(2) in effect accepts two successive stages of differing scope. Since the penalty is to be proposed after the inquiry, which inquiry in effect is to be carried out by the disciplinary authority (the enquiry officer being only his delegate appointed to hold the inquiry and to assist him), the employee's reply to the enquiry officer's report and consideration of such reply by the disciplinary authority also constitute an integral part of such inquiry.

Hence, when the enquiry officer is not the disciplinary authority, the delinquent employee has a right to receive a copy of the enquiry officer's report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employee's right to defend himself against the charges levelled against him. A denial of the enquiry officer's report before the disciplinary authority takes its decision on the charges, is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice."

12) In *Radhey Shyam Gupta vs. U.P. State 1Agro Industries Corporation Ltd. and Another*, (1999) 2 SCC 2, it was held:

"34. But in cases where the termination is preceded by an enquiry and evidence is received and findings as to misconduct of a definitive nature are arrived at behind the back of the officer and where on the basis of such a report, the termination order is issued, such an order will be violative of the principles of natural justice inasmuch as the purpose of the enquiry is to find out the truth of the allegations with a view to punish him and not merely to gather evidence for a future regular departmental enquiry. In such cases, the termination is to be treated as based or founded upon misconduct and will be punitive. These are obviously not cases where the employer feels that there is a mere cloud against the employee's conduct but are cases where the employer has virtually accepted the definitive and clear findings of the enquiry officer, which are all arrived at behind the back of the employee -- even though such acceptance of findings is not recorded in the order of termination. That is why the misconduct is the foundation and not merely the motive in such cases."

13) In *Syndicate Bank and Others vs. Venkatesh Gururao Kurati*, (2006) 3 SCC 150, the following conclusion is relevant:

"18. In our view, non-supply of documents on which the enquiry officer does not rely during the course of enquiry does not create any prejudice to the delinquent. It is only those documents, which are relied upon by the enquiry officer to arrive at his conclusion, the non-supply of which would cause prejudice, being violative of principles of natural justice. Even then, the non-supply of those documents prejudice the case of the delinquent officer must be established by the delinquent officer. It is well-settled law that the doctrine of principles of natural justice are not embodied rules. It cannot be put in a straitjacket formula. It depends upon the facts and circumstances of each case. To sustain the allegation of violation of principles of natural justice, one must establish that prejudice has been caused to him for non-observance of principles of natural justice."

15. From the above decisions, the following principles would emerge:

i) The enquiries must be conducted bona fide and care must be taken to see that the enquiries do not become empty formalities.

ii) If an officer is a witness to any of the incidents which is the subject matter of the enquiry or if the enquiry was initiated on a report of an officer, then in all fairness he should not be the Enquiry Officer. If the said position becomes known after the appointment of the Enquiry Officer, during the enquiry, steps should be taken to see that the task of holding an enquiry is assigned to some other officer.

(iii) In an enquiry, the employer/department should take steps first to lead evidence against the workman/delinquent charged and give an opportunity to him to cross-examine the

witnesses of the employer. Only thereafter, the workman/ delinquent be asked whether he wants to lead any evidence and asked to give any explanation about the evidence led against him.

(iv) On receipt of the enquiry report, before proceeding further, it is incumbent on the part of the disciplinary/punishing authority to supply a copy of the enquiry report and all connected materials relied on by the enquiry officer to enable him to offer his views, if any."

10. After considering the dictum laid down by the Apex Court and also considering the facts on record, we are of the definite opinion that the enquiry was not held in accordance with law by following the principles of natural justice. The charges were never proved by the department before the enquiry officer as required under law. The petitioner was also not given opportunity to cross-examine the witnesses though he has specifically denied the documents and has also made a specific endorsement on the documents themselves being fabricated.

11. In the aforesaid fact, the writ petition is allowed. A writ in the nature of certiorari is issued quashing the dismissal order dated 2.11.2012 as well as corrigendum issued on 12.11.2012 and the opposite party is directed to hold enquiry from the stage of filing of reply to the charge sheet by fixing date, time and place after giving opportunity to the petitioner to participate in the enquiry and conclude the enquiry within a period of four months from the date of receipt of a certified copy of this order. It is further provided that the disciplinary authority may take a decision in respect of reinstatement of the petitioner as contemplated under law.

12. The petitioner is directed to co-operate in the enquiry.

Application U/S 482 No.- 20282 Of 2016

Kripa Shankar Singh & Ors. ...Applicants
State Of U.P. & Anr. ...Opposite Parties
Versus

Counsel for the Applicants:
Arvind Sikaria

Counsel for the Opposite Parties:
G.A.

Headnote: Para-

Where the FIR does not contain the essential ingredients of Section 3(1)(x) of the SC/ST Act—namely that the accused is not a member of SC/ST and that intentional caste-based insult or intimidation was made within public view—the continuation of proceedings under the said provision amounts to abuse of process of law and is liable to be quashed. However, where prima facie material exists for offences under the IPC, the High Court in exercise of powers under Section 482 Cr.P.C. should not quash the charge sheet at the pre-trial stage.

Case Law discussed:

Gorige Pentaiah Vs. State of Andhra Pradesh

Procedural History:

Application under Section 482 Cr.P.C. filed for quashing of proceedings of Criminal Case No. 292 of 2016 arising out of Case Crime No. 733 of 2015, under Sections 323, 427, 504, 506 IPC and Section 3(1)(x) of the SC/ST Act, P.S. Khanpur, District Ghazipur, pending before the Judicial Magistrate, Ghazipur.

Decision:

Application partly allowed.

Proceedings relating to offence under Section 3(1)(x) of the SC/ST Act quashed.

Prayer for quashing proceedings under Sections 323, 427, 504, 506 IPC rejected. Trial court directed to proceed in accordance with law.

(Delivered by Hon'ble Mr. Justice Harsh Kumar)

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

1. Learned A.G.A. states that in view of facts and circumstances of the case by issuing notices to opposite party no.2 no useful purpose would be served and the application may be heard and disposed of without issuing notices to the opposite party no.2.

2. Heard learned counsel for the applicants, learned A.G.A. and perused the record.

3. Present application u/s 482 Cr.P.C. has been moved with the prayer to quash the proceedings of criminal case no.292 of 2016 (State of U.P. Vs. Kripa Shankar Singh and others), arising out of case crime no.733 of 2015, under Sections 323, 427, 504, 506 IPC and Section 3(1)(x) of the SC/ST Act, P.S. Khanpur, District Ghazipur, pending in the court of Judicial Magistrate, Ghazipur.

4. Learned counsel for the applicants contends that the FIR has been lodged with absolutely false, baseless and concocted allegations; that it is wrong to say that the first informant was going by motorcycle at the time of alleged incident along-with Vijay Singh Pradhan and B.D.C. Sunil Kumar Goswami, as three persons are not permitted to ride on a two wheeler; that the applicants did neither damage the motorcycle of first informant nor committed mar-peat with him nor abused nor threatened him; that it is absolutely wrong and is highly improbable that the applicants were taking liquor together at the time of alleged incident because the applicant no.1 is father of applicant no.2 and applicant nos.2, 3 & 4 are young boys of family of applicant no.1; that there is no whisper in the FIR that the applicants are not members of Scheduled Caste or Scheduled Tribe or they intentionally insulted or intimidated the opposite party no.2 or abused him in the name of caste, with an intention to humiliate the opposite party no.2 within public view; that the provisions of SC/ST Act are not attracted in this case; that it is nowhere mentioned that the applicants are not members of Scheduled Caste or Scheduled Tribe and insulted or intimidated to humiliate the opposite party no.2 within public view and so the offence punishable under Section 3(1)(x) of the SC/ST Act is not made out; that the opposite party no.2 is neighbour of applicants and is on inimical terms with the applicant no.1, because the applicant no.1 had turned down his offer for exchange of agricultural plots about a decade back; that the opposite party no.2 has political affiliation and has lodged false FIR in order to harm and harass the applicants including applicant nos. 2 to 4, who are students; that in these circumstances the charge sheet filed against the applicants without there being sufficient evidence against them, is liable to be quashed.

5. Per contra learned A.G.A. submits that on 08.10.2015 when the opposite party no.2 was returning to his home, the applicants obstructed his way and not only damaged his motorcycle and committed mar-peat, but also insulted and humiliated him by abusing and threatening; that the issues of facts have been raised by the applicants, correctness of which is to be decided upon evidence before the trial court and at this stage the contention of the applicants about the falsity of prosecution case may not be presumed to be correct and without evidence before trial court the prosecution case cannot be disbelieved or thrown out; that the Investigating Officer after collecting sufficient material evidence has submitted charge sheet; that the present application u/s 482 Cr.P.C. has been moved with wrong and baseless allegations just to delay the disposal of trial and there is no ground for quashing the charge sheet or proceedings.

6. Upon perusal of record and copy of FIR at Annexure 2, I find that there is no averment in the FIR that the applicants ever called the opposite party no.2 by his caste name and further there is no averment about the applicants being not members of Scheduled Caste or Scheduled Tribe. It is

also pertinent to mention here that there is no averment that the applicants intimidated the opposite party no.2 with an intent to humiliate within public view.

7. The provisions of Section 3(1)(x) of the SC/ST Act provides that "whoever, not being a member of Scheduled Caste or a Scheduled Tribe, intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine." Since the basic ingredients for making offence under Section 3(1)(x) of the SC/ST Act are missing in the FIR, the applicants may not be presumed to have committed offence under Section 3(1)(x) of the SC/ST Act and should not be forced to face the trial for the offences under Section 3(1)(x) of the SC/ST Act irrespective of the fact that they may be tried for other offences. The Investigating Officer appears to have not taken care of the required ingredients of offences as per provisions of under Section 3(1)(x) of the SC/ST Act at the time of submitting charge sheet.

8. It will not be out of place to make reference of the verdict of Hon'ble Supreme Court in the case of Gorige Pentaiah Vs. State of Andhra Pradesh and others reported in (2009) 1 SCC (Cri.) 446, Paragraph 6 of which reads as follows: -

"In the instant case, the allegation of Respondent 3 in the entire complaint is that on 27.05.2004, the appellant abused them with the name of their caste. According to the basic ingredients of Section 3(1)(x) of the Act, the complainant ought to have alleged that the appellant-accused was not a member of Scheduled Caste or a Scheduled Tribe and he (Respondent 3) was intentionally insulted or intimidated by the accused with intent to humiliate in a place within public view. In the entire complaint, nowhere it is mentioned that the appellant-accused was not a member of the Scheduled Caste or a Scheduled Tribe and he intentionally insulted or intimidated with intent to humiliate Respondent 3 in a place within public view. When the basic ingredients of the offence are missing in the complaint, then permitting such a complaint to continue and to compel the appellant to face the rigmarole of the criminal trial would be totally unjustified leading to abuse of process of law."

9. In view of the discussions made above, I am of the considered view that since the basic ingredients for an offence punishable under Section 3(1)(x) of the SC/ST Act are missing from the FIR and so no offence under above provisions can be said to be made out. As such, the criminal trial of applicants with respect to the said offence will be wholly unjustified, leading to abuse of process of law. In the circumstances the order of cognizance under Section 3(1)(x) of the SC/ST Act as well as trial for the offence under above provisions may not be allowed to continue and is liable to be quashed. However, as far as offences under Sections 323, 504, 506, 427 IPC are concerned, upon investigation the charge sheet has been submitted and at this stage, without any evidence to the contrary, the prosecution case may not be presumed to be false by this Court under Section 482 Cr.P.C.

10. In view of discussions made above, I have come to the conclusion that there is no sufficient ground for quashing the entire charge sheet or deleting the names of the applicants from the charge sheet as per prayer, though the application under Section 482 Cr.P.C. is liable to be allowed partly and the proceedings of case crime no.733 of 2015 with regarding to Section 3(1)(x) of the SC/ST Act are liable to be quashed. As far as the prayer for deleting the names of the applicants or quashing the charge sheet in respect of other offences under Sections 323, 427, 504, 506 IPC, the application is devoid of merits and is liable to be rejected.

11. The application u/s 482 Cr.P.C. is partly allowed and the proceedings in case crime no.733 of 2015 with regard to offence under Section 3(1)(x) of the SC/ ST Act are quashed and in respect to other offences under Sections 323, 427, 504, 506 IPC the application is rejected. The Magistrate concerned shall proceed with the trial under Sections 323, 427, 504, 506 IPC in accordance with law. If the applicants surrenders before the Magistrate/ court concerned, the same shall be considered and disposed of expeditiously in accordance with law.

12. Accordingly, the application under Section 482 Cr.P.C. is partly allowed.

Application U/S 482 No.- 23905 Of 2016

Ramveer & Ors. **...Applicants**
State Of U.P. & Anr. **Versus**
...Opposite Parties

Counsel for the Applicants:
Anuj Kumar Gupta

Counsel for the Opposite Parties:
G.A., Sri K.D. Tiwary

He: Paras 6 to 13

Summoning of an accused in a criminal case is a serious matter and cannot be done in a routine or mechanical manner. Though detailed reasons are not required at the stage of issuing process under Section 204 Cr.P.C., the order must reflect due application of judicial mind. Where the Magistrate fails to discuss the material evidence recorded under Sections 200 and 202 Cr.P.C. and merely records that a prima facie case exists without indicating the basis thereof, such order is liable to be quashed.

In the present case, the complaint (Case No. 566/2016, Govind vs. Ramveer and 8 others) alleged offences under Sections 452, 323, 504, 354-A and 506 IPC. The Magistrate, while passing the summoning order dated 20.07.2016, neither discussed the evidence nor specified the overt acts attributable to each accused. The impugned order did not reflect consideration of statements under Sections 200 and 202 Cr.P.C. or application of judicial discretion.

Accordingly, the summoning order dated 20.07.2016 passed by Judicial Magistrate, Court No. 1, Sambhal, was quashed and the matter remanded to the trial court for passing a fresh order in accordance with law after affording opportunity to the parties.

Case Law discussed:

M/s. Pepsi Foods Ltd. v. Special Judicial Magistrate
Paul George v. State

Result: Application Allowed. Summoning order quashed. Matter remanded.
(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. Heard learned counsel for the applicants, Sri K.D. Tiwary, learned counsel for OP No.-2, learned AGA and perused the records.

2. Complaint case no. 566/2016 (Govind Vs. Ramveer and 8 others) was filed with averment that complainant's brother-in-law Narottam trespassed in house of complainant with other co-accused and used criminal force, caused injuries and uttered foul words.

3. Complainant's real sister is married to Narottam, one of the applicant, and it is alleged that when he approached his wife in her parental home, altercation arose and incident complained of had happened. After adducing evidences under sections 200 & 202 CrPC, summoning order dated 20.7.2016 was passed by trial court.

4. Learned counsel for the applicants contended that summoning order under challenge is passed without application of mind and without considering the facts and circumstances of the matter. He contended that if applicant Narottam had visited his wife, then it cannot be treated as house trespass.

5. These contentions were refuted by learned counsel for OP No. 2, who submitted that use of criminal force is itself proof of criminal trespass and trial court had committed no error in passing impugned order.

6. In **"1998 UPCR 118; M/s. Pepsi Food Ltd. & another vs. Special Judicial Magistrate & others"** Hon'ble Supreme Court had held as under :-

"Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning the accused. Magistrate had to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

7. In **"2002 Cri.L.J. 996; Paul George vs. State"** Hon'ble Apex Court had held as under:-

"We feel that whatever be the outcome of the pleas raised by the appellant on merit, the order disposing of the matter must indicate application of mind to the case and some reasons be assigned for negating or accepting such pleas.- - - -"

It is true that it may depend upon the nature of the matter which is being dealt with by the Court and the nature of the jurisdiction being exercised as to in what manner the reasons may be recorded e.g. in an order of affirmance detailed reasons or discussion may not be necessary

but some brief indication by the application of mind may be traceable to affirm an order would certainly be required. Mere ritual of repeating the words or language used in the provisions, saying that no illegality, impropriety or jurisdictional error is found in the judgment under challenge without even a whisper of the merits of the matter or nature of pleas raised does not meet the requirement of decision of a case judicially."

8. No doubt the enquiry conducted under section 202 CrPC is not required to be detailed enquiry or scrutiny of evidence to that extent which is required for the purposes of the trial or conviction, but at the same time, the Court must apply its mind while passing order for the issue of summonses under section 204(1) of the Code of Criminal Procedure. Court should remain very careful in summoning the accused persons in future at least in cases where the accused persons are resident of far off places. The Court is, no doubt, bound to consider the contents of the complaint and the preliminary evidence, but it is not essential requirement of S. 204, Criminal P.C. to give detailed reasons for issuing process to the accused. The only essential ingredient is that the order must exhibit that the Magistrate had applied his mind before passing the order.

9. The passing of order of summoning any person as accused is a very important matter, which initiates criminal proceeding against him. Such orders cannot be passed summarily or without applying judicial mind.

10. A perusal of impugned order indicates that learned Magistrate had written nothing concerning facts of the case in hand. After noting the names of witnesses Magistrate mentioned that there is sufficient prima facie evidence against accused persons for summoning them u/ss 452, 323, 504, 354-A, 506 IPC. Neither any discussion of evidence was made, nor was it considered as to which accused had allegedly committed what overt act. The accused persons of complaint were summoned for offences mentioned in that application. I doubt whether the learned Magistrate had actually read statements u/ss 200, 202 CrPC or the documents of the original file or not. No reason was mentioned in the impugned order as to what those documents contain, and how they help the prosecution case. Impugned order clearly lacks the reflection of application of judicial discretion or mind. Nothing is there which may show that learned Magistrate, before passing of the order under challenge had considered facts of the case and evidence or law. Therefore it appears that, in fact, no judicial mind was applied before the passing of impugned order of summoning. Such order cannot be accepted as a proper legal judicial order passed after following due procedure of law. Therefore it is liable to be quashed.

11. Accordingly, this application is allowed and the order dated 20.7.2016 passed by Judicial Magistrate, Court No.-1, Sambhal in complaint case no. 566/2016 (Govind Vs. Ramveer and 8 others), under sections 452, 323, 504, 354-A, 506 IPC, P.S. Hayat Nagar, District Sambhal is hereby quashed. The matter is remanded to trial court with direction that after affording opportunity, the trial court shall pass fresh orders in accordance with law.

12. The copy of this order be communicated to lower court.

(2016) 8 ILRA 781
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.08.2016

BEFORE

THE HON'BLE RAM SURAT RAM (MAURYA), J.

Writ B No.- 43368 Of 2006

Harish Chand

...Petitioner

Versus

Addl. Collector (Admin. & Revenue) Deoria / D.D.C. Deoria & Ors.

...Respondents

Counsel for the Petitioner:

R.S. Misra, Arun Kumar

Counsel for the Respondents:

C.S.C., Bishram Tiwari, Ravindra Sharma, V.K. Singh, R.C. Singh

Headnote:

Case Law discussed:

Gurmukh Ram Madan v. Bhagwan Das Madan, AIR 1998 SC 2776

J. Yashoda v. K. Shobha Rani, (2007) 5 SCC 730

Tukaram S. Dighole v. Manikrao Shivaji Kokate, AIR 2010 SC 965

H. Siddiqui v. A. Ramalingam, AIR 2011 SC 1492

Lalit Popli v. Canara Bank, (2003) 3 SCC 583

Ajay Kumar Parmar v. State of Rajasthan, (2012) 12 SCC 406

State of Gujarat v. Vinaya Chandra Chhota Lal Pathi, AIR 1967 SC 778

Procedure:

Petition under Article 226 of the Constitution challenging the order dated 01.07.2006 passed by Deputy Director of Consolidation in revision under the U.P. Consolidation of Holdings Act, 1953, whereby the order of Assistant Settlement Officer Consolidation dated 10.03.2005 allowing the appeal of the petitioner and directing recording of his name over the land in dispute was set aside and the basic year entry in favour of the respondents was maintained.

Result:

Writ Petition Allowed. Order of Deputy Director of Consolidation dated 01.07.2006 set aside and order of Assistant Settlement Officer Consolidation dated 10.03.2005 affirmed.

(Delivered by Hon'ble Ram Surat Ram (Maurya), J.)

(Delivered by Hon'ble Ram Surat Ram (Maurya), J.)

1. Heard Sri Arun Kumar, for the petitioner and Sri R.C. Singh, along with Sri Ravindra Sharma, for the contesting respondents.

2. This petition has been filed against the order of Deputy Director of Consolidation, dated 01.07.2006 passed in title proceeding under U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as the 'Act').

3. The dispute between the parties is in respect of basic consolidation year khata 98 of village Bagahi, Tappa Mail, pargana Salempur Majhauri, district Deoria, which was recorded in the names of Subhash and Suresh (respondents-2 and 3) (hereinafter referred to as the respondents). Harish Chand (the petitioner) filed an objection (registered as Case No. 343/2348) under Section 9-A of the Act, for recording his name over it and deleting the names of the respondents. He claimed that Sachchan was bhumidhar of the land in dispute. Sachchan died on 08.10.1967, leaving behind him the petitioner as his only son and heir of the land in dispute. Since then the petitioner was in possession of the land in dispute. The petitioner was minor at the time of death of Sachchan. Taking advantage of minority of the petitioner and illiteracy of his widow mother, the respondents got their names mutated over the land in dispute, on the basis of a fabricated sale deed dated 09.10.1967. The petitioner, through his guardian, filed a suit (registered as O.S. No. 452 of 1968) on 27.3.1968, for cancellation of the sale deed, before Civil Court, which was abated by order dated 07.05.1971, under Section 5 of the Act. The objection was contested by the respondents and they have stated that the sale deed of the land in dispute was executed by Sachchan on 09.10.1967 in their favour. One Brij Kishore Maurya, who is Panchayat Secretary of the village, got this objection filed through his sister-in-law Prem Sundari, impersonating herself as Smt. Gulaichi and her minor son Harish Chand. Although, Smt. Gulaichi was not wife of Sachchan, nor Harish Chand was son of Sachchan.

4. Consolidation Officer, after hearing the parties, by his order dated 27.11.1978 held that Sachchan died on 08.10.1967, and, sale deed dated 09.10.1967 is fabricated document. He further found that Smt. Gulaichi was not the widow of Sachchan, nor Harish Chand was the son of Sachchan. On these findings, he dismissed the objection of the petitioner, directed for deleting the names of the respondents and recording the land in dispute in the name of Gaon Sabha. Harish Chand filed an appeal (registered as Appeal No. 1/1/13) and the respondents filed another appeal (registered as Appeal No. 2/2/14) from the order of Consolidation Officer. Before Appellate Court, both the parties were allowed to lead their additional evidence. Assistant Settlement Officer Consolidation, after hearing the parties, by order dated 10.03.2005 affirmed the finding of Consolidation Officer that Sachchan died on 08.10.1967. He held that sale deed dated 09.10.1967 was executed by some imposter and not by Sachchan. He also relied upon statement and report of Sri M.M. Kakkar, Fingerprint & Hand Writing Expert and found that thumb impressions of Sachchan in the Register No. 8 of sale deed dated 09.10.1967 were not tallying with admitted thumb impressions of Sachchan on the sale deeds dated 31.03.1959 and 03.03.1964, previously executed by him. So far as Smt. Gulaichi, the mother of the petitioner is concerned, he relied upon Kutumb Register, Electoral Roll of the year 1968-1969 as well as oral evidence of the petitioner and found that Smt. Gulaichi was widow of Sachchan and Harish Chand was his son. On these findings, he allowed the appeal of the petitioner and dismissed the appeal of the respondents and directed for recording the name of the petitioner over land in dispute.

5. The respondents filed two separate revisions and Gaon Sabha filed one revision against the order of Assistant Settlement Officer Consolidation. All the three revisions were consolidated and heard by Deputy Director of Consolidation, who by order dated 01.07.2006 held that admitted thumb impressions of Sachchan on the sale deeds dated 31.03.1959 and 03.03.1964 were tallying with his thumb impression on Register No. 8 of the sale deed dated 09.10.1967. Loops of his thumb impressions on both the sale deeds had curved towards left and had fifteen ridges between delta and core. The other expert report are not clear on this point. As sale deed dated 09.10.1967 was executed by Sachchan as such his death on 08.10.1967 was not proved. The names of the respondents were mutated in revenue record on the basis of sale deed dated 09.10.1967. Consolidation Court has no jurisdiction to go into controversy that sale deed was in favour of minors as such it is void. On these findings, he allowed the revision of the respondents, dismissed the revision of Gaon Sabha and maintained the basic year entry. Hence, this petition has been filed.

6. The counsel for the petitioner submitted that Appellate Court framed two issues for determination, i.e. (i) whether sale deed dated 09.10.1967 was executed by Sachchan in favour of the respondents? and (ii) whether Smt. Gulaichi was the widow and Harish Chand was the son of Sachchan?. The petitioner in order to prove his case, has filed certified copies of Kutumb Register, Death Register, Voter List of 1968-69. In order to get thumb impressions of Sachchan on sale deed dated 09.10.1967, tallied from his admitted thumb impressions, the petitioner filed sale deeds dated 31.03.1959 and 03.03.1964, executed by Sachchan. As the respondents withheld the original sale deed dated 09.10.1967, the petitioner summoned Register No. 8 relating to sale deed dated 09.10.1967, from office of Sub-Registrar. He filed Expert Reports of Sri. M.M. Kakkar, a Fingerprint & Hand Writing Expert and Sri S.N. Mukherji a Government Fingerprint & Hand Writing Expert, who had examined thumb impression of Sachchan on the sale deed dated 09.10.1967, in connection with a criminal case, i.e. Crime No. 32/1968, which was later on investigated by C.B.C.I.D. who has submitted charge sheet against the respondents and the witnesses of the sale deed. They proved their reports. The petitioner also examined Brij Kishore Maurya, Panchayat Secretary (PW-1), Naga Chaudhary, Pradhan of the village (PW-2), to prove Extracts of Death Register, Kutumb Register and Electoral Roll. Smt. Gulaichi also entered into the witness box as PW-3 and stated that she was widow of Sachchan and the petitioner was the son of Sachchan. The statement of Smt. Gulaichi was relevant to prove the relationship by conduct under Section 50 of Evidence Act, 1872. From the evidence of the petitioner, it was fully proved that Sachchan died on 08.10.1967 and the petitioner was the son of Sachchan and after his death, he had inherited the property. As Sachchan had died on 08.10.1967, sale deed dated 09.10.1967 was executed by some imposter of Sachchan. Deputy Director of Consolidation relied upon the report of Sri R.R. Sahai, without even referring to the reports of Sri M.M. Kakkar and Sri S.N. Mukherji. Deputy Director of Consolidation ought to have tallied the report of expert from the disputed fingerprint and then would have recorded his own independent finding, about genuineness of the thumb impression of Sachchan on the sale deed dated 08.10.1967. He relied upon the report of Sri R.R. Sahai and without assigning any reason discarded reports of Sri M.M. Kakkar and Sri S.N. Mukherji. Sri R.R. Sahai, had no degree relating to examination of fingerprints, as admitted by him in his oral statement. His report cannot be termed as an expert report and is not admissible under Section 45 of Evidence Act, 1872. Judgment of Deputy Director of Consolidation is based upon

inadmissible evidence, as well as ignoring the admissible evidence on record. He has illegally set aside findings of facts of appellate court without assigning any reason. His order is liable to be set aside.

7. I have considered the arguments of the counsel for the parties and examined the record. Consolidation Officer and Assistant Settlement Officer Consolidation, relying upon Death Register and Kutumb Register, which were proved by Brij Kishore Maurya, Panchayat Secretary (PW-1), Naga Chaudhary, Pradhan of the village (PW-2), held that Sachchan died on 08.10.1967. Deputy Director of Consolidation, without referring direct evidence relating date of death of Sachchan held that Sachchan was alive on 09.10.1967, as his thumb impression on Register No. 8 of the sale deed 09.10.1967 was tallying with his admitted thumb impression. Instead of dealing with direct evidence, he drew inference in respect of issue of death of Sachchan. Course adopted by Deputy Director of Consolidation in this respect is illegal. Findings of Consolidation Officer and Assistant Settlement Officer Consolidation in this respect do not suffer from any illegality. It has been illegally set aside on the basis of inference by respondent-1.

8. The respondents based their title on sale deed dated 09.10.1967, allegedly executed by Sachchan in their favour. The petitioner denied execution of sale deed by Sachchan and stated that after death of Sachchan sale deed was manufactured. Burden was upon the respondents to prove due execution of the sale deed. They did not file original sale deed. Akshaiber (DW-3), father of the respondents stated that the respondents, who were 12 years and 9 years old at the time of sale deed, himself negotiated and finalized deal for sale deed. At the time of sale deed, he did not went to the office of Sub-Registrar for execution/registration of sale deed. Original sale deed was lost, in the way of Salempur but no information relating to its missing was given to police. Sudeen (DW-1), marginal witness, in his statement recorded on 08.02.1977 has stated that sale deed was executed one year prior to his statement. Jeeut (DW-2), the other marginal witness was resident of about 4 k.m. away from village Bagahi and he was not knowing either to Sachchan or Suresh and Subhas, who were minors at that time. His being marginal witness is not a natural conduct. On the basis of these evidence, appellate court found that due execution of sale deed was not proved by the respondents. From aforesaid facts it is clear that the respondents have not produced best evidence in their possession as such adverse inference is liable to be drawn against them under Section 114 Illustration (g) of Evidence Act, 1872. Deal of sale deed was negotiated and finalized by minors of 12 and 9 years old, which is also not a natural conduct. Explanation as required under Section 65 (f) of Evidence Act, 1872, to adduce secondary evidence, was not given. Statement of marginal witnesses were not reliable to prove due execution of sale deed. Deputy Director of Consolidation illegally reversed the findings of appellate court without considering aforesaid circumstances in cursory manner, only relying upon exert evidence.

9. Supreme Court in **Gurmukh Ram Madan (Dr) v. Bhagwan Das Madan**, AIR 1998 SC 2776, held that a sale deed is not a public document and its secondary evidence could not have been let in evidence except after explanation as to the non-availability of the original in an appropriate manner. In **J. Yashoda v. K. Shobha Rani**, (2007) 5 SCC 730, held that secondary evidence, is an evidence which may be given in the absence of that better evidence which law

requires to be given first, when a proper explanation of its absence is given. The rule which is the most universal, namely, that the best evidence the nature of the case will admit shall be produced, decides this objection. That rule only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it. Section 65 deals with the proof of the contents of the documents tendered in evidence. In order to enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. Under Section 64, documents are to be provided (sic proved) by primary evidence. Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the section. In **Tukaram S. Dighole v. Manikrao Shivaji Kokate, AIR 2010 SC 965**, held that the general rule is that secondary evidence is not admissible until the non-production of primary evidence is satisfactorily proved. However, clause (e) of Section 65, which enumerates the cases in which secondary evidence relating to documents may be given, carves out an exception to the extent that when the original document is a "public document" secondary evidence is admissible even though the original document is still in existence and available. In **H. Siddiqui v. A. Ramalingam, AIR 2011 SC 1492**, held that the provisions of Section 65 of the 1872 Act provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where the original documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non-production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon.

10. Deputy Director of Consolidation based his findings only on expert evidence. So far as expert evidence relating to thumb impression of Sachchan on the disputed sale deed is concerned, expert evidence is admissible under Section 45 of Evidence Act, 1872, relevant part of which is quoted below:-

45. Opinions of experts.--When the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts.

Such persons are called experts.

Illustrations

(c) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.

11. Sri R.R. Sahai, expert of the respondents, in his statement has admitted that he had not done any special course relating to examination of Handwriting and Finger Prints. His report cannot be treated as expert evidence within meaning of Section 45 of the Act. He further stated that photographs taken by him for the purposes of its enlargement, were blurred. If the photograph was blurred, then his report in respect of number of ridges in between delta and core, is not reliable. His report is not reliable also. In any case, the Court has to form his opinion in respect of genuineness of thumb impression, by examining original thumb impression with the help of expert report and not to take expert report as gospel truth as done in present case. Deputy Director of Consolidation has ignored reports and statements of Sri M.M. Kakkar and Sri S.N. Mukherji, evidence of the petitioner, on the ground that number of ridges in between delta and core in these reports are not tallying with the report of Sri R.R. Sahai. Supreme Court in **State of Gujrat Vs. Vinaya Chandra Chhota Lal Pathi, AIR 1967 SC 778**, held that sole evidence of a handwriting expert is not normally sufficient for recording a definite finding that the writing being of certain person or not. In **Lalit Popli v. Canara Bank, (2003) 3 SCC 583**, held that it is to be noted that under Sections 45 and 47 of the Evidence Act, the court has to take a view on the opinion of others, whereas under Section 73 of the said Act, the court by its own comparison of writings can form its opinion. Evidence of the identity of handwriting is dealt with in three sections of the Evidence Act. They are Sections 45, 47 and 73. Both under Sections 45 and 47 the evidence is an opinion. In the former case it is by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experiences. In both the cases, the court is required to satisfy itself by such means as are open to conclude that the opinion may be acted upon. Irrespective of an opinion of the handwriting expert, the court can compare the admitted writing with the disputed writing and come to its own independent conclusion. Such exercise of comparison is permissible under Section 73 of the Evidence Act. Ordinarily, Sections 45 and 73 are complementary to each other. Evidence of the handwriting expert need not be invariably corroborated. It is for the court to decide whether to accept such an uncorroborated evidence or not. In **Ajay Kumar Parmar v. State of Rajasthan, (2012) 12 SCC 406**, held that where there is an opinion whether of an expert, or of any witness, the court may then apply its own observation by comparing the signatures, or handwritings for providing a decisive weight or influence to its decision.

12. The respondents failed to prove due execution of sale deed dated 09.10.1967 by Sachchan. Findings of Consolidation Officer and Assistant Settlement Officer Consolidation in respect respect has been illegally set aside by Deputy Director of Consolidation, relying upon inadmissible evidence and ignoring relevant evidence.

13. So far as Smt. Gulaichi, being widow and Harish Chandra being son of Sachchan is concerned, Smt. Gulaichi entered into witness box. Her name was recorded in Kutumb Register and Electoral Roll as wife of Sachchan, which were proved by Brij Kishore Maurya (PW-1) and Naga Chaudhary (PW-2). Sudeen (DW-1) admitted that Smt. Prem Sundari was widow of Sachchan. According to the respondents, Smt. Prem Sundari was impersonating herself as Smt. Gulaichi. Consolidation Officer ignored the statement of Smt. Gulaichi on the ground that she could not state the name of maternal uncle of Sachchan. Appellate court relied upon her statement and other evidence on record and held that Smt. Gulaichi was widow and Harish Chandra was son of Sachchan. For a rustic and illiterate lady, who had become widow within a short period, it is not possible to remember name of relations of her husband. Findings of appellate court in this respect, does not suffer from any illegality. Deputy Director of Consolidation has not decided this issue as he had found that sale deed dated 09.10.1967 was valid.

14. In view of aforesaid discussions, writ petition succeeds and is **allowed**. Order of Deputy Director of Consolidation dated 01.07.2006 is set aside. The order of Assistant Settlement Officer Consolidation dated 10.03.2005 is affirmed.

(2016) 8 ILRA 788
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.08.2016

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Writ C No.- 37394 Of 2016

Nidhi Kaushik & Ors.

...Petitioners

Versus

Union Of India & Ors.

...Respondents

Counsel for the Petitioners:

Ram Kumar Dubey

Counsel for the Respondents:

C.S.C., A.S.G.I., Pratik J. Nagar

Headnotes:

Constitution of India – Article 226 – Writ of Mandamus – Maintainability – Private unaided minority educational institution – Scope of interference – Writ jurisdiction can be exercised only for enforcement of public duty – Private law rights or contractual matters not enforceable unless public law element is involved.

Education Law – Right of Children to Free and Compulsory Education Act, 2009 – Claim for free education – Minority educational institution – Applicability – In view of law laid down by the Supreme Court in *Pramati Educational and Cultural Trust v. Union of India*, provisions of the Act of 2009 are not applicable to minority institutions, whether aided or unaided – Students cannot insist admission or continuation of study free of cost in such institution.

Admission in School – Students granted opportunity to complete admission formalities – Failure to deposit prescribed fees and comply with institutional requirements – Petitioners seeking direction to continue studies without payment of fees – Held, where management had already allowed admission but petitioners failed to fulfil formalities, Court would not issue mandamus compelling institution to provide education free of cost.

Constitution of India – Article 12 – Private educational institutions – Not 'State' – Writ jurisdiction against such institutions limited to enforcement of statutory or public duty – Reliance placed on principles laid down in *Federal Bank Ltd. v. Sagar Thomas* and other precedents.

Held: Petitioners, who are minor children, sought a direction to allow them to pursue studies in respondent minority institution without payment of fees under the Right of Children to Free and Compulsory Education Act, 2009. The institution was declared a minority institution. In view of the judgment of the Supreme Court in *Pramati Educational and Cultural Trust v. Union of India*, the provisions of the 2009 Act are not applicable to minority institutions. Further, petitioners failed to complete admission formalities and deposit fees despite opportunity granted by the institution. No enforceable public law right being established, writ of mandamus cannot be issued.

Case Law discussed:

Pramati Educational and Cultural Trust v. Union of India;

Federal Bank Ltd. v. Sagar Thomas;

Praga Tools Corporation v. C.V. Imanuel;

Andi Mukta Satguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani;
K.K. Saxena v. International Commission on Irrigation and Drainage;
Binny Ltd. v. V. Sadasivan;
M.K. Gandhi v. Director of Education (Secondary), U.P.;
Committee of Management, Delhi Public School v. M.K. Gandhi;
Ramesh Ahluwalia v. State of Punjab;
Vatsal Gupta v. State of U.P.;
Master Satyam Gandhi v. Union Territory, Chandigarh.

Procedure: Petition under Article 226 of the Constitution seeking a direction to respondents to permit petitioners to pursue studies in Classes XI, IX and VI in respondent institution free of cost under the Right of Children to Free and Compulsory Education Act, 2009.

Result: Writ Petition dismissed. No order as to costs.
(Delivered by Hon'ble Suneet Kumar, J.)

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

1. Sri Amit Negi, has put in appearance on behalf of sixth respondent, Sri V.P. Mishra holding brief of Sri Pratik J. Nagar has put in appearance on behalf of second respondent and learned Standing Counsel has accepted notice on behalf of respondent nos. 3,4 and 5.

2. On the consent of the parties, the petition is being decided without calling for counter affidavit as per Rule of the Court.

3. The petitioners, are three in number and are minor children of Vijay Kumar Sharma (Kaushik), who have approached this Court seeking a direction to the respondents to permit the petitioners to pursue course of standard XI, IX and VI respectively, with the sixth respondent, Bishop Johnston School & College, Civil Lines, Allahabad¹. The Institution is affiliated with the second respondent, Council for Indian School Certificate Examinations, New Delhi². The petitioners would insist that they may pursue their course with the respondent Institution free of cost pursuant to the provision of Right of Children to Free and Compulsory Education Act 2009³.

4. Sri Negi, learned counsel appearing for the sixth respondent would contend that the institution has been declared as a minority institution vide communication dated 3 April 2008, issued by the National Commission for Minority Educational Institutions. The first petitioner is a regular student of the Institution, she passed her Xth examination, thereafter, was granted admission in XI standard, however, she did not appear to complete the formalities for admission. The petitioner no. 2 and 3 were studying in some other institution and had approached the respondent Institution for admission in class IX and VI respectively, which was allowed by the management though petitioner no. 2 and 3 failed to qualify the entrance examination. However, considering the fact that they are girl students, their case was considered sympathetically by the Institution and were granted admission. However, parents of the petitioners did not complete the formalities for admission despite having being given opportunity, further, the fee prescribed by the Institution for the respective standard has not yet been deposited.

5. Sri Negi would further contend that the management of the Institution has no personal grievance or grudge against the petitioners or their parents, in the event, the petitioners are prepared to comply with the rules and regulation of the Institution and deposit the course fee regularly, the Institution would have no grudge against them.

6. Sri Nagar, learned counsel appearing for the affiliating Board would submit that the petition would not be maintainable against a private institution, reliance is placed on a Full Bench decision rendered in **M.K. Gandhi and others Vs. Director of Education (Secondary), U.P., Lucknow and others**⁴.

7. On a specific query to the learned counsel for the petitioner as to whether petitioners are prepared to deposit the fee within a stipulated time, learned counsel for the petitioners would contend that the petitioners intend to deposit the fee but due to certain financial difficulty, they are unable to deposit the fee immediately, however, the learned counsel would not specify as to when the fee would be deposited. He would rather insist that under Act 2009, the children upto age of 14 years have a right to pursue education in the Institution free of cost, therefore, would urge that they may be permitted to study free of cost.

8. Rival submission falls for consideration.

8A. The question that arises for determination is as to whether the petitioners are entitled to free education under Act 2009?

9. The contesting parties would not dispute that the Institution is a minority Institution established and administered by a minority community. Sri Negi would contend that the matter has been settled by the Constitution Bench of the Hon'ble Supreme Court in **Pramati Educational and Cultural Trust Vs. Union of India**⁵, wherein, it has been held that the provision pertaining to admit 25% of students belonging to marginalised section of the society would not apply to the minority institution.

10. In **Federal Bank Ltd. v. Sagar Thomas & others**⁶ Supreme Court culled out the categories of body/ persons who would be amenable to writ jurisdiction of the High Court. This can be found in para 18 of the judgment, specifying eight categories. Para 18 is extracted:

"18. From the decisions referred to above, the position that emerges is that a writ petition under Article 226 of the Constitution of India may be maintainable against (i) the State (Government); (ii) an authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed and owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature; and (viii) a person or a body under liability to discharge any function under any statute, to compel it to perform such a statutory function."

11. The Court clarified that though writ can be issued against any private body or person, the scope of mandamus is limited to enforcement of public duty. It is the nature of duty performed by such person/body which is the determinative factor as the Court is to enforce the said duty, therefore, the identity of the authority against whom the right is sought is not relevant. Such duty, the Court clarified, can either be statutory or even otherwise, but, there has to be public law element in the action of that body.

12. Where a person or authority is a 'State' within the meaning of Article 12 of the Constitution, admittedly a writ petition under Article 226 would lie against such a person or body, however, even in such cases writ would not lie to enforce private law rights, therefore, before issuing any writ, particularly writ of mandamus, the Court has to satisfy that action of such an authority, which is challenged, is in the domain of public law as distinguished from private law. (Ref: *Praga Tools Corporation v. C.V. Imanuel*⁷, *Andi Mukta Satguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and others vs. V.R. Rudani and others*⁸ and *K.K. Saxena vs. International Commission on Irrigation and drainage*⁹ and *Binny Ltd. & another v. V. Sadasivan & others*¹⁰).

13. Full Bench of this Court in *M.K. Gandhi*, upon considering large number of judgments of the Supreme Court, opined that private unaided intermediate institution would not be a 'State' within the meaning of Article 12 of the Constitution, however, the Central Board of Secondary Education¹¹ was held to be a State within the meaning of Article 12 of the Constitution, therefore, was amenable to the writ jurisdiction. The service conditions or the contract of service of the teachers appointed by the private school is not enforceable in writ jurisdiction, the remedy would lie before the competent civil court.

14. The Full Bench decision was challenged before the Supreme Court in *Committee of Management, Delhi Public School & Ors. Vs. M.K. Gandhi & Anr.*¹², the Court affirmed part of the judgment holding that the writ petition against Delhi Public School was not maintainable, however, set aside other part holding that the writ petition is maintainable against the Central Board of Secondary Education (CBSE).

15. In *Ramesh Ahluwalia vs State of Punjab and others*¹³ the petition under Article 226 of the Constitution against private unaided educational institution was held to be maintainable on the ground of performance of public functions.

16. In *Vatsal Gupta Vs. State of U.P and others*¹⁴, the Single Judge declined to issue a writ of mandamus to a private minority unaided institution refusing to grant admission to the student (petitioner therein) to standard XI for the reason that rules of the institution for admitting the students is not a "positive obligation based on public law element....., the fact that a writ petition is maintainable under Article 226 of the Constitution does not ipso facto lead to the issuance of a writ". The petition was consequently dismissed as it was held that the admission to standard XI is a fresh admission and not an automatic promotion.

17. In *Pramati Educational*, the Constitution Bench was called upon to answer the following reference :

(i) Whether by inserting clause (5) in Article 15 of the Constitution by the Constitution (Ninety-third Amendment) Act, 2005, Parliament has altered the basic structure or framework of the Constitution.

(ii) Whether by inserting Article 21A of the Constitution by the Constitution (Eighty-Sixth Amendment) Act, 2002, Parliament has altered the basic structure or framework of the Constitution.

18. The Court answered the reference (para-47) holding therein that clause (5) of Article 15 of the Constitution and the Constitution (Eighty-Sixth Amendment) Act, 2002 inserting Article 21A of the Constitution do not alter the basic structure or framework of the Constitution and is constitutionally valid, further, Act, 2009 is not ultra vires to Article 19(1)(g) of the Constitution. However, insofar as Act 2009 applies to minority schools, aided or unaided, covered under clause (1) of Article 30 of the Constitution is ultra vires the Constitution.

"In the result, we hold that the Constitution (Ninetythird Amendment) Act, 2005 inserting clause (5) of Article 15 of the Constitution and the Constitution (Eighty-Sixth Amendment) Act, 2002 inserting Article 21A of the Constitution do not alter the basic structure or framework of the Constitution and are constitutionally valid. We also hold that the 2009 Act is not ultra vires Article 19(1)(g) of the Constitution. We, however, hold that the 2009 Act insofar as it applies to minority schools, aided or unaided, covered under clause (1) of Article 30 of the Constitution is ultra vires the Constitution."

19. In view of the statement of law rendered in **Pramati Educational**, the students cannot insist free education as a matter of right in a private minority institution being aided or unaided.

20. In **Master Satyam Gandhi v. Union Territory, Chandigarh and others**¹⁵, held as follows:

"Before parting with the order, it goes without saying that the students who study up to Class X in any school whether aided or non-aided, such students are entitled to get admission in Class XI in the same school unless he or she declines before the admission is closed. However, in which stream they are to be admitted, it depends upon their merits and performance that shall be decided by the school authority."

21. The appellant before the Supreme Court was Class X student of a private unaided school affiliated to CBSE. The Institution refused to grant admission to Class XI in 'medical stream' considering his academic performance and grades of Class X, however, was offered seat in 'commerce stream' to which the appellant refused to take admission, consequently, High Court dismissed the petition refusing to grant relief sought by the appellant by issuing appropriate writ directing the school to admit the appellant even in commerce stream. The Supreme Court dismissed the appeal, upheld the order of the High Court, but held that a regular student of the institution is entitled to admission in standard XI, therefore, the observation in **Vatsal Gupta** that the admission in class XI is a fresh admission and no writ would lie is in the teeth of **Master Satyam Gandhi** case.

22. Having considered the statement of law, since the petitioners themselves have refused to take admission in the respective standard despite management admitting them, therefore, this Court declines to interfere in the matter.

23. The petition being devoid of merit is accordingly **dismissed**.

24. No order as to costs.

(2016) 8 ILRA 793
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.08.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE KAUSHAL JAYENDRA THAKER, J.

Writ Tax No.- 1089 Of 2001

M/s Simbhaoli Sugar Mills Ltd., Ghaziabad	...Petitioner
Versus	
State Of U.P. & Ors.	...Respondents

Counsel for the Petitioner:

Neeraj Sharma, B.J. Agarwal, Nikhil Agarwal

Counsel for the Respondents:

C.S.C., Avinash Tripathi, U.S. Awasthi

Procedure:

Writ petition under Article 226 of the Constitution challenging the demand notice/order dated 05.10.2001 issued by the Assistant Excise Commissioner, Simbhaoli Distillery, Ghaziabad demanding penal interest of Rs. 9,25,508.81/- on alleged delayed payment of excise duty relating to transit wastage for the period 1979-80 to 1998-99.

Citation:

M/s Simbhaoli Sugar Mills Ltd. v. State of U.P. & Others, **Writ Tax No. 1089 of 2001, decided on 11.08.2016 (All.)**

Case Law Discussed:

New Delhi Municipal Committee v. Kalu Ram & Another, (1976) 3 SCC 401
M/s Mohan Meakin Limited v. State of U.P. & Others, Writ (Tax) No. 809 of 2012

Headnote:

Excise Act, 1910 (U.P.) – Section 38-A – Interest on arrears of excise revenue – Liability arises only after determination and demand.

Excise duty on excess transit wastage becomes “excise revenue” only when it is **determined and imposed by the competent authority** in accordance with the relevant rules. The expression “**becomes payable**” in Section 38-A means “**legally recoverable**”, i.e., after determination of liability.

Where the Excise Authorities for the first time determined and demanded excise duty on 30.08.2001 for alleged excess transit wastage relating to the period 1979-80 to 1998-99, and the petitioner deposited the demanded duty within one month, the amount cannot be treated as arrears attracting interest under Section 38-A.

In the absence of any earlier determination or demand showing that excise revenue had become payable before 30.08.2001, levy of penal interest for the prior period was **illegal and unsustainable**.

The impugned demand notice dated 05.10.2001 charging penal interest was liable to be quashed.

Result:

Writ petition allowed.

Demand notice/order dated 05.10.2001 imposing penal interest set aside.

(Delivered by Hon'ble Sudhir Agarwal, J.)

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Kaushal Jayendra Thaker, J.)

1. Heard Sri Nikhil Agarwal, learned counsel for petitioner and Sri A.C. Tripathi, counsel for respondents.

2. Writ petition is directed against demand notice/order dated 05.10.2001 (annexure 3 to the writ petition) whereby Assistant Excise Commissioner, Simbhaoli Distillery, Ghaziabad has required petitioner to deposit penal interest of Rs. 9,25,508.81/- on account of transit fee for the Year 1979-80 to 1998-99 for the loss of excise duty of Rs. 8,65,557.50/-.

3. Brief facts giving rise to present dispute are as under:-

4. Petitioner M/s Simbhaoli Sugar Mills Ltd., a Company engaged in manufacture and sale of excisable goods, filed writ petition challenging cost of transit wastage duty on rectified spirit and IMFL. It was dismissed by Court and appeal preferred was also dismissed by Supreme Court on 29.03.1995. Assistant Excise Commissioner, Simbhaoli Distillery, respondent 3, for the first time issued a demand notice dated 30.08.2001 demanding export duty on transit wastage to the tune of Rs. 8,87,648.50/- for the period 1979-80 to 1998-99. On 12.12.2001, respondent 3 rectified the amount to Rs. 8,65,557.50/-. The aforesaid amount was deposited on 12.09.2001. Thereafter impugned demand notice dated 05.10.2001 has been raised charging penal interest on the alleged delayed payment of excise duty.

5. It is contended before us is that liability to pay excise duty would arise only when a demand is raised and if it is not paid within three months from the date of demand, penal interest is payable. In the present case, for the first time, demand was raised on 30.08.2001 and within one month thereof petitioner deposited the amount, hence no penal interest would be paid. In this regard Section 38-A inserted by Section (2) of U.P. Act no. 7 of 1985 in U.P. Excise Act, 1910 (hereinafter referred to as 'Act 1910') is relied.

6. The facts are not in dispute. The dispute revolves around interpretation of Section 38-A of Act 1910, which reads as under:-

"38-A. Interest on arrears of excise revenue-(1) Where any **excise revenue** has not been paid **within three months from the date on which it becomes payable**, interest at such rate not exceeding twenty-four percent per annum, as may be prescribed, shall be **payable from the date such excise revenue becomes payable** till the date of actual payment:

Provided that until a higher rate is prescribed, the rate of interest will be eighteen percent per annum;

Provided further that in respect of an excise revenue which became payable before the commencement of the Uttar Pradesh Excise (Amendment) Act, 1985 interest at the said rate shall be payable from the date of such commencement if the excise revenue is not paid within 3 months of the said date."

Explanation- Nothing in this sub-section shall be construed to affect the payment of interest under an agreement, the terms of an auction or, a decree of the Court, passed before the date of commencement of the Uttar Pradesh Excise (Amendment) Act, 1985 or which may be passed after the date of such commencement, in suits or proceedings filed before the said date.

(2) Provisions of Section 39 shall mutatis mutandis apply to realisation of such interest as they apply to realisation of excise revenue.

(emphasis added)

7. 'Excise Revenue' under Section 3(1) has been defined as under:-

"excise revenue" means revenue derived or derivable from any duty, fee, tax, fine (other than a fine imposed by a Court of law), or confiscation imposed or ordered under the provisions of this Act, or of any other law for the time being in force relating to liquor or intoxicating drugs;"

(emphasis added)

8. It shows that a duty, fee, tax, fine or confiscation imposed or ordered under the provisions of Act 1910 shall constitute "excise revenue" if it relates to liquor or intoxicating drugs. An excise duty will partake nature of "excise revenue" only when it is imposed or ordered under the provisions of Act 1910 or any other law for the time being in force. If it is not paid within three months from the date of imposition or order then interest is payable.

9. Further Section 38-A is attracted when excise revenue becomes payable. Vide Explanation; Section 38-A, term 'payable' has been defined as "Interest is payable where any excise revenue has not been paid within three months from the date on which it becomes payable."

10. The term 'becomes payable' used under Section 38-A has been considered in **M/s Mohan Meakin Limited Vs State of U.P. and others, Writ (Tax) 809 of 2012** and it is held that "becomes payable" means "legally recoverable". Court said "excise revenue becomes payable when it is determined". Court relied on an earlier decision of Supreme Court in **New Delhi Municipal Committee Vs. Kalu Ram and another, 1976 (3) SCC 401** wherein Court construed the word 'payable' and held that it means "legally recoverable".

11. Further Rule 814 of Excise Manual dealing with allowances for loss of personal reads as under:-

"Rule 814. Allowance for loss in transit- An allowance up to 0.5 percent will be made for the actual loss in transit, by leakage, evaporation or other unavoidable cause, of spirit transported or exported under bond in wooden casks or metal vessels.

The allowance to be made under this rule will be determined by deducting from the quantity of spirit despatched from the distillery, the quantity received at the place of destination, both quantities being stated in terms of alcohol. The allowance will be calculated on the quantity contained in each wooden cask metal vessels comprised in a consignment. If the report of the officer by whom the consignment of spirit has been gauged and proved at its destination shows that the wastage has occurred above the limit allowable the person executing the bond shall be liable to pay duty on so much of the deficiency as in excess of the allowance. The rate of duty leviable shall be the highest rate of duty leviable on such spirit in this State.

When the wastage does not exceed the prescribed limit, no action need be taken by the Officer-in-charge of the Distillery or bonded warehouse, as the case may be, but when the wastage exceeds the allowable limit, the Officer-in-charge of the Distillery shall obtain the explanation of the Distillers or the person executing the bond and forward the same together with a full report of the circumstances to the Assistant Excise Commissioner or the Deputy Excise Commissioner of the charge in which the Distillery is situated. The Assistant Excise Commissioner or the Deputy Excise Commissioner shall charge duty on excess wastage provided that when the total wastage in a consignment is within the allowable limit. Deputy/Assistant Excise Commissioner of the charge may write off the excess wastage in any particular wooden cask or metal vessel"

(emphasis added)

12. Reading of the aforesaid provision makes it clear that permissible allowance for loss in transit has to be determined and calculated by competent authority so as to arrive at inference

whether the transit wastage is within permissible limit. Further Excise Officials are supposed to charge duty which obviously can be done by giving a notice of demand.

13. It is not the case of respondents that any determination was made for the period 1979-80 to 1998-99 at any earlier point of time. On the contrary it has been said in counter affidavit, in para 3(iii) that after decision of Supreme Court in dismissing appeal on 28.03.95, Excise Authorities determined amount of excise duty payable on the excess transit wastage and raised demand by letter dated 30.08.2001.

14. In the written argument submitted by learned Standing Counsel, also it is not the case that excise duty on account of excess transit loss was ever earlier determined by competent authority. It is also not the case that it is such a computed item that on its own petitioner was liable to pay excise duty at a particular point of time, without demand or order.

15. On the contrary, it is explained that Rule 633 of U.P. Excise Rules, provides for export of foreign liquor manufactured at a distillery in Uttar Pradesh to any other place in India. Collector of exporting District grants pass to such export in Form PD-25. Consignment is checked and verified at the place of destination. Importer produces certificate to Collector of exporting District regarding quantity certified by the officer which reached destination. Thereafter wastage is determined consignment wise, duly certified and thereafter only Exporter is liable to pay excise duty on consignment wise which is summed and totaled year wise. It is said that determination of excise duty on wastage is done consignment- wise which on reaching destination is certified by Excise Officer posted in the distillery as well as the place where consignment is delivered. Rules 813 and 814 which require determination of wastage and payment of excise duty are also referred.

16. Liability to pay excise duty on excess transit wastage has not been disputed before us but the question is, whether there is any determination at any point of time earlier to 30.08.2001 making "excise revenue" payable by petitioner on any date prior to 30.08.2001. No such determination was made by Excise Authorities and communicated to petitioner nor has been placed before us nor pleaded in the counter affidavit nor even referred to in the written arguments.

17. In order to hold that "excise revenue" was payable by petitioner at any earlier point of time than 30.08.2001, it was incumbent upon respondents to show that as per U.P. Excise Rules, determination of excess transit wastage was made by competent authority and communicated to petitioner, so as to make him liable to pay prescribed excise duty thereon.

18. In the present case, counter affidavit is conspicuously silent on this aspect and the only letter by which such determination has been shown for the first time is dated 30.08.2001 and admittedly, within one month thereafter the demanded duty has been paid.

19. The extent of excess transit loss may result in creating a liability upon petitioner to pay excise duty but unless such duty is imposed or ordered by competent authority, after determination as required under Rules, it cannot be said that it is an "excise revenue" payable and, hence, liability

of interest will not arise from a date prior thereto. It is for this reason, that respondents have not disclosed in the entire counter affidavit any date on which such "excise revenue" was payable for the period of almost ten years, for which cumulative interest has been charged for the entire period from 1979-80 to 1998-99.

20. For the first time, excise duty was ordered by order dated 30.08.2001 and since it has been paid within one month thereof, we do not find that the petitioner is liable to pay interest under Section 38-A of Act 1910. No such interest is attracted in the case in hand.

21. Writ petition is allowed. Impugned demand notice/order dated 05.10.2001 is hereby set aside.

22. However, before parting, we may observe that though Supreme Court dismissed appeal admittedly on 28.03.1995, still concerned excise authority took more than six years time in raising demand of excise duty. Had it been ordered earlier, State would not have lost benefit of amount of "excise revenue" which would have become payable earlier by petitioner.

23. Apparently here is a case of clear lack of negligence on the part of respondent 3 keeping the matter in hibernation for more than six years and thereafter determining excise duty only by order dated 30.08.2001. Therefore, we direct Principal Secretary, Excise, U.P. Government, to make appropriate inquiry in the matter and recover loss, if any, suffered by State from concerned officer responsible for such wrong, after holding inquiry in accordance with law.

(2016) 8 ILRA 799
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.08.2016

BEFORE

THE HON'BLE MRS. VIJAY LAKSHMI, J.

Application U/S 482 No.- 2028 Of 2001

Jagdish Kumar & Ors. ...Applicants
State Of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:

D.D. Gupta, Ajatshatru Pandey, G.S. Chaturvedi

Counsel for the Opposite Parties:

A.G.A., Sameer Jain

Section 482 Cr.P.C. – Quashing of cognizance in dowry death case – Applicants sought quashing of the cognizance order dated 20.1.2001 passed by the C.J.M., Varanasi in Case No. 255 of 2001 (State v. Ravi Kumar & Others), arising out of Case Crime No. 113 of 2000, under Sections 498A, 304B I.P.C. and 3/4 Dowry Prohibition Act, P.S. Cantt., district Varanasi. FIR alleged cruelty and dowry demand, whereas the defence relied on a dying declaration recorded by the Settlement Officer (Consolidation), Varanasi, after medical certification of the declarant's consciousness, in which the deceased stated that she accidentally caught fire while boiling milk for her child and no family member was present at that time, and her mother-in-law extinguished the fire. Applicants emphasized three weeks' delay in lodging the FIR and prior intimation sent by the husband through speed post to the police about an accidental burn, contending that there was no possibility of conviction and that continuation of proceedings would be an abuse of process and sheer wastage of court time. Held, while exercising inherent jurisdiction under Section 482 Cr.P.C., the High Court cannot assess the veracity, reliability or truthfulness of evidence such as a dying declaration or conduct a pre-trial evaluation of defence materials; at this stage only prima facie case is to be seen in light of settled Supreme Court precedents, and disputed defence must be tested by the trial court, where the accused have the remedy of moving an application for discharge. In view of the law laid down in R.P. Kapur v. State of Punjab, State of Haryana v. Bhajan Lal, State of Bihar v. P.P. Sharma, Zandu Pharmaceutical Works Ltd. v. Mohd. Saraful Haq and others and other authorities, the prayer for quashing the cognizance order was refused, though applicants were given liberty to appear before the trial court and seek bail, with a direction that bail be considered in light of Amrawati v. State of U.P. and Lal Kamendra Pratap Singh v. State of U.P., and that no coercive action be taken for 30 days.

Application Dismissed

Case Law discussed:

State of Orissa v. Bansidhar Singh, (1996) 2 SCC 194

R.P. Kapur v. State of Punjab, A.I.R. 1960 S.C. 866

State of Haryana v. Bhajan Lal, 1992 SCC (Cr.) 426

State of Bihar v. P.P. Sharma, 1992 SCC (Cr.) 192

Zandu Pharmaceutical Works Ltd. v. Mohd. Saraful Haq and another, 2005 SCC (Cr.) 283 (Para 10)

Amrawati and another v. State of U.P., 2004 (57) ALR 290 (FB)

Lal Kamendra Pratap Singh v. State of U.P., 2009 (3) ADJ 322 (SC)

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. Heard learned counsel for the applicants, learned A.G.A. for the State and learned counsel for O.P. No. 2. Perused the records.

2. The applicants, by means of this application under Section 482 Cr.P.C., have invoked the inherent jurisdiction of this Court with prayer to quash the cognizance order dated 20.1.2001 passed by the C.J.M. Varanasi, in Case No. 255 of 2001, State Vs. Ravi Kumar and others, arising out of Case Crime No. 113 of 2000, under Sections 498A, 304B I.P.C. and 3/4 D.P. Act, P.S. Cantt., district Varanasi.

3. The contention of learned counsel for the applicants is that the applicants are innocent and O.P. No. 2 has lodged a false FIR against them with a delay of three weeks without any plausible explanation for the same. Learned counsel has drawn the attention of this court to the dying declaration of the deceased, copy whereof has been annexed as Annexure no. 6 to the affidavit filed in support of the application, which shows that the deceased has clearly stated that while boiling milk for her child she accidentally caught fire and at that time no family member was present at home, however, her mother-in-law reached there and extinguished the fire. The further submission of learned counsel for the applicant is that the aforesaid dying declaration has been recorded in accordance with law by the Settlement Officer of Consolidation, Varanasi, after the Medical Officer, S.S.P.G. Hospital, Varanasi, certified that the patient remained conscious during and after such statement. It is next submitted by learned counsel for the applicant that prior to the lodging of the FIR the husband of the deceased had sent an information through speed post on 22.2.2000 to the police of P.S. Cantt., Varanasi, informing about the said occurrence, copy whereof has been annexed as Annexure no. 10 to the affidavit. Learned counsel has submitted that in view of the above facts, there is absolutely no possibility of conviction of the applicants and the criminal proceedings against the applicants will not only amount to a futile exercise but an abuse of the process of the court and sheer wastage of the precious time of the litigants, their counsel and the Court, hence the cognizance order and the entire proceedings of the case initiated in pursuance thereof be quashed.

4. Learned AGA and learned counsel for O.P. No. 2 have vehemently opposed the application by submitting that while exercising the inherent jurisdiction under section 482 Cr.P.C. this court cannot look into the minute factual details and it cannot examine the veracity, reliability and truthfulness of the evidence, which are to be adduced by the prosecution during trial and this court cannot quash the entire proceedings on the basis of any evidence (dying declaration in the present case) without even giving opportunity to the prosecution to duly prove that evidence.

5. Learned counsel for O.P. No. 2 has placed reliance on the law laid down by the Apex Court in the case of ***State of Orissa Vs. Bansidhar Singh, (1996) 2 SCC 194***, in which the Hon'ble Apex Court has held that "the veracity, reliability and truthfulness of the alleged dying declaration

would be tested only after the evidence is recorded in the court and if on proper evaluation of such evidence, the court comes to the conclusion that the dying declaration is truthful version of the deceased relating to the circumstances of his death, then there is no question of any further corroboration as the conviction can be founded only on such dying declaration."

6. In the wake of the aforesaid law laid down by the Hon'ble Apex Court this court while exercising the jurisdiction u/s 482 Cr.P.C. cannot judge the veracity, reliability and truthfulness of the alleged dying declaration. At this stage only prima facie case is to be seen in the light of the law laid down by Supreme Court in cases of ***R.P. Kapur Vs. State of Punjab, A.I.R. 1960 S.C. 866, State of Haryana Vs. Bhajan Lal, 1992 SCC (Cr.) 426, State of Bihar Vs. P.P.Sharma, 1992 SCC (Cr.) 192 and lastly Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another (Para-10) 2005 SCC (Cr.) 283.*** The submissions made by learned counsel for the applicants call for adjudication on pure questions of fact, which may be adequately adjudicated upon only by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court in this case. This Court does not deem it proper, and therefore cannot be persuaded to have a pre-trial before the actual begins. The disputed defence of the accused cannot be considered at this stage.

7. Moreover, the applicants have got a right of discharge by moving a proper application for the said purpose before the trial court and he is free to make all the submissions in the said discharge application before the Trial Court including those which have been canvassed by him before this Court in this application.

8. Accordingly the prayer for quashing the impugned cognizance order is refused.

9. However, it is directed that if the applicants appear before the court below and apply for bail within 30 days from today, the court below shall make endeavour to decide the bail application keeping in view the observations made by this Court in the Full Bench decision of ***Amrawati and another Vs. State of U.P. 2004 (57) ALR 290*** and affirmed by Hon'ble Supreme Court in the case of ***Lal Kamendra Pratap Singh Vs. State of U.P. 2009 (3) ADJ 322 (SC).***

10. For the aforesaid period of 30 days no coercive action shall be taken against the applicants.

11. With the aforesaid observations this application is finally disposed off.

Application U/S 482 No.- 14286 Of 2013

Deep Narayan & Anr. ...Applicants
Versus
State Of U.P. & Anr. ...Opposite Parties

Counsel for Applicants:
Rakesh Dubey, Rajiv Gupta

Counsel for Opposite Parties:
Govt. Advocate, Shashank Tripathi

Territorial Jurisdiction – Sections 177 to 179 Cr.P.C. – Offence under Section 498A I.P.C. being a Continuing Offence — Application under Section 482 Cr.P.C. filed to quash proceedings in a complaint case under Sections 498A, 323, 504, 506 I.P.C. and 3/4 D.P. Act, on the ground that the Magistrate at Kanpur Nagar lacked territorial jurisdiction as the alleged offence took place at Katni, M.P., the matrimonial home of the complainant's daughter – Held: The complaint discloses that the wife was subjected to cruelty for dowry demand at her matrimonial home and was thereafter left at her parental home at Kanpur with a threat that she would not be permitted to return unless the dowry demand was met; the offence under Section 498A I.P.C. being a continuing one, commencing at the matrimonial home and continuing to the parental home, is squarely covered by clause (c) of Section 178 and by Section 179 Cr.P.C. (relying on *Sunita Kumari Kashyap Vs. State of Bihar* and another, Criminal Appeal No. 917 of 2011; *Sujata Mukherjee (Smt) Vs. Prashant Kumar Mukherjee*, (1997) 5 SCC 30; and *State of M.P. Vs. Suresh Kaushal* and another, (2003) 11 SCC 126) – The Magistrate at Kanpur Nagar therefore has jurisdiction to try the case. (Paras 7, 11-24)

Effect of Prior Compromise Between Spouses – Fresh Cause of Action on Subsequent Harassment – Distinction from Cases of Permanent Separation — Contention that the summoning order could not survive an earlier compromise recorded between the parties at the Mediation Centre, pursuant to which a final report had been submitted – Held: A fresh dispute between husband and wife may arise at any time even after reunion following a compromise, giving rise to a fresh cause of action; this position may not hold where the spouses separate permanently after the compromise – The judgment in *Ruchi Agarwal Vs. Amit Kumar Agrawal and others*, 2005 SCC (Cri) 719, is distinguishable, being a case where the parties had permanently separated after compromise and the wife had accepted alimony in lieu of divorce, unlike the present case where the parties reunited and a fresh cause of action arose upon renewed harassment for dowry – Reliance on *Geeta Mehrotra and another Vs. State of U.P.*, (2012) 10 SCC 741, held not to assist the applicants on facts of the case. (Paras 8, 25-26)

Section 204(2) Cr.P.C. – Filing of List of Witnesses – Not a Condition Precedent to Institution of Complaint – Directory in Nature — Contention that the summoning order is vitiated for want of compliance with Section 204(2) Cr.P.C., as no list of witnesses was filed by the complainant before summons were issued – Held: The impugned order itself directs the complainant to file the list of witnesses and take

steps within seven days, summons being issuable thereafter only upon compliance, which is the normal procedure followed by the court's office; there is no material to show that summons were actually served without an accompanying list of witnesses – The requirement of Section 204(2) Cr.P.C. is that the list of witnesses be filed before issuance of summons and not along with the complaint, and any omission in this regard, where the purpose of the provision is otherwise served, is curable under Section 465 Cr.P.C. (relying on *Sardar Awtar Singh and others Vs. State of U.P. and others*, 2006 Cr.L.J. 715; *Krishna Kant Pathak Vs. State of U.P.*, 1995 ACC 14; and *Ved Prakash Vs. Sri Om*, Delhi High Court, decided on 31.10.2011, following *Abdul Hafiz Vs. Ghulam Mohi-ud-din*, 1997 Cri. L.J. 518). (Paras 9, 27-31)

Quashing of Proceedings under Section 482 Cr.P.C. – Scope – Case Not Falling Within Recognised Categories — Held: The case does not fall within any of the categories recognised by the Hon'ble Apex Court in its catena of judgments, the latest being *A.R.C.J. Vs. Nimra Carglass Technics (P) Ltd.*, (2016) 1 SCC 348, which would justify quashing of the proceedings – Prayer for quashing accordingly refused, with liberty to the applicants to apply for bail before the court below within six weeks, to be considered in light of the Full Bench decision in *Amrawati and another Vs. State of U.P.*, 2004 (57) ALR 290, as affirmed in *Lal Kamendra Pratap Singh Vs. State of U.P.*, 2009 (3) ADJ 322 (SC); no coercive action to be taken against the applicants for the said period of six weeks. (Paras 32-35)

Application Disposed off. (Para 36)

Case Law Discussed

1. Geeta Mehrotra and another Vs. State of U.P. (2012) 10 SCC 741
2. Ruchi Agarwal Vs. Amit Kumar Agrawal and others 2005 SCC (Cri) 719
3. Sunita Kumari Kashyap Vs. State of Bihar and another, Criminal Appeal No. 917 of 2011 (decided 11.4.2011)
4. Sujata Mukherjee (Smt) Vs. Prashant Kumar Mukherjee (1997) 5 SCC 30
5. State of M.P. Vs. Suresh Kaushal and another (2003) 11 SCC 126
6. Sardar Awtar Singh and others Vs. State of U.P. and others 2006 Cr.L.J. 715
7. Krishna Kant Pathak Vs. State of U.P. 1995 ACC 14
8. Ved Prakash Vs. Sri Om, Delhi High Court, decided on 31.10.2011
9. Abdul Hafiz Vs. Ghulam Mohi-ud-din 1997 Cri. L.J. 518
10. A.R.C.J. Vs. Nimra Carglass Technics (P) Ltd. (2016) 1 SCC 348
11. Amrawati and another Vs. State of U.P. 2004 (57) ALR 290 (Full Bench)
12. Lal Kamendra Pratap Singh Vs. State of U.P. 2009 (3) ADJ 322 (SC)

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. The applicants, by means of this application under Section 482 Cr.P.C., have invoked the inherent jurisdiction of this Court with prayer to quash the entire proceedings in Complaint Case No. 141 of 2012, *Ram Dulare Gaur Vs. Avadh Narayan and another*, under Sections 498A, 323, 504, 506 I.P.C. and 3/4 D. P. Act, P.S. Mahila Thana, district Kanpur Nagar, pending in the court of M.M. Court No. IV, Kanpur Nagar.

2. Counter and rejoinder affidavits have already been exchanged between the parties.

3. Heard learned counsel for the applicants, learned A.G.A. for the State and learned counsel for O.P. No. 2. Perused the records.

4. Learned counsel for the applicants has contended that the applicant nos. 1 and 2 are the real brothers, who are the Jeth and husband of the daughter of O.P. No. 2, respectively; the applicant no. 1 has no concern with the matrimonial dispute between his brother (applicant no. 2) and his wife i.e. the daughter of O.P. No. 2, Smt. Indira Gaur. Learned counsel has further submitted that the marriage between the applicant no. 2 and Smt. Indira Gaur was performed on 12.7.2008 at district Katni (M.P.) without any dowry. After the marriage, it transpired that Smt. Indira Gaur is a disabled lady. Despite that the applicant no. 2 was ready to cooperate with her. However, after sometime she lodged a first information report against the applicants and their family members making false and frivolous allegations. The matter was referred to Mediation Centre, Kanpur, and the dispute was settled between the parties. On the basis of the said compromise the I.O. submitted a final report in the court. On the said final report, the learned Magistrate issued notice to the complainant (O.P. No. 2) for filing his objection, if any. The O.P. No. 2 filed the objections/ protest petition, even though admitting the fact of compromise reached between the parties, alleging that the applicants, after the said compromise, started to ill-treat his daughter once again in connection with dowry demand.

5. The learned Magistrate treated the protest petition/ objection as a complaint and after recording the statements of the complainant and his daughter Smt. Indira Gaur under sections 200 and 202 Cr.P.C., summoned the applicants.

6. The aforesaid summoning order has been challenged before this court on three grounds:

(1) Lack of territorial jurisdiction to the Magistrate of Kanpur Nagar, as the offence alleged has taken place at Katni, M.P. Where the daughter of O.P. No. 2 was residing in her matrimonial home.

(2) The learned Magistrate, only on the basis of general and vague allegations made in the protest petition, with regard to dowry demand and even in absence of any injury report, has summoned the applicants without application of mind to the fact that the matter has already been settled between the parties by way of compromise. The learned counsel for the applicants has relied upon the judgments of the Hon'ble Apex Court reported in **(2012) 10 SCC 741, Geeta Mehrotra and another Vs. State of U.P.** and **2005 SCC (Cri) 719, Ruchi Agarwal Vs. Amit Kumar Agrawal and others** in support of this contention.

(3) The third ground on the basis of which learned counsel for the applicant has challenged the legality and correctness of impugned summoning order, is that, without following the mandate of sub-section 2 of section 204 Cr.P.C., which makes it compulsory for the complainant to file the list of witnesses, the Magistrate has issued summons, therefore, the impugned summoning order cannot be sustained. Learned counsel has contended that no list of prosecution witnesses was filed by the complainant, which fact is evident from perusal of the impugned order itself, which clearly shows that the learned Magistrate has directed the complainant to file the list of witnesses. He has contended that in absence of the list of prosecution witnesses,

the summoning of the applicants, being against the mandatory requirement of section 204(2) Cr.P.C. is bad in law and the same cannot be sustained.

7. Per contra, learned counsel for O.P. No. 2 has contested the aforesaid arguments on the ground that in the protest petition, it has been clearly alleged that after the compromise between the parties, the applicants again started harassment of the daughter of O.P. No. 2, therefore, he had to file protest petition against the final report, and as there was sufficient prima-facie material before the learned Magistrate, to summon the applicants, he, treating the protest petition as complaint case, rightly summoned the accused persons including the applicants. It does not make any difference that the dispute was earlier settled between the parties by way of compromise. Learned counsel for O.P. No. 2 has further submitted that the applicants have dishonestly grabbed the belongings of the daughter of O.P. No. 2 hence the offence under section 406 I.P.C. is fully made out against the applicants. Apart from that, the ingredients of sections 498A, 504, 506 I.P.C. being present in this case, the learned Magistrate did nothing wrong while summoning the applicants under these sections.

8. Considered the rival submissions of the parties.

9. In so far as the territorial jurisdiction of the Magistrate is concerned, there appears no force in the aforesaid submissions because the offence under section 498-A I.P.C. is a continuing offence, which may start at the matrimonial home of the bride and continue to her parental home where as a consequence of her maltreatment at the hands of her husband and in-laws, she is forced to live under a state of mental agony and depression, after being driven out from her matrimonial home.

10. The law relating to territorial jurisdiction of a criminal court, is provided under section 177 to section 179 of Cr.P.C. All these sections are reproduced below:

"177. Ordinary place of inquiry and trial - Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed.

178. Place of inquiry or trial. (a) When it is uncertain in which of several local areas an offence was committed, or

(b) where an offence is committed partly in one local area and partly in another, or

(c) where an offence is a continuing one, and continues to be committed in more local areas than one, or

(d) where it consists of several acts done in different local areas,

It may be inquired into or tried by a Court having jurisdiction over any of such local areas.

179. Offence triable where act is done or consequence ensues. *When an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued."*

11. From the above provisions, it is clear that the normal rule is that the offence shall ordinarily be inquired into and tried by a court within whose local jurisdiction it was committed. However, when it is uncertain in which of several local areas an offence was committed or where an offence is committed partly in one local area and partly in another or where an offence is a continuing one, and continues to be committed in more than one local area and takes place in different local areas as per Section 178, the Court having jurisdiction over any of such local areas is competent to inquire into and try the offence. Section 179 makes it clear that if anything happened as a consequence of the offence, the same may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued.

12. Now, returning to the case in hand, the facts of the instant case, as per the complaint, clearly show that after being treated with cruelty for dowry demand, the wife was left at her parental home by her husband and her in-laws only in the clothes, she was wearing at that time and her husband and her in-laws, while leaving her at Kanpur, threatened her that if without fulfilling their dowry demand, she dared to come back to Katni, she would not physically be in a position to return to Kanpur.

13. Thus it is clear that the occurrence started at Katni but continued to Kanpur Nagar where the aforesaid episode of threatening the wife by the husband and in-laws for dowry demand, took place. In view of the above, it cannot be said that the learned Metropolitan Magistrate, Kanpur, had no jurisdiction to try the case.

14. In the case of ***Sunita Kumari Kashyap Vs. State of Bihar and another, Criminal Appeal No. 917 of 2011 decided on 11.4.2011*** the same question about territorial jurisdiction Magistrate under section 498A I.P.C. arose before the Hon'ble Supreme Court for consideration and the Apex Court held that the offence under section 498A I.P.C. being a continuing one, it is covered under sections 179 and also under section 178 Cr.P.C. The relevant extracts from the aforesaid landmark judgment is quoted below:-

"Perusal of the entire complaint, which was registered as an FIR, clearly shows that there was ill-treatment and cruelty at the hands of her husband and his family members at the matrimonial home at Ranchi and because of their actions and threat she was forcibly taken to her parental home at Gaya where she initiated the criminal proceedings against them for offences punishable under Sections 498A and 406/34 IPC and Sections 3 and 4 of the D.P. Act....."

"We have already adverted to the details made by the appellant in the complaint. In view of the specific assertion by the appellant-wife about the ill-treatment and cruelty at the hands of the husband and his relatives at Ranchi and of the fact that because of their action, she was

taken to her parental home at Gaya by her husband with a threat of dire consequences for not fulfilling their demand of dowry, we hold that in view of Sections 178 and 179 of the Code, the offence in this case was a continuing one having been committed in more local areas and one of the local areas being Gaya, the learned Magistrate at Gaya has jurisdiction to proceed with the criminal case instituted therein. In other words, the offence was a continuing one and the episode at Gaya was only a consequence of continuing offence of harassment of ill-treatment meted out to the complainant, clause (c) of Section 178 is attracted. Further, from the allegations in the complaint, it appears to us that it is a continuing offence of ill-treatment and humiliation meted out to the appellant in the hands of all the accused persons and in such continuing offence, on some occasion all had taken part and on other occasion one of the accused, namely, husband had taken part, therefore, undoubtedly clause (c) of Section 178 of the Code is clearly attracted.

In view of the above discussion and conclusion, the impugned order of the High Court holding that the proceedings at Gaya are not maintainable due to lack of jurisdiction cannot be sustained. The impugned order of the High Court dated 19.03.2010 in Criminal Misc. No. 42478 of 2009 and another order dated 29.04.2010 in Criminal Misc. Case No. 45153 of 2009 are set aside. In view of the same, the SDJM, Gaya is permitted to proceed with the criminal proceedings in trial Nos. 1551 of 2008 and 1224 of 2009 and decide the same in accordance with law.

15. Similar issue was considered by the Apex Court in **Sujata Mukherjee (Smt) vs. Prashant Kumar Mukherjee, (1997) 5 SCC 30**, and the Hon'ble Apex Court found that Clause (c) of Section 178 Cr.P.C. is attracted and the Magistrate at wife's parents' place has also jurisdiction to entertain the complaint. Accepting the stand of complainant, the Apex Court held as under:-

"We have taken into consideration the complaint filed by the appellant and it appears to us that the complaint reveals a continuing offence of maltreatment and humiliation meted out to the appellant in the hands of all the accused respondents and in such continuing offence, on some occasions all the respondents had taken part and on other occasion, one of the respondents had taken part. Therefore, clause (c) of Section 178 of the Code of Criminal Procedure is clearly attracted."

16. In State of **M.P. vs. Suresh Kaushal and another, (2003) 11 SCC 126**, again in a similar circumstance, considering the provisions of Section 179 with reference to the complaint relating to the offences under Section 498A read with Section 34 IPC, Hon'ble Apex Court held as under:

"6. The above Section contemplates two courts having jurisdiction and the trial is permitted to take place in any one of those two courts. One is the court within whose local jurisdiction the act has been done and the other is the court within whose local jurisdiction the consequence has ensued. When the allegation is that the miscarriage took place at Jabalpur it cannot be contended that the court at Jabalpur could not have acquired jurisdiction as the acts alleged against the accused took place at Indore."

17. In wake of the law laid down by Hon'ble Apex Court in the cases cited above, none of which have been over-ruled by any larger Bench of the Apex Court, this court is of the considered view that the Magistrate at Kanpur Nagar has jurisdiction to try the case.

18. The second ground taken by the appellants for challenging the impugned order, related to an earlier compromise between the parties, also appears to be without any basis. It is a matter of common knowledge that fresh dispute between husband and wife may take place at any time, even after their reunion in pursuance of a compromise entered between them, giving rise to a fresh cause of action. However, the situation may be otherwise in the cases where the husband and wife get separated after the compromise. Hence it cannot be held that the wife cannot file fresh complaint against the husband even if a fresh cause of action, due to fresh dowry demand and her harassment in connection with such demand, has taken place.

19. The judgment rendered in the case of **Ruchi Agarwal** (supra) is of no help to the applicants due to the reason that the facts of Ruchi Agarwal's case are entirely different from the facts of the present case. In Ruchi Agarwal's case both the husband and the wife had separated themselves after the compromise. The wife had given her consent for divorce after taking a handsome amount as alimony. To the contrary, in the present case the husband and the wife, after the compromise were reunited and were living together when fresh cause of action in the shape of fresh harassment of the wife arose, compelling her to file the protest petition.

20. The third ground, taken by leaned counsel for the applicants is that without following the mandate as provided under section 204(2) Cr.P.C., which provides that no summon or warrant shall be issued against the applicants under sub-section 1 of section 204 Cr.P.C. until list of prosecution witnesses has been filed, the learned Magistrate in the instant case, has straightway summoned the applicants to face trial.

21. The aforesaid ground too, appears to be without any force. The learned Magistrate in the impugned summoning order itself, has directed the complainant to file the list of witnesses and the copy of the complaint. The complainant has been further directed to take steps within seven days. Summons were to be issued by the office of the Magistrate only after taking steps by the complaint in compliance of the aforesaid directions of the court, which is the normal procedure followed by the office. The applicant has nowhere stated that summons were served on him without list of witnesses being attached to it. Therefore, it cannot be said that summons were actually issued by the office of Magistrate, without such list of witnesses.

22. A coordinate Bench of this court, in the case of **Sardar Awtar Singh and others Vs. State of U.P. and others, 2006 Cr.L.J. 715** has held that the complainant under section 204(2) Cr.P.C. is required to file list of witnesses before issuance of the summons to the accused. He is not required to file list of witnesses along with the complaint.

23. In **Krishna Kant Pathak Vs. State of U.P. 1995 ACC 14** also, this Court has held that it is not necessary that list of witnesses should accompany the petition of complaint. It can be filed at the time of issuing process.

24. Delhi High Court in **Ved Prakash Vs. Sri Om** decided on 31 October 2011 relying on its earlier judgment rendered in **Abdul Hafiz Vs. Ghulam Mohi-ud-din, 1997 Cri. L.J. 518**, has held that omission to file list of witnesses does not vitiate the proceedings if the purpose is otherwise served. The omission is regularly curable under section 465 Cr.P.C. The purpose being that the accused should be apprised at the earliest point of time of the persons, who are likely to give evidence against him.

25. In view of the above, there does not appear any substance in any of the grounds taken by learned counsel for the applicants.

26. On the basis of the above discussion, I do not find any justification to quash the entire proceedings of the aforesaid complaint case and also because this case does not fall in any of the category recognized by the Hon'ble Apex Court in a catena of judgments the latest one being **A.R.C.J. Vs. Nimra Carglass Technics (P) Ltd. (2016) 1 SCC 348**, which may justify its quashing. Hence, the prayer for quashing the proceedings of the complaint case is refused

27. However, it is directed that if the applicants appear before the court below and apply for bail within six weeks from today, the court below shall endeavour to decide their bail application, keeping in view the observations made by this Court in the Full Bench decision of **Amrawati and another Vs. State of U.P. 2004 (57) ALR 290** and affirmed by Hon'ble Supreme Court in the case of **Lal Kamendra Pratap Singh Vs. State of U.P. 2009 (3) ADJ 322 (SC)**.

28. For the aforesaid period of six weeks no coercive action shall be taken against the applicants.

29. With the aforesaid directions this application is finally disposed off.

Effect of Order in Revision – Not a Finding on Merits – Magistrate to Independently Apply Judicial Mind — Held: Allowing or dismissal of a revision by the revisional court is not to be treated as a finding against or in favour of the findings recorded by the Magistrate's court, since orders in revisional jurisdiction

are passed on procedural and technical considerations and not as adjudication on facts – The Magistrate is expected to independently appreciate the evidence on record together with the relevant legal points concerning production of evidence, and thereafter pass an appropriate order on the question of cognizance/summoning by application of his own judicial mind, uninfluenced by any factual observation made by the revisional court.

Disposed off.

Case Law Discussed

1. Jagannath Choudhary & Ors. vs. Ramayan Singh & Another AIR 2002 SC 2229
2. Amit Kapoor vs. Ramesh Chander (2012) 9 SCC 460

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. Present revision has been preferred against the judgment dated 23.7.2016 passed by the Court of Additional Sessions Judge (F.T.C.), Mahoba in Criminal Revision no. 41/2015, by which order dated 22.5.2015 passed by C.J.M., Mahoba dismissing the complaint under section 203 CrPC was quashed and matter was remanded for fresh orders in light of observations made in the judgment of revisional court.

2. Heard learned counsel for the applicants, learned AGA and perused the records.

3. The contention of learned counsel for the applicants was that during investigation, no overt act appeared to have been committed by any person. Even in the statement of victim before police and Sub-Divisional Magistrate when victim had given statement which revealed that no offence was committed. In this case after investigation, final report was submitted. But due to protest petition, complaint case has been initiated, in which Magistrate had dismissed the complaint under section 203 CrPC twice, and both the times revisional courts had remanded the matter with certain observations. Learned counsel for the applicants further contended that if such matter is regularly remanded again and again, with factual observations, by interference in findings of facts, then on any occasion, under pressure of order of remand, any Magistrate will pass any order against applicants in light of observation made by revisional court, which will prejudice the legal rights of applicants. Therefore in interest the order should be passed by this Court to finalize the matter.

4. These arguments were refuted by learned AGA, who submitted that victim had not stated name of any accused before police and before the Magistrate, and she had not stated anything about commission of any offence, and informed that due to dissatisfaction from informant she had left her home suo motu and gone alone, so after investigation final report was submitted. But informant had filed protest petition and complaint case, over which police has no control. His further submission was that till now no offence appears to have been committed by any accused and any applicant is not accused in any case, therefore, they have no right to interfere in any proceedings.

5. This is a fact that from evidences, earlier executive Magistrate, and after investigation the Investigating Officer, and later on the trial court have found that no prima facie case of commission of offence is made out, and therefore the orders under 203 CrPC were passed. But those orders were quashed and matter was remanded with certain observations by revisional courts. The observations of lower revisional court in impugned order are more on facts with directions than on legal points.

6. In **Jagannath Choudhary & ors v. Ramayan Singh & another AIR 2002 S.C. 2229** the Apex Court had held that:

"Where the court concerned does not appear to have committed any illegality or material irregularity or impropriety in passing the impugned judgment and order, the revision cannot succeed. If the impugned order apparently is presentable, without any such infirmity which may render it completely perverse or unacceptable and when there is no failure of justice, interference cannot be had in exercise of revisional jurisdiction".

"It is not an appeal wherein scrutiny of evidence is possible, neither the revisional jurisdiction is open for being exercised simply by reason of the factum of another view being otherwise possible."

7. In **Amit Kapoor v. Ramesh Chander (2012) 9 SCC 460** the Apex Court had observed:

"Normally, a revisional jurisdiction should be exercised on a question of law. However, when factual appreciation is involved, then it must find place in the class of cases resulting in a perverse finding. Basically, the power is required to be exercised so that justice is done and there is no abuse of power by the court. Merely an apprehension or suspicion of the same would not be a sufficient ground for interference in such cases."

8. This legal position is settled that at the time of passing the order on point of cognizance/summoning, the Magistrate has to consider facts in accordance with law and has to pass appropriate order by application of his own judicial mind. The revision is admitted by superior court only of supervising and considering and for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such subordinate/inferior Court. Any other observation or direction, including on the point of fact or on point of manner of consideration of evidence by revisional court, under section 397 CrPC, is erroneous and illegal. Revision is not an appeal wherein scrutiny of evidence is possible like trial of appellate court. As a rule the revisional courts should generally refrain from giving findings, observations or directions on facts or on merits of the case.

9. It is also clarified that allowing of revision by lower revisional court or dismissal of revision shall not be taken as finding against findings of Magistrate Court. The order of revisional court shall not be considered as basis of giving finding of fact, because the orders in revisional jurisdiction are passed on procedural and technical reasons. Learned Magistrate is expected to appreciate the evidences adduced and also other legal points regarding production of evidences, and then he is expected to pass order on point of summoning.

10. In view of above, in present matter, the trial court is directed to appreciate the facts of the matter before it and then pass appropriate order without being influenced by any observation of revisional court on any fact of the case. With these observations, this application stands disposed of.

(2016) 8 ILRA 813
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.08.2016

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Appeal No.- 7096 Of 2009
&
Criminal Appeal No.- 7150 Of 2009

Ashwani Kumar & Anr.

...Appellants

Versus

State Of U.P.

...Respondent

Counsel for Appellants/Petitioner :- Dr. Akhilesh Kumar Sharma, P.K. Singh, Ramesh Pundir, Smt. Rekha Pundir (in Appeal No. 7096 of 2009); Dr. Akhilesh Kumar Sharma, Amit Misra (in Appeal No. 7150 of 2009)

Counsel for Respondents :- Govt. Advocate; Sri Saghir Ahmad, Sri J.K. Upadhya, Km. Meena, learned A.G.A., assisted by Syed Hasan Shaukat Abidi and Sri Irfan Chaudhary, State Brief Holders

Murder – Circumstantial Evidence – Last Seen Together Theory — Deceased Ramesh, who had developed an illicit relationship with his sister-in-law accused-appellant Lata after his wife's death, was taken away from his house at about 5 P.M. by accused-appellants Rajkumar and Lata to their adjoining house ostensibly to settle a monetary dispute – Within a few minutes he was found strangled to death in their house – Held: Once the last seen theory comes into play, the onus shifts upon the accused to explain what happened to the deceased thereafter; the facts relating to the manner of death being within their special knowledge – Reasonable proximity of time between last seen alive and discovery of death fully established – Accused-appellants Rajkumar and Lata having furnished no explanation, guilt held established beyond doubt [Paras 32-34, 41]

Plea of Alibi – Burden on Accused – Documentary and Oral Evidence Found Unreliable — Accused-appellant Rajkumar claimed to have been present at a tractor service camp 22 km away between 10:30 A.M. and 6:00 P.M., relying on attendance register and job cards (Exts. Kha1 to Kha7) and testimony of DW1 and DW4 – Documents found unsigned by the accused, containing overwriting and no countersignature of any senior/junior officer – DW4 did not depose that the accused remained present throughout the day – Accused-appellant Lata's plea that she was at a neighbour's house (DW3 Jaipal) between 3:30 P.M. and 4:30 P.M. did not exclude her presence at the time of occurrence (5 P.M.), and the version of DW2 (her daughter) stood self-contradictory – Held: Plea of alibi set up by both accused-appellants Rajkumar and Lata not established; onus to prove alibi lies squarely on the accused and was not discharged. [Paras 22-31]

Interested/Related Witnesses – Credibility Not Diminished Merely on Ground of Relationship — Witnesses of fact (PW1, PW2, PW7) being close relatives of the deceased and complainant, subjected to searching cross-examination without any material contradiction elicited – Held: Mere relationship or interest does not render testimony untrustworthy where it is consistent, natural and withstands cross-examination [Paras 35-38]

Motive – Failure to Prove Motive – Effect Differs as Between Sets of Accused — Prosecution's theory that accused-appellants Ashwani Kumar and Meenu@Meenakshi had usurped a portion of a bank loan sanctioned in favour of the deceased, precipitating the murder, stood completely falsified by the testimony of

PW8, the bank's Senior Manager, who proved that the entire loan amount was disbursed directly to third-party suppliers by banker's cheques and no cash was paid to the deceased or anyone else – Held: Failure to prove motive is not, by itself, fatal where direct/circumstantial evidence of complicity is otherwise complete (as against Rajkumar and Lata), but where motive was the principal plank connecting certain accused to the crime and no other evidence establishes their presence at the scene, its collapse is fatal to their conviction. [*Paras 21, 39-40*]

Presence of Co-Accused at Place of Occurrence – Not Established – Benefit Extended — No witness deposed to having actually seen accused-appellants Ashwani Kumar and Meenu@Meenakshi present in the house of Rajkumar and Lata at the time of occurrence; their alleged presence rested only on hearsay relayed through the deceased before he was taken away – Held: Such evidence insufficient to establish physical presence or complicity; conviction of Ashwani Kumar and Meenu@Meenakshi under Section 302/34 IPC recorded by the Trial Court cannot be sustained and is liable to be set aside. [*Paras 20-21, 41*]

Appeal Allowed

Case Law Discussed

1. Shyamal Ghosh vs. State of West Bengal (2012) 7 SCC 646 = 2012 (79) ACC 365 (SC)
2. S.K. Yusuf vs. State of West Bengal (2011) 11 SCC 754
3. Mohd. Azad @ Samin vs. State of West Bengal (2008) 15 SCC 449
4. State (through CBI) vs. Mahender Singh Dahiya (2011) 3 SCC 109
5. State of U.P. vs. Jagdeo 2003 Cri LJ 844 (SC)
6. Mano Dutt and Another vs. State of U.P. 2012 (77) ACC 209
7. Namdeo vs. State of Maharashtra 2007 (58) ACC 414 (SC)

(Delivered by Hon'ble Bala Krishna Narayana, J.)

1. These two criminal appeals were heard by us on 9.8.2016 on which date we had passed the following orders :

Criminal Appeal No. 7096 of 2009

"Heard Sri P.K. Singh, learned counsel for the appellants, Sri Saghir Ahmad, Sri J.K. Upadhyay, Km. Meena, learned AGA for the State and Syed Hasan Shaukat Abidi and Sri Irfan Chaudhary, State Brief Holder.

We will give reasons later. But we pronounce the operative portion here and now.

This criminal appeal is allowed. The impugned judgement and order dated 10.11.2009 passed by Sri Anil Kumar Srivastav (H.J.S.) Session Judge Saharanpur in S.T. No. 751 of 2005 convicting and sentencing the appellants under Section 302 read with Section 34 I.P.C., Police Station Kotwali Nagar, District Saharanpur to undergo life imprisonment and fine of Rs. 10,000/- each and in default of payment of fine then appellants further undergo 10 months simple imprisonment extra are hereby set aside.

The appellants are acquitted of all the charges framed against them and they shall be released forthwith, unless they are wanted in any other criminal case.

There shall be however no order as to costs."

Criminal Appeal No. 7150 of 2009

"Heard Sri Javed Habib, Amicus Curiae for the appellants, Sri Saghir Ahmad, Sri J.K. Upadhyay, Km. Meena, learned AGA assisted by Syed Hasan Shaukat Abidi and Sri Irfan Chaudhary, brief holders for the State.

We will give reasons later. But we pronounce the operative portion here and now.

This criminal appeal is dismissed."

We are now giving reasons :

2. Briefly stated the facts of this case are that PW1 Kr. Mitali daughter of Ramesh Kumar resident of Mohalla Nawabganj, District Saharanpur gave a written report Ex. Ka1 to Police Station Kotwali Nagar, District Saharanpur on 22.7.2005 at about 18:15 hours stating therein that after the death of her mother about five years before, her father Ramesh Kumar had developed illicit relationship with accused-appellant Lata, wife of accused-appellant Raj Kumar, sister-in-law of accused-appellant Ashwani Kumar and sister of accused-appellant Meenu wife of Ashwani Kumar. Accused-appellant Ashwani Kumar on account of the aforesaid affair had got a loan sanctioned in favour of her father but the loan amount was received by accused-appellants Ashwani Kumar and Meenu which they were not paying to her father Ramesh and when on the date of the occurrence her father demanded payment of the loan amount from the accused-appellant, they started beating him and on the same day at about 5 PM accused-appellants Lata and Raj Kumar called her father to their house and the accused-appellant Ashwani Kumar who was also present in the house of accused-appellant Raj Kumar told her father that he would pay the loan amount to him at his convenience on which her father Ramesh Kumar told all the four accused loudly that he wanted his entire money back then and there. Thereafter appellants Lata and Meenu@Meenakshi started shouting that something had happened to Ramesh Kumar and when the complainant and other persons reached the house of Raj Kumar they found the complainant's father Ramesh Kumar lying dead in the house of accused-appellants Raj Kumar and Lata. In the written report of the incident Ex. Ka1 it was also alleged that accused-appellant Lata had seized the title deeds of all the properties of her father, his gold and silver jewelry and cash.

3. On the basis of the written report Ex. Ka1 case crime no. 248 of 2005 was registered against all the accused-appellants under Section 304 IPC at Police Station Kotwali Nagar, District Saharanpur and Chek FIR Ex. Ka2 was prepared by constable Kirtan Pal Singh PW5 and relevant GD entry Ex. Ka3 was made vide rapat no. 53 at 18:15 hours on 22.7.2005 and the investigation of the case was entrusted to SSI Sarvesh Kumar PW9.

4. During the course of investigation of the aforesaid case the Investigating Officer PW9 SSI Sarvesh Kumar conducted the inquest on the dead body of the deceased Ramesh Kumar which

commenced on 22.7.2005 at 18:40 hours and was completed on the same day at 19:40 hours. He prepared the inquest report Ex. Ka8 and other relevant documents challan lash. Ex. Ka9, photo lash Ex. Ka10 and letters addressed to RI and CMO Ex. Ka 11 and Ex. Ka 12 respectively. Thereafter he entrusted the dead body of the deceased to constable Bhimsen and constable Harpal on 22.7.2005 at 20:15 hours for being taken to the District Hospital for conducting the post mortem. The post mortem on the cadaver of the deceased was conducted by PW12 Dr. R.K. Gupta on 23.7.2005 at about 4 PM who also prepared the post mortem report Ex. Ka13.

5. The Investigating Officer of the case after inspecting the place of incident prepared its site plan Ex. Ka5 and also recovered "Chunniya" allegedly used by the accused-appellants for committing the murder of the deceased on the pointing out of the accused-appellant Lata and prepared its recovery memo Ex. Ka6. After completing the investigation of the case the Investigating Officer submitted charge-sheet (Ext. Ka 7) against all the accused-appellants on 2.9.2005 Ex. Ka7 under Section 302 IPC before the CJM Saharanpur who took cognizance on the same on 14.9.2005 and after summoning the accused-appellants committed the case for the trial of the accused to the Court of Sessions Judge, Saharanpur vide his committal order dated 14.12.2005. Upon committal, the case was registered as Session Trial No. 751 of 2005.

6. On the basis of the material available on record, learned Sessions Judge, Saharanpur framed charge against all the appellants under Section 302/34 IPC. The accused pleaded not guilty and claimed trial.

7. The prosecution in order to prove its case examined PW1 Kr. Mitali, PW2 Smt. Shikha, PW3 Smt. Gauri Devi, PW4 Smt. Chhoti Devi and PW7 Naresh Kumar as eye-witnesses of the occurrence. The prosecution further examined PW5 Constable Kirtan Pal Singh, PW6 Constable Bhimsen, PW8 D.D. Agrawal, Senior Manager Central Bank of India, PW9 Sarvesh Kumar Yadav Investigating Officer of the case, PW10 Inspector Braj Pal Singh Solanki second Investigating officer of the case, PW11 Mahendra Singh Saini and PW12 Dr R.K. Gupta as formal witnesses. The accused-appellants in their statements recorded under Section 313 Cr.P.C., denied the prosecution case and disputed the veracity of the evidence adduced by the prosecution for proving the charge framed against them. They further stated that the accused-appellants are relatives of the complainant and the deceased Ramesh. The FIR in this case was lodged against them by PW1 Kumari Mitali with the object of putting pressure upon them.

8. The accused-appellant Lata in her additional statement further stated that the complainant Kumari Mitali, her uncle and her other relatives had put the dead body of the deceased in her house by forcing their entry into her house from the roof of her house through the staircase of her house and at that time neither she nor her husband were present in their house. Her husband had gone to work while she had gone to the house of her neighbour Jaipal and at that time her daughter Kumari Diksha and two other children were present in her house who upon noticing the dead body of the deceased lying in their house had informed her about the aforesaid fact while she was in the house of Jaipal.

9. The accused-appellant Rajkumar had also denied his presence in his house at the time of the incident and had further stated that on account of his being an employee/manager of M/s SMG Tractors, Saharanpur, authorized dealers of Mahendra Tractors in Saharanpur, he was present in the service camp organized by the Mahendra Tractors at Kasba Nanauti which was at a distance of about 22 km from the place of incident on 22.7.2005 from 10:30 AM to 6:00 PM. The accused-appellants Rajkumar and Lata had examined Ramkumar, Kumari Diksha, Jaipal and Jagmohan as DW1 to DW4. Appellant Rajkumar in criminal appeal no. 7150 of 2009 also adduced documentary comprising of employees' attendance register and job cards Exts. Kha1 to Kha7 for proving the fact that he was an employee of M/s SMG Tractors and on the date of incident he was present in the service camp organized by the M/s Mahendra Tractors in Kasba Nanauti from 10.30 A. M. to 6.00 P. M.

10. Learned Trial Judge after considering the submissions advanced before him by the learned counsel for the parties and scanning the evidence on record convicted all the accused-appellants under Section 302/34 IPC and sentenced them to imprisonment for life, together with fine of Rs. 10,000/- and in case of default in the payment of fine 10 months additional simple imprisonment each.

11. Learned counsel for the appellants submitted that the prosecution having miserably failed to discharge its initial burden by adducing any cogent evidence that the deceased Ramesh was murdered in the house of accused-appellants Rajkumar and Lata in criminal appeal no. 7150 of 2009 and accused-appellants Ashwani Kumar and Meenu@Meenakshi in criminal appeal no. 7096 of 2009 were also present in the house of the accused-appellants Rajkumar and Lata at the time of the occurrence, the conviction of the accused-appellants recorded by the Trial Court under Section 302/34 IPC by invoking the aid Section 106 of the Evidence Act is per se illegal and unsustainable in the eye of law. He next submitted that in the present case there is no direct evidence of murder of deceased Ramesh by the accused-appellants and although prosecution has failed to establish the various links in the chain of the circumstantial evidence consistent only with the hypothesis of guilt of the accused yet the Trial Court has illegally convicted them. He further submitted that witnesses of fact examined by the prosecution for proving the fact that Ramesh was taken from his house to the house of the accused-appellants Rajkumar and Lata by them where he was later murdered, are all partisan and interested witnesses being close relatives of the deceased, vitally interested in seeing that the accused-appellants, who are also related to the deceased, complainant and the other witnesses of fact, were convicted for the murder of the complainant's father Ramesh. Reliance placed by the trial Court on their evidence for convicting the accused-appellants is per se illegal. He also submitted that since the present case is based upon circumstantial evidence, motive is of supreme relevance and the prosecution having failed to prove that the accused-appellants had any motive to commit such a ghastly crime, the recorded conviction of the appellants and the sentence awarded to them by the trial Court after illegally disbelieving the testimony of the defence witnesses who were produced by the defence for proving the plea of alibi set up by the accused-appellants Raj Kumar and Lata in their defence and discarding the documentary evidence adduced by them in this regard cannot be sustained and is liable to be set aside.

12. Per contra Sri Saghir Ahmad, learned AGA submitted that in the present case the presence of accused-appellants in the house of accused-appellants Rajkumar and Lata at the time of the incident stands fully proved from the evidence of PW1, PW2, PW3 and PW7.

13. The prosecution case stands further corroborated from the medical evidence on record and the discovery of the "Chunniya" used by the accused-appellants for committing the murder of deceased Ramesh on the pointing out of the accused-appellant Lata and even if it is assumed for the sake of arguments that the prosecution has not been able to prove the motive for the accused-appellant to commit the murder of deceased Ramesh, the same shall not be fatal to the prosecution case. The finding of guilt recorded by the learned Trial Judge in the impugned judgment against the accused-appellant is based upon cogent and reliable evidence and the sentence awarded to them is supported by relevant considerations. The impugned judgment and order do not suffer from any illegality or infirmity requiring any interference by this Court.

14. We have heard the learned learned counsel for the parties at great length and very carefully scanned the entire lower Court record.

15. The only question which arises for our consideration in this appeal is that whether the prosecution has been able to prove it's case against the accused-appellants beyond all reasonable doubts or not.

16. Record shows that the prosecution in order to prove its charge against the accused-appellants had examined as many as 12 witnesses, of which five, PW1 to PW4 and PW7 are witnesses of fact while remaining are formal witnesses. Record further shows that the deceased, accused-appellants, complainant Kumari Mitali PW1 and the other witnesses of this case Smt. Shikha PW2, Smt. Gauri Devi PW3 and PW7 Naresh Kumar are closely related to each other while PW4 Chhoti Devi is a neighbour of the complainant. Another very significant fact which emerges out from the perusal of evidence of the witnesses of fact produced by the prosecution and the site plan of the place of occurrence, Ext. Ka 5 is that the respective houses of deceased Ramesh and accused-appellants Rajkumar and Lata in criminal appeal no. 7150 of 2009 are adjacent to each other. Record further shows that the deceased Ramesh was allegedly murdered at a place on the staircase of the house of the accused-appellant and his dead body was found lying at a place in a room of the house of the accused-appellant Rajkumar denoted by letters B and A respectively in the site plan of the place of occurrence Ex. Ka5. Record also shows that accused-appellants Meenu@Meenakshi and Lata are real sisters of the deceased's wife Ramesh while accused-appellants Ashwani Kumar and Rajkumar are their husbands PW1 complainant Kumari Mitali and PW2 Smt. Shikha are daughters of the deceased, PW7 Naresh Kumar is husband of PW2 Smt. Shikha and the accused-appellants are real uncles and aunts (Mousa and Mousi) of the complainant PW1 and PW2 and brothers-in-law and sisters-in-law of the deceased Ramesh. PW3 is also closely related to the deceased and the only independent witness who was produced by the prosecution, PW4 Smt. Chhoti Devi had failed to support the prosecution case during the trial and was declared hostile.

17. PW1 complainant Kumari Mitali who is the daughter of the deceased has in her examination-in-chief recorded before the trial Court deposed that the deceased Ramesh was an employee of Chawla Garment, Nehru Market. Her mother had died about five years before the incident leaving behind her and her two other daughters one of whom Smt. Shikha was married and one son. Her father had developed illicit relationship with accused-appellant Lata about 3- 3½ years before and thereafter he had started staying mostly with accused-appellant Lata in her house which is adjacent to the house of PW1 Kumari Mitali (complainant) . She further deposed that the illicit relationship between her father and accused-appellant Lata had become subject matter of gossip in the whole locality. Her father's salary was snatched by accused-appellant Lata and only a very small portion thereof was given to her. Her father who had become heavily indebted, with the intention of increasing his income wanted to set up a business of readymade garments and for that purpose he required finance. The accused-appellant Meenu and her husband accused-appellant Ashwani Kumar had got a loan sanctioned in the name of her father and about 15 days before the incident, a sum of Rs. 20,000/- which was part of the total amount of sanctioned loan was disbursed by the bank but the said amount was dishonestly kept by accused-appellants with themselves. Apart from the aforesaid amount another sum of Rs. 50,000/- was disbursed by the bank towards the loan sanctioned in favour of the deceased. On the date of the incident i.e. on 22.7.2005 her father had sent her to the house of the accused-appellant Meenu to fetch the sum of Rs. 20,000/- from her and when PW1 Kumari Mitali met accused-appellant Ashwani Kumar in his house he had told her to tell her father that he would pay the sum of Rs. 2000/- to her father at his convenience while accused-appellant Meenu had threatened her father on which she returned back to her house and on finding her house locked she went to the house of accused-appellant Lata where she met her father and told him about her conversation with accused-appellants Meenu and Ashwani Kumar on which he started quarreling with accused-appellant Lata, she then returned back to her house. Thereafter on the same day at about 3:00 PM she along with her sister Shikha and her father Ramesh (deceased) had gone for the treatment of her sister to the clinic of Raiwala Hakeem where they met accused-appellant Lata and her daughter Diksha. On meeting Lata her father told her and her sister to go home and he himself went away somewhere with accused-appellant Lata. After making some purchases, PW1 and her sister returned to their house and on returning back to their house they found PW7 Naresh Kumar husband of PW2 and her father sitting there. Soon thereafter accused-appellants Lata and Raj Kumar came to her house and took her father to their house in her presence on the pretext of arranging his meeting with accused-appellants Ashwani Kumar and Meenu who had also come to their house. After sometime she heard voice of her father asking the accused-appellants to return his money then and there and the voices of accused-appellants saying that they would pay the amount in question to him at their convenience. Thereafter there was silence for sometime and then she heard accused-appellants Lata and Meenu shouting loudly that something had happened to Ramesh, on which PW1 her sister PW2 Shikha and her other relatives rushed to the house of the Rajkumar and on reaching there they saw their father lying dead in the house of accused-appellants. She also deposed that all the title deeds of her father's properties and the ornaments of her mother were in the possession of accused-appellant Lata and the accused-appellant had committed the murder of their father as a result of the dispute between them and her father regarding the loan amount of Rs. 50,000/- PW1 proved written report of the incident Ex. Ka1.

18. PW2 Smt. Shikha in her evidence recorded before the trial Court corroborated the testimony of PW1 on all material points. As far as PW3 Gauri Devi is concerned, her evidence is material only on the point of their being a dispute between the deceased and the accused-appellants over the payment of loan amount. Her evidence on the other aspects of the matter is hearsay as she has categorically stated in her testimony on page 41 of the paper book that she had learnt about the death of the deceased on the same day at about 8 pm thereafter she had immediately gone to his house.

19. PW4 Chhoti Devi was declared hostile on the request of the DGC (Criminal) after she failed to support the prosecution case. PW7 Naresh Kumar also corroborated the testimony of PW1 on all material aspects.

20. Thus, the accused in this case, on the basis of the evidence on record, can be safely classified into two sets. The accused first set comprise of accused-appellants Raj Kumar and Lata appellants in Criminal Appeal No. 7150 of 2009 and accused second set constitute accused-appellants Ashwani Kumar and Meenu alias Meenakshi appellants in Criminal Appeal No. 7096 of 2009. As far as the accused-appellants in Criminal Appeal No. 7150 of 2009 are concerned, incriminating circumstances cited against them by the prosecution inter alia, are that on account of the illicit relationship between the deceased and accused-appellant Lata who was the real sister of accused-appellant Meenu@Meenakshi, accused-appellant Ashwani Kumar husband of accused-appellant Meenu@Meenakshi and brother-in-law of accused-appellant Lata had got a loan sanctioned in favour of the deceased for establishing a unit for manufacturing readymade garments but out of total amount of loan sanctioned accused-appellants Ashwani Kumar and Meenu@Meenakshi had illegally received a sum of Rs. 20,000/- which they were not returning to the deceased despite his repeated demands; and that accused-appellants Ashwani Kumar and Meenu@Meenakshi were also present in the house of accused-appellants Rajkumar and Lata on the date of the incident according to the testimonies of PW1, PW2 and PW7 who had deposed that when the accused-appellants Rajkumar and Lata had come to the house of the deceased on the date of the incident at about 5 PM they had told the deceased Ramesh in their presence that accused-appellants Ashwani Kumar and Meenu@Meenakshi had come to their house for getting the monetary dispute between them and the deceased settled and after the deceased had gone to the house of the accused-appellants Rajkumar and Lata with them they first heard the voice of their father demanding payment of his money from the accused-appellants and the voices of accused-appellants saying that they would return his money at their convenience and thereafter they heard the voices of the accused-appellants Lata and Meenu@Meenakshi shouting that something had happened to Ramesh and when they along with their other relatives reached the house of the accused-appellants Rajkumar and Lata on hearing the shrieks of the accused-appellants they found their father lying dead in the house of the accused-appellant Rajkumar.

21. Upon scanning the evidence on record both oral as well as documentary, we do not find any cogent or reliable evidence on record indicating either at their presence at the place of occurrence along with co-accused Raj Kumar and Lata in their house or at their complicity in the commission of murder of the deceased Ramesh. Admittedly, the accused-appellants Raj Kumar and

Lata were not residing with the accused-appellants Ashwani Kumar and Meenu alias Meenakshi in their house which is adjacent to the deceased's house and that they were residing separately from the accused-appellants Raj Kumar and Lata. There is neither any direct nor circumstantial evidence of their physical presence in the house of appellants Raj Kumar and Lata at the time of occurrence. The evidence given by PW1, PW2 and PW7 before the trial court about the accused-appellants Ashwani Kumar and Meenu being present in the house of accused-appellants Raj Kumar and Lata is based upon the alleged information given in this regard to the deceased in their presence by accused-appellants Raj Kumar and Meenu when they had come to his house for taking him away to their house to meet the accused-appellants Ashwani Kumar and Meenu alias Meenakshi who according to them had come to their house to meet the deceased with the object of settling the money dispute between them. Although PW1, PW2 and PW7 in their testimonies have stated that after the deceased Ramesh had gone to the house of accused-appellants Raj Kumar and Lata with them, they had heard heated arguments between the deceased and accused-appellants in their voices and later the voices of Lata and Meenu@Meenakshi shouting that something had happened to Ramesh. The aforesaid evidence, in our opinion, is not sufficient for holding that accused-appellants Ashwani Kumar and Meenu alias Meenakshi were also present in accused-appellant Raj Kumar's house at the time of occurrence as neither PW1 nor PW2 or PW7 have in their evidence stated that they had seen the accused-appellants Ashwani Kumar and Meenu alias Meenakshi also present in the house of accused-appellant Raj Kumar when on hearing alleged shrieks of accused-appellants Meenu and Lata, they had rushed to the house of accused-appellants Raj Kumar and Lata and seen the dead body of deceased Ramesh lying in their house. Even if it presumed that there was some monetary dispute between accused-appellants Ashwani Kumar and Meenu on one side and the deceased Ramesh on the other, the same in itself cannot be treated as inculpatory or sufficient to infer their presence at the place of the incident at the time of occurrence. Even otherwise, from the evidence of PW8 D.D. Agarwal, Senior Manager, Central Bank of India, the prosecution case that accused-appellant Ashwani Kumar had illegally usurped some portion of loan disbursed by the bank to the deceased which he was not returning back to the deceased Ramesh despite his repeated demands and which had ultimately led to his being murdered by the accused-appellant, stands totally falsified. PW8 D.D. Agarwal in his evidence recorded before the Trial Court has on pages 60 and 61 of the paper book categorically stated that out of the total amount of loan sanctioned in favour of the deceased, the sum of Rs. 20,185/- was disbursed on 4.7.2005 directly to M/s Maya Machinery Stones, Saharanpur by a banker's cheque drawn in its favour for purchase of embroidery and sewing machine while the balance amount of Rs. 49,850/- was paid to M/s Sant Lal and Stones and Kanhaiya Lal Market, Saharanpur also by a banker's cheque drawn in favour of the aforesaid firm for purchasing raw material. He had further deposed that out of the total sum of Rs. 70,000/- which was sanctioned as loan by the Bank of India in favour of the deceased Ramesh Rs. 63,500/- was disbursed by the bank while the remaining amount of Rs. 6500/- was contributed by the deceased himself. PW8 DD Agarwal also deposed on page 62 of the paper book that neither the borrower deceased Kuleshwar Singh (Ramesh) nor anyone else was paid any part of the amount sanctioned as loan in cash. Thus in view of the testimony of PW8 DD Agarwal, the prosecution theory that accused-appellants Ashwani Kumar and Meenu@Meenakshi had usurped some part of the loan amount sanctioned in favour of the deceased Ramesh and he was murdered by them and the other co-accused Rajkumar and Lata when he started pressurizing them to return the aforesaid

amount to him stands totally disproved and hence the conviction of the accused-appellants Ashwani Kumar and Meenu@Meenakshi (appellants in criminal appeal no. 7096 of 2009) recorded by the Trial Court, in the absence of any cogent and reliable evidence on record indicating at their complicity in the commission of the murder of the deceased cannot be sustained and is liable to be set aside.

22. We now proceed to examine the challenge of the second set of the accused-appellants, Raj Kumar and Lata to their conviction recorded by the trial court.

23. It has been submitted by learned counsel appearing for the accused-appellants Raj Kumar and Lata that both of them were not present at the place of incident at the time of occurrence and they have falsely been implicated in the present case by PW1 Kumari Mitali (complainant) and other witnesses who had become inimical towards them after the death of their mother and due to the suspected intimacy of complainant's father with accused-appellant Lata.

24. The accused-appellant Raj Kumar in his statement recorded under Section 313 Cr.P.C. has stated that a free service camp was organized by Mahendra Motors in Nanuta Town on the date of the incident between 10.30 and 6.00 PM and he on account of being an employee of M/s S.M.G. Tractors, authorised dealer of Mahendra Tractor in Saharanpur was required to remain physically present in the service camp between 10.30 AM and 6.00 PM and he was actually present in the service camp held in Nanuta town on the date of occurrence between 10.30 A. M. and 6.00 P. M. In order to prove the alibi set up by the accused-appellant Raj Kumar, in his defence he had examined one Ram Kumar, Manager of M/s S.M.G. Tractors, Authorised Dealer of Mahendra Tractors in Saharanpur and one Jag Mohan, another employee of the same company as DW1 and DW4. He had also adduced documentary evidence to which we shall refer and scrutinize later.

25. DW1 Ram Kumar in his examination-in-chief deposed that he was working as Manager of M/s SMG Tractors since 2001. M/s SMG Tractors were the authorized dealers of Mahendra and Mahendra in District Saharanpur and accused-appellant Rajkumar was working as a Mechanic in SMG Tractors since April 2005. On 22.7.2005 a free service camp was organized by M/s SMG Tractors in Nanauta Town of District Saharanpur and accused-appellant Rajkumar had remained present there from 10:30 AM to 6:00 PM and had also signed the attendance register Ex. Kha1. He also deposed that accused-appellant Rajkumar had serviced three tractors in the service camp from 10:30 AM to 11:30 AM, 12noon to 2PM and 3:25 PM to 5 PM bearing registration nos. RGH/4445, RDHA - 1116 - RGA/2897 respectively. He proved the job card numbers 27, 31 and 32 pertaining to the servicing of the aforesaid tractors as Ex. Kha2, Kha3 and Kha4. He also proved the job cards pertaining to the tractors which were serviced by PW4 Jagmohan as Kha5, Kha6 and Kha7. However from the facts stated by DW1 on page 97, 98 and 99 of the paper book in his cross examination it transpires that the entries made in attendance register Ex. Kha1 were not signed by any senior or junior officer of the firm. Ex. Kha2, Kha3 and Kha4 did not denote the name of the employee whose thumb impressions were affixed thereon. The aforesaid documents were further not signed by accused-appellant Rajkumar and there were overwritings in the job cards in the column which denoted the time consumed by a mechanic in servicing a particular tractor. A close

scrutiny of the statement of DW4 Jagmohan shows that he has nowhere stated in his evidence that accused-appellant Rajkumar had remained present in the service camp organized in the Nanauta Town Saharanpur throughout on 22.6.2004 from 10:30 AM to 6:00 PM. Thus neither the testimony of DW1 and DW4 produced by the accused-appellants nor the documentary evidence adduced by him before the Trial Court appears to be either convincing or reliable for accepting the plea of alibi set up by the accused-appellants in his defence.

26. As far as accused-appellant Lata in criminal appeal no. 7150 of 2009 is concerned she has pleaded that at the time of and on the date of the incident she was not present in her house and had gone to the house of her neighbour Jaipal and taking advantage of her absence from her house, PW1 complainant Kumari Mitali with the help of her uncle and her other relatives had surreptitiously entered into her house from the roof of her house through the staircase and after abandoning the dead body of the deceased Ramesh in her house had returned to their house. The information about the dead body of the deceased lying in her house was given to her by her daughter Diksha and two other children who were present in her house at the time when the deceased's dead body was brought inside her house by PW1 Kumari Mitali and her other relatives and abandoned there.

27. DW2 Km. Diksha and DW3 Jaipal were examined on behalf of accused-appellant Lata for proving the plea of alibi set up by her in her defence.

28. DW2 Diksha deposed before the trial Court that she is the daughter of Rajkumar and her house is adjacent to that of deceased Ramesh. On the date of the incident Shikha Mitali and Naresh Tillu@Pramod had brought the deceased Ramesh in an unconscious state into her house via the staircase of her house and had left him there but later she stated that he was already dead at that time.

29. DW3 Jaipal who is the neighbour of the accused-appellant Rajkumar had in his cross examination recorded before the trial Court stated on oath that on the date of the incident accused-appellant Lata had come to his house at about 3:30 PM and had remained there till 4:30 PM. At about 4:30 PM her daughter Lata had come to his house and accused-appellant Lata after talking to her for sometime in his house had left for her house with her daughter and thereafter he had heard that the dead body of the deceased Rajkumar was found lying in the house of Rajkumar.

30. DW2 Kumari Diksha in her cross examination on page 91 of the paper book has stated that before leaving her house to call her mother she had seen Shikha, Mitali Naresh and Tillu@Pramod bringing Ramesh towards the staircase of her house in an unconscious state from the roof of her house where she had gone on hearing sounds coming from the terrace. Thus the fact stated by her in her examination-in-chief that she had left her house for calling her mother after the complainant and her other relatives had left the dead body of the deceased in her house stands falsified. Similarly the evidence of DW3 Jaipal also does not help the accused-appellant Lata because DW3 Jaipal as has categorically deposed in his testimony that the accused-appellant Lata had left his house along with her daughter at about 4:30 PM and hence the possibility of her

participating in the commission of murder of deceased Ramesh which had taken place at 5 PM cannot be ruled out.

31. Thus upon an overall appraisal and assessment of the testimony of defence witnesses, it transpires that the accused-appellants Rajkumar and Lata have totally failed to establish the plea of alibi set up by them in their defence.

32. The next question which arises for our consideration is that whether the prosecution has been able to establish, on the basis of any cogent evidence led by it, that the various links in the chain of the circumstantial evidence are complete and the circumstances are consistent only with the hypothesis of guilt of the accused-appellants to the extent that it cannot be explained of any other hypothesis.

33. The Apex Court in its judgment in the case of *Shyamal Ghosh v. State of West Bengal* (2012) 7 SCC 646 = 2012 (79) ACC 365 (SC) paragraphs 63 and 72 to 77 has explained that once the last seen theory comes into play onus shifts upon the accused to explain as to what has happened to deceased after the accused and deceased were last seen alive. The Apex Court has further explained that there must be reasonable proximity of time between the period the accused and deceased were last seen together and the time when the fact of deceased having expired comes to light. The Apex Court has further explained that what would be reasonable has to be determined in the facts and circumstances of each case. In this context it will be useful to reproduced paragraphs 63, 72 to 77 of the aforesaid judgment herein below :

63. *Then it was also contended that circumstantial evidence is a very weak evidence and in the present case, the complete chain having not been established, the accused are entitled to acquittal. This argument again does not impress us. Firstly, we have discussed in some details that this is not purely a case of circumstantial evidence. There are eye-witnesses who had seen the scuffling between the deceased and the accused and the strangulation of the deceased by the accused persons and also the loading of the mutilated body parts of the deceased contained in gunny bags into Maruti Van. Evidence establishing the "last seen together" theory and the fact that after altercation and strangulation of the deceased which was witnessed by PW8, PW17 and PW19, the body of the deceased was recovered in pieces in presence of the witnesses, have been fully established. To a very limited extent, it is a case of circumstantial evidence and the prosecution has proved the complete chain of events. The gap between the time when the accused persons were last seen with the deceased and the discovery of his mutilated body is quite small and the possible inference would be that the accused are responsible for commission of the murder of the deceased. Once the last seen theory comes into play, the onus was on the accused to explain as to what happened to the deceased after they were together seen alive. The accused persons have failed to render any reasonable/plausible explanation in this regard.*

72. *Then, it is also contended and of course with some vehemence that where the prosecution is relying upon the last seen theory, it must essentially establish the time when the accused and deceased were last seen together as well as the time of the death of the deceased. If*

these two aspects are not established, the very application of the 'last seen theory' would be impermissible and would create a major dent in the case of the prosecution. In support of this contention, reliance is placed upon the judgment of this Court in the case of S.K. Yusuf v. State of West Bengal [(2011) 11 SCC 754].

73. Application of the 'last seen theory' requires a possible link between the time when the person was last seen alive and the fact of the death of the deceased coming to light. There should be a reasonable proximity of time between these two events. This proposition of law does not admit of much excuse but what has to be seen is that this principle is to be applied depending upon the facts and circumstances of a given case. This Court in para 21 of Yusuf's case (supra) while referring to the case of Mohd. Azad @ Samin v. State of West Bengal [(2008) 15 SCC 449] and State through Central Bureau of Investigation Vs. Mahender Singh Dahiya [(2011) 3 SCC 109], held as under:-

"21. The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. (Vide Mohd. Azad v.State of W.B and State v. Mahender Singh Dahiya)"

74. The reasonableness of the time gap is, therefore, of some significance. If the time gap is very large, then it is not only difficult but may even not be proper for the court to infer that the accused had been last seen alive with the deceased and the former, thus, was responsible for commission of the offence. The purpose of applying these principles, while keeping the time factor in mind, is to enable the Court to examine that where the last seen together and the time when the deceased was found dead is short, it inevitably leads to the inference that the accused person was responsible for commission of the crime and the onus was on him to explain how the death occurred.

75. In the facts of the present case, the factor of time does not play such a significant role because it is a case where there were eye-witnesses to the strangulation of the deceased by the accused, and therefore, it may not be expected of the prosecution to show the time of last seen and death, by leading independent evidence. PW-17 is the witness to the altercation between the accused and the deceased. PW-8 is the witness to the strangulation of the deceased by the accused persons. Besides, PW-7, PW-9 and PW-11 are witnesses to the loading of the gunny bags containing human body parts in the Maruti Van by the accused. Thus, these facts have been established by independent witnesses. None of these witnesses is a relation or a witness inimical towards the accused.

76. It has come on record that the occurrence had taken place on 29th September, 2003 at midnight. There may be some variation (5 to 10 minutes) in the time stated by different witnesses as to when the occurrence took place. From their statements, it is clear that by and large, they have given approximately the same time with reasonable variation, which is primarily for the reason that the accused persons and deceased were seen by the witnesses at different places. We

have already held that these discrepancies do not amount to any material contradiction. Thus, the time of death stands clearly established between 11.30 pm to 12.00 am on 29th/30th September, 2003. Thereafter, it was the act of disposal of the body of the deceased which attracts the offence under Section 201 IPC.

77. As far as the death of the deceased is concerned, there was hardly any time gap between the two incidents, i.e. the last seen alive and the fact of death of the deceased becoming known. All the events occurred between 11.00 p.m. to 12.00 a.m. at midnight of 29th September, 2003. Thus, the contention raised on this ground is entirely without any merit.

34. A conjoint reading of the complete evidence and the material on record suggests as here under :

(i) The deceased Ramesh after the death of his wife had developed an illicit relationship with his wife's sister accused-appellant Lata and had started staying mostly with her in her husband's house which is immediately adjacent to the house of deceased Ramesh in which his two daughters including PW1 complainant Kumari Mitali and his son were residing.

(ii) The accused-appellant Lata had taken full control of the finances of deceased Ramesh and had also seized his cash, jewelry and documents relating to his properties.

(iii) On 22.7.2005 at about 5 PM accused-appellants Rajkumar and Lata had come to the house of deceased Ramesh and taken him away with them to their house on the pretext of meeting, accused-appellants Ashwani Kumar and Meenu@Meenakshi who according to them were waiting for him in their house for getting the money dispute between them settled.

(iv) On hearing the alleged shrieks of accused-appellants Lata and Meenu@Meenakshi, PW1 Kumari Meetali and PW2 Shikha along with their other relatives had rushed to the house of accused-appellants Rajkumar and Lata and on reaching there they found Ramesh lying dead in the house of accused-appellants Rajkumar and Lata.

(v) There is no evidence of presence of any other person in the house of the accused-appellants Rajkumar and Lata as none of the witnesses of fact examined on behalf of prosecution have deposed that they had seen any other person including accused-appellants Ashwani Kumar and Meenu@Meenakshi present in the house of accused-appellants Rajkumar and Lata when they had reached their house on hearing the shrieks of the accused-appellants.

(vi) Nature of injuries mentioned in the post mortem report make it clear that the deceased had died due to asphyxia as a result of strangulation.

PW11 Dr. R.K. Gupta who had conducted the post mortem on the deceased's dead body had opined that death of the deceased was due to asphyxia as a result of strangulation. He had further noted the following ante mortem injuries on the dead body of the deceased :

(i) Ligature mark 18 cm x 1.5 cm on front and both sides of neck, 6 cm above sternal notch, ligature mark is horizontally placed.

(ii) ligature mark 11 cm x 1.5 cm on front and right side neck, just above injury no. 1. This mark is going upwards post-mark.

(vii) The "Chunniya" allegedly used in committing the murder of the deceased Ramesh was discovered on the pointing out of the accused-appellant Lata pursuant to her disclosure statement.

The prosecution in this case has proved by cogent evidence that the deceased was last seen alive in the company of the accused-appellants Rajkumar and Lata who had taken him away to their house with them and after only a few minutes he was found strangled to death in their house. The facts relating to the occurrence of the manner in which the deceased had died in their house were within the special knowledge of accused-appellants Rajkumar and Lata and the burden was upon them to have shown as to what had actually happened to the deceased which had resulted in his death. The accused-appellants having failed to come up with any explanation with regard to the circumstances under which the deceased Ramesh was strangled to death in their house and their plea of alibi set up by them in defence having been found by us to be unreliable, we have no hesitation in holding that the various circumstances relied upon by the prosecution relating to guilt of accused was fully established beyond doubt.

35. As far as the accused-appellants challenge to the admissibility of the evidence of PW1, PW2 and PW7 who were examined by the prosecution for proving the charge framed against them on the ground that they are close relatives of the deceased and hence partisan witnesses vitally interested in seeing the conviction of the accused-appellants is concerned the same is also without any merit.

36. On the point of interested witnesses, the Hon'ble Supreme Court in State of U.P. Vs. Jagdeo 2003 Cri LJ 844 (SC) observed that only on the ground of interested or related witnesses, their evidence cannot be discarded. Most of the times eye-witnesses happen to be family members or close associates because unless a crime is committed near a public place, strangers are not likely to be present at the time of occurrence.

37. Regarding evidentiary value of testimony of the interested witnesses or relatives witnesses, Hon'ble Supreme Court in Mano Dutt and another Vs. State of U.P. 2012 (77) ACC 209 has observed in paragraph No. 19 referring to the case of Namdeo Vs. State of Maharashtra 2007 (58) ACC 414 (52) = 2007 (54) AIC 162. That evidence of such witnesses has to be reliable subject to their evidence being trustworthy and admissible in accordance with law.

38. All the witnesses of fact except PW4 who was declared hostile were subjected to gruelling cross examination by the learned counsel for the defence but he has failed to elicit anything from them which could render the veracity of their testimony on the point of the deceased

having gone to the house of the accused-appellants Rajkumar and Lata on the date of the incident at about 5 PM and his having been found dead in their house only a few minutes later, doubtful even for a minute. All the aforesaid witnesses have consistently deposed about their being present in the house of the deceased at the time when the accused-appellants Rajkumar and Lata had come to the deceased's house and taken him away with them to their house. We do not find any reason to discard or disbelieve their evidence.

39. Now coming to the last ground of challenge to the conviction of the appellants Rajkumar and Lata that the prosecution has totally failed to prove by any cogent evidence that the accused-appellants Rajkumar and Lata had any motive to commit the murder, we find that the prosecution has not been able to prove by any reliable evidence, the motive suggested by the prosecution witnesses for the accused-appellants to commit the murder of the deceased and in fact from the evidence of PW8 DD Agarwal which we have already discussed and critically examined herein above, we find that it is true that the motive set up by the prosecution for the accused-appellants to commit the murder of the deceased in fact stands totally falsified.

40. The ancillary question which next arises for our consideration is that whether the failure of the prosecution to prove by any cogent evidence, the motive for the appellant to commit the murder of the deceased the credibility of the entire prosecution case stands shattered. The reply is in the positive as far as accused-appellants Ashwani Kumar and Meenu are concerned. We have already recorded herein above that the prosecution has not been able to prove by any cogent evidence, the complicity of the accused-appellants Ashwani Kumar and Meenu in the commission of the murder of deceased Ramesh. But the same does not hold good vis-a-vis accused-appellants Rajkumar and Lata for the reasons already recorded by us herein above.

41. In view of the above, we do not find any reason to interfere with the recorded conviction and the sentence awarded to the accused-appellants Rajkumar and Lata appellants in criminal appeal no. 7150 of 2009. As far as accused-appellants Ashwani Kumar and Meenu@Meenakshi appellants in criminal appeal no. 7096 of 2009 are concerned, in view of the foregoing discussion, we have no hesitation in holding that the prosecution has not been able to prove its case beyond all reasonable doubts against them.

These are the reasons upon which we are allowing criminal appeal no. 7096 of 2009 Ashwani Kumar and another Vs. State of U.P. and dismissing criminal appeal no. 7150 of 2009 Rajkumar and another Vs. State of U.P.

(2016) 8 ILRA 829
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.08.2016

BEFORE

THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Criminal Revision No.- 2506 Of 2013

Shakeel

...Revisionist

Versus

State Of U.P. & Anr.

...Opposite Parties

Counsel for Revisionist:

Zafar Abbas, Jameel Ahmad Azmi, R.A. Khan, R.K. Mishra, Ravindra Sharma

Counsel for Opposite Parties:

Govt. Advocate, Raghvendra Prakash

Juvenile Justice – Determination of Age – Rule 12(3), Juvenile Justice (Care and Protection of Children) Rules, 2007 — Revision preferred against the appellate order dated 11.9.2013 (Additional Sessions Judge, Court No. 6, Azamgarh) setting aside the order dated 1.7.2013 of the Principal Magistrate, Juvenile Justice Board, Azamgarh, which had declared the revisionist a juvenile *[Paras 2-4]* – No matriculation certificate, school-leaving date-of-birth certificate, or municipal/panchayat birth certificate produced before the Board – Revisionist referred to the Chief Medical Officer, whose report dated 27.5.2013 opined his age as about 19 years on the date of examination, the F.I.R. having been lodged on 17.3.2013 for an incident of the same day *[Para 6]* – Held: Under the priority of proof prescribed by Rule 12(3), in the absence of documents under clause (a)(i) to (iii), medical opinion of the duly constituted Medical Board alone is authorised to determine age *[Paras 5, 7]* – Appellate order declaring the revisionist above 18 years of age and an adult on the date of occurrence suffers from no illegality, perversity or infirmity *[Para 8]*.

Criminal Revision dismissed

(Delivered by Hon'ble Prabhat Chandra Tripathi, J.)

1. List has been revised. Sri R.K. Mishra, learned counsel for the revisionist, Sri Raghuvendra Prakash, learned counsel for the opposite party no.2 and the learned A.G.A. for the State are present.

2. This criminal revision has been preferred against the judgement and order dated 11.9.2013 passed by the learned Additional Sessions Judge, Court No.06, Azamgarh in Criminal Appeal No.58 of 2013 (Shanti Devi v. State of U.P.), whereby the order dated 1.7.2013 passed by the Principal Magistrate, Juvenile Justice Board, Azamgarh in Application No.31 of 2013, case crime no.236 of 2013, under Sections 363, 366, 376 (2) (d), 392, 411 I.P.C. and 3/4 of the Protection of Children From Sexual Offences Act, 2012, P.S. Phoolpur, District Azamgarh has been set aside and the appeal has been allowed.

3. Learned counsel for the revisionist has argued that the revisionist-Shakeel was declared juvenile by order dated 1.7.2013 of the Principal Magistrate, Juvenile Justice Board, Azamgarh.

4. The findings of the Principal Magistrate, Juvenile Justice Board, Azamgarh was challenged in Criminal Appeal No.58 of 2013 (Shanti Devi v. State of U.P.), which was set aside by order dated 11.9.2013 of the learned Additional Sessions Judge, Court No.06, Azamgarh and the accused revisionist was declared above the age of 18 years and as an adult on the date of occurrence.

5. Rule 12 (3) of The Juvenile Justice (Care and Protection of Children) Rules, 2007 is quoted as below:-

"12. (3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining -

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/ her age on lower side within the margin of one year.

and while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards, such child or the juvenile in conflict with law."

6. It is admitted fact that no educational records were produced to determine the age of the revisionist- Shakeel before the Juvenile Justice Board, Azamgarh and thereafter he was produced before the Chief Medical Officer, Azamgarh for age determination of the revisionist. The Chief Medical Officer, Azamgarh in his examination report of age dated 27.5.2013, has opined that the

accused revisionist-Shakeel was about 19 years of age on the date of examination. The F.I.R. was lodged on 17.3.2013 mentioning therein the incident of the same day.

7. Thus, according to priority mentioned in Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007, in absence of the educational certificates and the birth certificate given by a corporation or a municipal authority or a panchayat, the Medical Board is only authorized to declare the age of the juvenile or child.

8. So, it is evident that there is no illegality, perversity or infirmity in the impugned judgement and order dated 11.9.2013 passed by the learned Additional Sessions Judge, Court No.06, Azamgarh. The revision lacks merit and is liable to be dismissed.

9. The revision is accordingly, **dismissed**.

10. Interim order, if any, stands vacated.

BEFORE

Criminal Revision No.- 3423 Of 2015

Criminal Revision dismissed

2. This criminal revision has been preferred by the revisionist for setting aside the order dated 23.03.2013 passed by the learned Additional District and Sessions Judge (Ex-cadre), Room No. 22, Allahabad in Sessions Trial No. 80 of 2009, arising out of Case Crime No. 293 of 2008 (State Vs. Sanjay Bhatt), under Section 8/21 N.D.P.S. Act, Police Station G.R.P., District Allahabad whereby the claim of juvenility of the revisionist has been dismissed.

3. The main argument of the learned counsel for the revisionist is that Akash Sharma and Sanjay Bhatt are one and the same person. The name of the revisionist has been wrongly mentioned as Sanjay Bhatt in the police papers viz F.I.R. in Crime No. 292 of 2008, under Section 379/411 I.P.C., Police Station G.R.P., District Allahabad and in Case Crime No. 293 of 2008, under Section 8/21 N.D.P.S. Act, Police Station G.R.P., District Allahabad.

4. The revisionist has assailed the impugned order dated 23.03.2013 passed by the learned Additional District and Sessions Judge (Ex-cadre), Room No. 22, Allahabad on this count only and in support of his contention he has relied upon the High School Examination Mark Sheet of the year 2004 and certificate of High School Examination, 2004 both issued by Board of High School And Intermediate Education, U.P. In both the abovementioned educational documents, the name of the examinee Akash Sharma have been mentioned.

5. To establish the identity of the revisionist that Akash Sharma and Sanjay Bhatt both are one and the same person, CW-1 Uma Shankar Sharma has stated that the name of his eldest son is Akash Sharma. CW-2 Jeet Bahadur, who was clerk in Sarswati Bal Mandir Inter College, Chak Daud Nagar, Naini has proved the details of the scholar register in which the name of Sanjay Sharma son of Uma Shankar Sharma, mother's name Smt. Neetu Sharma, date of birth 19.11.91 has been mentioned.

6. On examination of the Identity Card of Akash Sharma, son of Uma Shankar Sharma issued by the Election Commission of India, in the column of 'DOB' year 1992 has been mentioned.

7. In the F.I.R. and charge sheet submitted by the police of Police Station G.R.P. Allahabad in Crime No. 293 of 2008, under Section 8/21 N.D.P.S. Act, in the column of accused, the name of the accused is mentioned as Sanjay Bhatt son of Uma Shankar Bhatt, R/o 502/A Prayagpuram, near Naini Central Jail, Police Station Naini, District Allahabad. Moreover, nowhere in the aforesaid F.I.R. and charge sheet it has been mentioned that the accused Sanjay Bhatt is the same person, who is known as Akash Sharma. Nonetheless in the Identity Card of the Akash Sharma issued by the Election Commission of India, address has been mentioned as House No. 126/3, Purafateh Mohammad, Pura Fateh Mohammad, Tehsil Karachhana, District Allahabad.

8. Resultantly, address mentioned in police papers viz. in F.I.R. and in charge sheet is quite different from the address mentioned in the Identity Card issued by the Election Commission of India.

9. On specific query raised by this Court, learned counsel for the revisionist has informed this Court that there are two different houses and two different addresses of the revisionist Akash Sharma and also the father of the revisionist is keeping two separate wives on different addresses.

10. The aforesaid analysis makes it crystal clear that the identity of the revisionist Akash Sharma and another person named as Sanjay Bhatt is not similar.

11. Thus, the impugned order dated 23.03.2013 passed by the learned Additional District and Sessions Judge (Ex-cadre), Room No. 22, Allahabad does not suffer from any legal infirmity or perversity. No interference is warranted at this stage. The revision is liable to be dismissed.

12. The revision is **dismissed**.

(2016) 8 ILRA 834
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.08.2016

BEFORE

THE HON'BLE ADITYA NATH MITTAL, J.

Election Petition No.- 2 Of 2012

Rajendra Pratap Singh @ Moti Singh ...Petitioner
Versus
Ram Singh & Ors. ...Respondents

Counsel for Petitioner:

Prasant Singh Atal, Shashi Prakash Singh

Counsel for Respondents:

Prem Prakash, Rakesh Kumar Madanwal

Election Petition – Postal Ballots – Non-Issuance of Form 12 and Form 13-A – Representation of the People Act, 1951, Sections 58, 100(1)(d)(iv) – Conduct of Election Rules, 1961, Rules 19, 20, 23, 54-A — Petitioner, defeated by a margin of 156 votes (61278 against 61434) for the seat of M.L.A., 249 Patti Assembly Constituency, District Pratapgarh, challenged the rejection, without opening, of 955 postal ballot papers cast by polling personnel on election duty at the 'PB Facilitation Centre' [*Paras 2, 4, 19*] – Returning Officer (DW-2) admitted that, for convenience, postal ballots were issued to polling personnel at the training venue without obtaining the mandatory letter of intimation in Form 12 and without the declaration in Form 13-A being furnished or attested, since identification was done departmentally through EPIC/appointment orders [*Paras 16, 25-27*] – District Election Officer's own e-mail (Ext. Ka-1) and the Election Commission of India's letter dated 5.3.2012 confirmed that only postal ballots issued and received back in conformity with the statutory Forms could be counted, and that the Returning Officer could not evolve his own procedure [*Paras 3, 12-13, 31*] – Held: Issuance of Form 12 (Rules 19 & 20) and the declaration in Form 13-A (Rule 23(1)(a)) are mandatory requirements under the Rules of 1961 and Chapter X of the Handbook for Returning Officers, 2009 (Para 10.3), which has statutory force (relying on Ram Sukh vs. Dinesh Aggarwal (2009) 10 SCC 541) [*Paras 24, 28-29*] – Non-compliance thereof by the Returning Officer/District Election Officer amounted to material non-compliance with the Act and Rules materially affecting the result of the election within the meaning of Section 100(1)(d)(iv) of the Act, given the narrow margin of victory [*Paras 33-36*] – Held further: The postal ballots so irregularly obtained (in the absence of Form 12 and Form 13-A) could not themselves be treated as valid votes and could not be counted; the Election Commission of India ought to have directed a fresh poll for the said polling personnel under Section 58(2) but failed to do so. [*Paras 37, 50*]

Reliefs – Declaration of Election Void – Petitioner Not Entitled to be Declared Elected – Postal Ballots Not to be Counted — Held: Since it could not be ascertained how many of the 955 rejected postal ballots, if opened, would have favoured the petitioner, the second relief claimed (declaration of the petitioner as duly elected) could not be granted; nor could the 955 postal ballots be directed to be counted, having been cast in violation of the mandatory Rules – Consequently, only the first relief, namely, declaring the election of Respondent No. 1 void under Section 98(b) read with Section 100(1)(d)(iv), was granted. [*Paras 54-55*]

Accountability of Election Machinery – Direction for Departmental Action — Held: The then Returning Officer, having grossly violated Rules 19, 20 and 23(1)(a) of the Rules of 1961 and devised his own procedure unknown to law despite the Election Commission's clarificatory communication, strict departmental action was directed to be taken against him, and he was directed not to be assigned any position of importance in future; copies of the order directed to be sent to the Election Commission of India and other authorities for compliance. *[Paras 51, 56]*
Election Petition allowed

Case Law Discussed

1. Ram Sukh vs. Dinesh Aggarwal (2009) 10 SCC 541

(Delivered by Hon'ble Aditya Nath Mittal, J.)

1. This Election Petition has been filed inter-alia seeking the following reliefs:

A) *"declare the election of respondent no.1 as Member of Legislative Assembly from 249 Patti Assembly Constituency, District Pratapgarh as null and void and declare the petitioner as duly election as Member of aforesaid constituency.*

B) *Pass an order for summoning all 955 ballot papers which were cast by electors on election duty at 'PB Facilitation Centres' established in the constituency at training places and to declare the result after counting them.*

C) *Pass such other order or direction which the Hon'ble Court may deem fit and proper in the facts of the case.*

D) *Award costs to the petitioner."*

2. Brief facts, which led to the filing of the instant election petition are, that the petitioner, who is the political leader, was one of the contesting candidate for the seat of the Member of the State Legislative Assembly in the State of Uttar Pradesh from 249 Patti Assembly Constituency, District Pratapgarh. The petitioner had received 61278 votes whereas the first respondent had received 61434 votes and, as such, the respondent no.1 was declared elected as Member of Legislative Assembly by a margin of 156 votes. It is said that the result of the election has been materially affected by improper refusal/rejection of 955 postal ballot papers, which were neither opened nor counted by the Returning Officer during the counting of the votes. The persons, who are either in defence services or in other services or under detention or on election duty, who were not able to reach their respective polling stations on the day of poll, are permitted to cast their votes by postal ballot papers for which the provisions have been made in the Conduct of Election Rules, 1961 (hereinafter referred as 'Rules 1961'), wherein it is provided that such voters have to fill up the application in Form -12 and send it to the Returning Officer before seven days of the voting. In the present case, the training-cum-postal ballot facilitation centre was established and the authorized representative of the contesting candidates were also allowed to remain present at the facilitation centre. While adopting the aforesaid procedure, the postal ballots were given to the polling

personnel at election duty relating to the Constituency No.249 Patti Assembly and drop boxes were also kept there with. In this Constituency, 955 polling personnel exercised their right to cast votes through postal ballot paper by dropping the same in the drop box. The aforesaid 955 polling personnel also completed the necessary formalities as provided in the Hand Book of Returning Officer 2009. Form 13-A is meant only for the identification of the persons as a voter of the constituency and the attestation is done by the authorized officer.

3. After the polling was over on 19.02.2012, the Deputy District Election Officer, District Pratapgarh wrote a letter dated 23.02.2012 to the Chief Electoral Officer, Lucknow seeking some clarification with regard to the counting of postal ballots. In the said letter, it was mentioned that the Returning Officer has himself identified the said electors and after being fully satisfied, issued the ballot papers and for this reason, Form 13-A was not issued because it was not felt necessary to do so. The said letter was forwarded to the Election Commission of India for necessary guidelines and the Election Commission of India issued a letter dated 05.03.2012 stating that only such postal ballot papers, which have been issued and received back as per the statutory requirements shall be counted.

4. On the date of counting i.e. on 06.03.2012, the petitioner had appointed Sri Vinod Pandey as his Election Agent for watching the counting. When the postal ballot papers were to be counted, it was revealed that there was only one postal ballot paper, which was received by post in the envelop whereas there were 955 postal ballot papers contained in two ballot boxes but the fold of these ballot papers was not opened and they were rejected by marking the word 'rejected'. Therefore, the aforesaid 955 postal ballot papers were neither opened nor counted in the election, regarding which the Election Agent of the petitioner submitted an application but the Returning Officer had not taken any action and subsequently rejected the said application on 06.03.2012. The difference (margin of votes) between the petitioner and the respondent no.1 was only 156 votes but 955 postal ballot papers were not at all counted causing serious prejudice. Therefore, it amounts to improper refusal to count the ballot papers and there was non-compliance of the provisions contained in the Representation of People Act 1951 (for short 'Act 1951') and the Rules of the 1961. In these circumstances, the election of the respondent no.1 is liable to be set aside and 955 postal ballot papers deserved to be counted after opening the same.

5. Respondent no.1 has contested the Election Petition and has filed his written statement. In the written statement, some preliminary objections were raised regarding non-compliance of the provisions of Order VI Rule 2(3) Code of Civil Procedure as well as non supply of complete copy as provided under Clause 'c' of Section (1) of Section 83 of the 'Act 1951' as well as non-signing of the annexures.

6. Respondent no.1 has submitted that the petition is absolutely frivolous and based on concocted and afterthought allegations. The petitioner has not shown any valid grounds for interference by this Hon'ble Court. The process for counting of votes received by post is prescribed under Rule 54-A of the Conduct of Election Rules 1961. However, the minutes dated 20.02.2012 clearly indicates that the procedure in the election has been followed properly. The postal ballots

have been rightly rejected and no irregularity or error has been committed by the Returning Officer. The petitioner has mentioned the contradictory averments in his petition and most of the contents in number of the paragraphs of the petition have been denied. It has been stated that the petitioner himself has not followed the provisions of law and, as such, the Election Petition is liable to be dismissed with exemplary cost.

7. In the written statement filed by the respondent no.7, in most of the paragraphs, it has been mentioned that the contents of such paragraph require no comments but it has also been stated that the whole process of the election has completed according to due process of law as well as the Act and Rules. Therefore, the petition is liable to be dismissed.

8. Respondent no.8, in reply to the contents of the election petition, has stated in most of the paragraphs that it does not call for any reply and the Election Petition is devoid of merits and deserves to be dismissed.

Except the respondent no.1, no other respondent has finally contested the petition.

9. The notices upon the other respondents was published in the daily newspaper 'Dainik Jagran' on 19.05.2012. Therefore, the service upon the other respondents has been deemed sufficient.

10. It is relevant to mention that during the course of hearing, various other applications under various provisions of law as well as preliminary objections were raised, which have been decided by different orders and such orders shall form part of this judgment.

11. Upon the pleadings of the parties, on 13.12.2012, Hon'ble Mr. Justice Rajiv Sharma has framed the following issues:

i. Whether the result of the election in so far as it concerns the returned candidate has been materially affected by the non-compliance with the provisions of the Representation of People Act, 1951, the Rules and the Orders made there under and also the provisions made in the exercise of powers under Article 324 of the Constitution of India including the handbook of returning officer?

ii. Whether non-issuance (it should be issuance) of Form 13-A to the electors of election duties was mandatory requirement in view of electors requirement to produce their appointment letter for election duty along with Electors' Photo Identity Card (E.P.I.C.) or copy of official identity card along with Form - 12? If so, its effect.

iii. whether the result of the election in so far as it concerns the returned candidate has been materially affected by improper refusal/rejection of 955 ballot papers which were neither opened nor counted by the Returning Officer during the counting of votes?

iv. Whether non-compliance of the statutory requirement admittedly by the returning officer of 249 Patti U.P. Assembly Constituency in issuing and receiving back of postal ballot papers to electors on election duty who have cast their vote at Postal Ballot Facilitation Centre has vitiated the entire election? If yes, its effect.

v. Whether Election Commission of India was required to appoint day and fix hours for taking fresh poll at Postal Ballot Facilitation Centre (P.B.F.C.) as required under Section 58 (2) of Representation of People Act, 1951?

vi. Whether the Election Petition is liable to be dismissed for non-compliance of the provisions of Order VI Rule 2 (3) Code of Civil Procedure and also for non-compliance of mandatory provisions of Section 83 (1) (C) of the Representation of People Act, 1951?

vii. Whether the provisions of Rule 54-A of the Conduct of Election Rules, 1961 has been followed and the postal ballot papers received without cover in Form 13-C by the Returning Officer shall be counted after scrutinizing the declaration in Form 13-A and there is any illegality in rejecting the ballot papers found without mandatory declaration and endorsement on the cover in Form 13-B?

viii. Whether the procedure in Election has been followed properly after scrutiny of polling booths, the necessary documents, i.e. Registrar 17-A, Form - 17C and Report of Micro observers has been properly consider and found the same correct in presence of all the candidates of the parties and their representatives have shown their satisfaction?

ix. Whether the grounds taken in the Election Petition are tenable in the eyes of law and the procedure adopted under Chapter XIV Clause 14.1 to 14.3 of the Handbook for Returning Officers is not in accordance to the procedure given in the Handbook for the purpose?

x. Whether 955 ballot papers were in order as per statutory requirement given in the handbook as well as the circulars issued by Election Commission of India time to time and the statutory requirement given in the handbook as well as the circulars issued by Election Commission of India time to time and the statutory requirement of Form 13-A has been followed and if so its effect?

xi. Whether the postal ballot papers have been properly identified by the Returning Officer and the procedure given by the purpose has been properly adopted and any provision of The Representation of People Act has been violated by the authority concerned declaring the opposite party No.1 as return candidate?

xii. Whether the petition is liable to be rejected due to non-joinder of necessary party and the Election Petition itself not maintainable as per preliminary objections raised by respondent No.1?

xiii. Whether the allegation made against the Chief Electoral Officer with regard to the conduct of the election and without impleading him as party the Election Petition cannot be adjudicated?

xiv. Whether the petitioner has comply the provisions of Section 83 of the People Representative Act and the relief claimed by the petitioner can be granted without constituting the proper pleading in accordance to the provisions of law?"

Subsequently, the following additional issues were framed on 14.03.2013.

xv. Whether the petitioner has raised objection before the returning officer prior to proceeding further in the counting of votes regarding the procedure adopted in the Election Process in accordance to provisions of the Representations of the People Act, 1951 ?

xvi. Whether the provisions of Rule 54-A of the Conduct of Election Rules, 1961 has been followed and the postal ballot papers received without cover in Form-13-C by the Returning Officer shall be counted after scrutinizing the declaration in Form 13-A and there is any illegality in rejecting the ballot papers found without mandatory declaration and endorsement on the cover in Form 13-B ?

xvii. Whether the counting of postal ballot papers started on 06.03.2012 at 8.00 a.m. and continued upto 3.30 pm and the result has been declared by the returning officer in Form 21-C of the Election Rules declaring opposite party No.1 as duly elected returned candidate of 249 Patti Constituency Assembly after satisfying himself about the fairness of counting of votes and complete accuracy of compilation of result in Form 20 and the name of opposite party no.1 has correctly being published under Section 67 of the Representations of the People's Act, 1951 ?

xviii. Whether 955 ballot papers were in order as per statutory requirement given in the handbook as well as the circulars issued by Election Commission of India time to time and the statutory requirement of Form-13-A has been followed and if so its effect?

xix. Whether the postal ballot papers have been properly identified by the Returning Officer and the procedure given by the purpose has been properly adopted and any provision of the Representations of the People's Act has been violated by the authority concerned declaring the opposite party no.1 as return candidate ?

xx. Whether the allegation made against the Chief Electoral officer with regard to the conduct of the election and without impleading him as party the Election Petition cannot be adjudicated ?

xxi. Whether the Election Petition is not maintainable as in the present Election Petition the petitioner has raised question in respect of counting of postal ballot papers and there is no allegation of corrupt practice against the returned candidate ?"

Thirteen annexures have been filed by petitioner along with Election Petition, out of which Annexure 7 has been marked as Ex.1. The respondent no.1 has filed six documents received under R.T.I. Act.

12. The plaintiff had filed his examination in chief through affidavit, upon which the cross examination of Rajendra Pratap Singh (PW-1) has been conducted on 29.03.2016. In the affidavit of examination in chief, the petitioner has verified the averments made in election petition as well as certified copy of the documents issued from the District Election Office, which have also been filed along with the list of documents, which includes the appointment of Assistant Returning Officer as well as certified copy of the report filed by the Returning Officer dated 21.03.2012 and also filed certified copy of the letter issued by the Officer on Special Duty wherein the Deputy District Election Officer, Pratapgarh sought verification from the Chief Electoral Officer, State of U.P.; directions with regard to non-issuance of Form 13-A at the PBFC and has also verified that on the basis of Form 12, votes were allowed to be cast with utmost secrecy (verified by the R.O./A.R.O.) that they are voters of the Constituency and therefore, Form 13-A was neither given to the voters nor take back from them. The Chief Electoral Officer forwarded the said letter for necessary instructions to the Election Commission, certified copy of which has also been filed as Document-6 and photocopy of which is also Annexure No.7 to the writ petition.

The election - petitioner has also testified that certified copy of the e-mail sent by the District Election Officer to the Commission on 4th March 2012 (Ext. Ka-1) wherein the District Election Officer has clarified as to why Form 13(A) (B) and (C) were not issued to the voters on election duty.

13. The cross examination of the petitioner has been recorded on 29.03.2016. The petitioner has also examined Sri M. Dev Raj, Joint Secretary in the Cabinet Secretariat, Government of India (the then District Magistrate, Pratapgarh) as PW-2, who has proved the e-mail communication (Annexure 7 to the petition) and has stated that he had sent this e-mail to the Deputy Election Commissioner. This Annexure 7 has been marked as Ext. Ka-1. This witness has been cross examined by the learned counsel for the opposite party no.1 on 11.04.2016.

14. The petitioner has examined Sri Vinod Pandey as PW-3, who has stated that he was the election agent of the petitioner and has supported the averments of his affidavit of examination in chief stating that objection was raised for non-counting of Postal Ballots.

15. The respondent no.1 has summoned and examined Sri T.O. Suraj, Secretary to Government of Kerala, Parliamentary Affairs, Trivendram as DW-1, who was observer in the election of 2012 for 249 Patti Assembly Constituency. This witness has stated that since the date of filing of nomination papers and till the declaration of the result, he was posted at Patti Constituency as observer but he had no direct involvement regarding the activities that who, how and when has applied for postal ballot. He has further stated that on the date of counting, he has received a complaint of Mr. Vinod Pandey for counting of postal ballot papers, upon which he had passed the order on 06.03.2012 and has further stated that the postal ballots, which were not having the

declaration Form 13-A, were rejected. This witness has been cross examined by the learned counsel for the petitioner.

16. Sri Sharda Prasad Yadav (DW-2) in his statement before the court deposed that in the year 2012, he was Returning Officer for Patti Assembly Constituency and taking into consideration the convenience of the voters, the postal ballot papers were issued on the date of training. The official had not given any separate application. The names of the persons whom the postal ballot papers were issued were mentioned in a register and they were got signed by them and after comparing with the voters' list, they were provided the postal ballot. There were separate drop boxes for each Constituency. No declaration Form was given to the voters and he did not remember that whether counter foil was published or not. He has further stated that on the date of counting on 06.03.2012, there were only one postal ballot paper, which was accepted and remaining 955 ballot papers were rejected because they did not contain Form 13-A. This witness has been cross examined by the counsel for the petitioner.

17. Both the parties to the petition closed their evidence.

18. Learned counsel for the petitioner as well as learned counsel for the opposite party no.1 have submitted their written arguments. Learned counsel for both the parties have also been heard orally at length and I have also perused the record.

19. Before recording the findings on the issues, it is relevant to mention that margin of victory of respondent no.1 against the petitioner is only 156 votes. It is also not in dispute that 955 postal ballot papers have been rejected because they did not contain the declaration in Form 13-A.

20. Before discussing the issue, some relevant provisions of the Representation of People Act 1951 as well as Conduct of Election Rules, 1961 are reproduced as under:

Sections 58, 84, 98, 100 and 101 of the Representation of People Act 1951 and Rule 23 & 54-A of the Rules 1961 reads as under:

Section 58 Fresh poll in the case of destruction, etc., of ballot boxes.--(1) If at any election,--

(a) any ballot box used at a polling station or at a place fixed for the poll is unlawfully taken out of the custody of the presiding officer or the returning officer, or is accidentally or intentionally destroyed or lost, or is damaged or tampered with, to such an extent, that the result of the poll at that polling station or place cannot be ascertained; or

(aa) any voting machine develops a mechanical failure during the course of the recording of votes; or]

(b) any such error or irregularity in procedure as is likely to vitiate the poll is committed at a polling station or at a place fixed for the poll, the returning officer shall forthwith report the matter to the Election Commission.

(2) Thereupon the Election Commission shall, after taking all material circumstances into account; either--

(a) declare the poll at that polling station or place to be void, appoint a day, and fix the hours, for taking a fresh poll at that polling station or place and notify the day so appointed and the hours so fixed in such manner as it may deem fit, or

(b) if satisfied that the result of a fresh poll at that polling station or place will not, in any way, affect the result of the election or that 5[the mechanical failure of the voting machine or] the error or irregularity in procedure is not material, issue such directions to the returning officer as it may deem proper for the further conduct and completion of the election.

(3) The provisions of this Act and of any rules or orders made there under shall apply to every such fresh poll as they apply to the original poll.]

Section 98. Decision of the High Court. - At the conclusion of the trial of an election petition, the High Court shall make an order -

(a) dismissing the election petition; or

(b) declaring the election of all or any of the returned candidates to be void; or

(c) declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected

(d)

Section 84. Relief that may be claimed by the petitioner.--A petitioner may, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claim a further declaration that he himself or any other candidate has been duly elected.]

Section 100: Grounds for declaring election to be void.--[(1) Subject to the provisions of sub-section (2) if [the High Court] is of opinion--

(a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act 9[or the Government of Union Territories Act, 1963 (20 of 1963)]; or

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or

(c) that any nomination has been improperly rejected; or

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected--

(i) by the improper acceptance or any nomination, or

(ii) by any corrupt practice committed in the interests of the returned candidate [by an agent other than his election agent], or

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) by any non--compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act,

[the High Court] shall declare the election of the returned candidate to be void.]

(2) If in the opinion of [the High Court], a returned candidate has been guilty by an agent, other than his election agent, of any corrupt practice but [the High Court] is satisfied--

(a) that no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and 5[without the consent], of the candidate or his election agent;

(b) omitted

(c) that the candidate and his election agent took all reasonable means for preventing the commission of corrupt practices at the election; and

(d) that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents,

then [the High Court] may decide that the election of the returned candidate is not void.

Sections 101 Grounds for which a candidate other than the returned candidate may be declared to have been elected.--If any person who has lodged a petition has, in

addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and [the High Court] is of opinion--

(a) that in fact the petitioner or such other candidate received a majority of the valid votes; or

(b) that but for the votes obtained by the returned candidate by corrupt practices the petitioner or such other candidate would have obtained a majority of the valid votes, [the High Court] shall after declaring the election of the returned candidate to be void declare the petitioner or such other candidate, as the case may be, to have been duly elected.

Rule 23 of the Conduct of Elections Rules 1961 : Issue of ballot paper -

(1) A postal ballot paper shall be sent by post under certificate of posting to the elector together with--

(a) a declaration in Form 13A;

(b) a cover in Form 13B;

(c) a large cover addressed to the returning officer in Form 13C; and

(d) instructions for the guidance of the elector in Form 13D:

Provided that the returning officer may, in the case of a special voter or a voter on election duty, deliver the ballot paper and Forms, or cause them to be delivered, to such voter personally.

(2) The returning officer shall at the same time--

(a) record on the counterfoil of the ballot paper the electoral roll number of the elector as entered in the marked copy of the electoral roll;

(b) mark the name of the elector in the marked copy of the electoral roll to indicate that a ballot paper has been issued to him, without however recording therein the serial number of the ballot paper issued to that elector; and

(c) ensure that that elector is not allowed to vote at a polling station.]

(3) Before any ballot paper is issued to an elector at an election in a local authorities' constituency or by assembly members, the serial number of the ballot paper shall be effectively concealed in such manner as the Election Commission may direct.

(4) Every officer under whose care or through whom a postal ballot paper is sent shall ensure its delivery to the addressee without delay.

(5) After ballot papers have been issued to all the electors entitled to vote by post, the returning officer shall--

(a) at an election in a parliamentary or assembly constituency, 2[subject to the provisions of rule 27P seal up in a packet] that part of the marked copy of the electoral roll which relates to service voters and record on the packet a brief description of its contents and the date on which it was sealed and send the other relevant parts of the marked copy to the several presiding officers 3[or marking the names of electors to whom ballot papers are issued at the polling stations without however recording therein the serial numbers of the ballot papers issued to the electors]; and

(b) at any other election, seal up in a packet the marked copy of the electoral roll and record on the packet a brief description of its contents and the date on which it is sealed.

(6) The returning officer shall also seal up in a separate packet the counterfoils of the ballot papers issued to electors entitled to vote by post and record on the packet a brief description of its contents and the date on which it was sealed.

Rule 54-A of the Conduct of Elections Rules 1961. Counting of votes received by post--

i. The returning officer shall first deal with the postal ballot papers in the manner hereinafter provided.

ii. No cover in Form 13-C received by the returning officer after the expiry of the time fixed in that behalf shall be opened and no vote contained in any such cover shall be counted.

iii. The other covers shall be opened one after another and as each cover is opened, the returning officer shall first scrutinise the declaration in Form 13A contained therein.

iv. If the said declaration is not found, or has not been duly signed and attested, or is otherwise substantially defective, or if the serial number of the ballot paper as entered in it differs from the serial number endorsed on the cover in Form 13B, that cover shall not be opened, and after making an appropriate endorsement thereon, the returning officer shall reject the ballot paper therein contained.

v. Each cover so endorsed and the declaration received with it shall be replaced in the cover in Form 13C and all such covers in Form 13C shall be kept in a separate packet which shall be sealed and on which shall be recorded the name of the constituency, the date of counting and a brief description of its content.

vi. The returning officer shall then place all the declarations in Form 13A which he has found to be in order in a separate packet which shall be sealed before any cover in Form 13B is opened and on which shall be recorded the particulars referred to in sub-rule (5).

vii. The covers in Form 13B not already dealt with under the foregoing provisions of this rule shall then be opened one after another and the returning officer shall scrutinise each ballot paper and decide the validity of the vote recorded thereon.

viii. A postal ballot paper shall be rejected--

(a) if it bears any mark (other than the mark to record the vote) or writing by which the elector can be identified; or]

(aa) if no vote is recorded thereon; or

(b) if votes are given on it in favour of more candidates than one; or

(c) if it is a spurious ballot paper; or

(d) if it is so damaged or mutilated that its identity as a genuine ballot paper cannot be established; or

(e) if it is not returned in the cover sent along with it to the elector by the returning officer.

ix. A vote recorded on a postal ballot paper shall be rejected if the mark indicating the vote is placed on the ballot paper in such manner as to make it doubtful to which candidate the vote has been given.

x. A vote recorded on a postal ballot paper shall not be rejected merely on the ground that the mark indicating the vote is indistinct or made more than once, if the intention that the vote shall be for a particular candidate clearly appears from the way the paper is marked.

xi. The returning officer shall count all the valid votes given by postal ballot in favour of each candidates, record the total thereof in the result sheet in Form 20 and announce the same.

xii. Thereafter, all the valid ballot papers and all the rejected ballot papers shall be separately bundled and kept together in a packet which shall be sealed with the seals of the returning officer and of such of the candidates, their election agents or counting agents as may desire to affix their seals thereon and on the packet so sealed shall be recorded the name of the constituency, the date of counting and a brief description of its contents.

For ready reference Form 12 and Form 13-A of the Conduct of Election Rules, 1961 are reproduced as follows:

[FORM 12]

(See rules 19 and 20)

LETTER OF INTIMATION TO RETURNING OFFICER

To
The Returning Officer for
Assembly/Parliamentary constituency.

Sir,

I intend to cast my vote by post at the ensuing election to the Legislative Assembly/House of the People from the Assembly/Parliamentary constituency.

My name is entered at S. No.....in Part No..... of the electoral role for assembly constituency comprised withinParliamentary constituency.

The ballot paper may be sent to me at the following address:--

.....
.....
.....

Place

Date

.....

Yours faithfully,

FORM 13A

[See rule 23(1)(a)]

DECLARATION BY ELECTOR

Election to the.....

(This side is to be used only when the elector signs the declaration himself) I hereby declare that I am the elector to whom the postal ballot paper bearing serial number.....has been issued at the above election.

Date.....

Signature of elector.

Address.....

Attestation of signature

The above has been signed in my presence by.....(elector) who** is personally known to me/has been identified to my satisfaction by.....(identifier) who is personally known to me.

Signature of identifier, if any.....
Address.....

Signature of Attesting Officer
Designation.....
Address.....
Date.....

(This side is to be used when the elector cannot sign himself)

I hereby declare that I am the elector to whom the postal ballot paper bearing serial number.....has been issued at the above election.

Date.....

Signature of Attesting Officer on behalf of elector.
Address of Elector.....

CERTIFICATE

I hereby certify that--12

1. the above named elector is personally known to me/has been identified to my satisfaction by.....(identifier) who is personally known to me;

2. I am satisfied that the elector is illiterate/suffers from.....(infirmity) and is unable to record his vote himself or sign his declaration;

3. I was requested by him to mark the ballot paper and to sign the above declaration on his behalf; and

4. the ballot paper was marked and the declaration signed by me on his behalf in his presence and in accordance with his wishes.

Signature of Attesting Officer.....

Signature of identifier, if any.....
Address.....
Date.....

Designation.....
Address.....

Here insert one of the following alternatives as may be appropriate:--

1. House of the People from the..... constituency.
2. Legislative Assembly from the..... constituency.
3. Council of States by the elected members of the Legislative Assembly of(State).
4. Council of States by the members of the electoral college of.....
(Union territory).
5. Legislative Council by the members of the Legislative Assembly.
6. Legislative Council from the..... constituency.

****Strike off the inappropriate alternative.**

21. Para 10.3 of Chapter X (Ballot Papers and Voting Machines) of the Hand Book of Returning Officers of 2009 is reproduced herein below:

10.3 You, as RO should ensure that:

(a) All polling officials should, without exception, be provided Form 12 for applying for postal ballot paper along with their appointment letter with a request to submit duly filled Form 12 on the first day of training. They may be told that there is no need to fill up "address" column of Form 12 since postal ballot papers will be issued to them personally at the training venue itself.

(b) You should further make adequate arrangement to receive Form 12 at the training center Adequate number of Form 12 should also be kept at the training venue so that any polling personnel who are in need of Form 12 can get it.

(c) When any such person submit a duly filled Form 12, he shall be required to produce, his appointment letter and also the EPIC issued to him or a copy of any official identity card issued to him by his department. Your official, who receive such Form 12 should see that it is filled up correctly and, if not, then the concerned polling official should be asked to correct. All duly filled applications (Form 12) received shall be processed immediately by the concerned Returning Officer/Assistant Returning Officer well before the second round of training. Hence, it is imperative that the second round of training is held after the postal ballot papers are printed and ready for issue. On the day of second round of training, you ensure separate and proper arrangements for issuing the postal ballot to the persons concerned. As the trainees may be elector

of different to different ACs, it becomes imperative that all R.Os/ A.R.Os along with their staff will remain present at the training venue for the above purpose. Now -

(d) First, identification of the trainee official whom PB is being issued shall be verified thorough EPIC or any other photo ID as well as appointment order.

(e) The cover containing the postal ballot paper will be handed over to him after obtaining his sign in the register for marinating account of issue of PB to polling staff in Format XXIVB. Simultaneous entry (PB) shall be made using red ink in the marked copy of the electoral roll. It should be made clear to him that once a PB is issued to a polling personnel called for training he shall after that cast his vote only through postal ballot even if he is exempted from election duty subsequently or kept on reserve. Considering the postal delays and inconvenience caused to such electors in returning back the PB after recording his vote, the Commission now encourages the system in which such electors, on receiving the PB from R.O/A.R.O record their preference on the postal ballot paper, then and there at "PB Facilitation Centre". For this, you should provide for some covered space at some distance from training centre, with some chairs and a table with facility to record vote in complete secrecy.

(f) When elector reaches to above said Facilitation centre, some Govt officer, as is authorized under law to attest Form 13A.

(g) The polling official (trainee), then record his vote on postal ballot, fold it and then

(h) Drop it in a duly locked and sealed "drop box" pertaining to his AC. The drop box shall be kept under close supervision of concerned RO/ARO and ECI Observer.

Note: 1. The D.E.O / SP / SDM shall personally inspect the training venue cum postal ballot facilitation center in advance in order to ensure adequate security measures are in place. As the electors will be casting their vote at the training venue proper arrangements shall be ensured to restrict entry to the venue only to the appointed polling staff and other authorized government servants and no other person. When the voters mark the ballot with their preference the secrecy of ballot shall be enforced without compromise. If the authorized representatives of contesting candidates remain present at the facilitation center proper seating arrangement shall be made for them. The presence of such representatives shall be registered by obtaining their signature in a register. The entire process including the arrangements made for this purpose shall be recorded in video.

FINDINGS

Issues No. 1, 2, 3, 4, 5, 7, 10, 11, 16, 18 and 19

All these issues relate to same controversy regarding postal ballots, therefore, they are taken together for decision.

22. During the course of arguments, it has been argued by learned counsel for petitioner that because the identity of the voters was verified, therefore, there was no occasion to submit Form 13-A. It has also been submitted that there was no fault on the part of the voters, therefore, the candidate cannot suffer for the laches of election machinery in not issuing the Form 13-A. It has also been submitted that the District Election Officer (hereinafter referred to as 'DEO') had himself wrote a letter to the Election Commission and e-mail was also sent; upon which the Election Commission has issued direction that votes should be counted in accordance with law. If the procedure prescribed under the Act of 1951 as well as Rules of 1961 was not followed, then under the provisions of Section 58 of the Act of 1951, fresh polls regarding 955 postal ballots should have been conducted for which the Election Commission of India was duty bound. The 'DEO' has himself admitted in Ext.1 that Form 13-A was not issued and the Election Commission has clarified that 'DEO' will not evolve his own procedure. The margin of victory was only 156 votes, therefore, rejection of 955 postal ballots has materially affected the result. Therefore, the election of opposite party no.1 is liable to be set aside.

23. Respondent no.1 has drawn my attention towards the provisions of Section 84, 98 and 100 of the Act of 1951 and has submitted that the provision of Section 58 of the Act of 1951 are not applicable because no mandamus has been sought by the petitioner. It has also been submitted that there is no pleadings that Form 12 was not issued. Regarding the postal ballots, the procedure has been prescribed, which has to be followed strictly. Neither the counter foils nor the register has been brought before the Court, therefore, the said 955 votes cannot be counted. It has also been submitted that the identification and attestation are two different things and the rules required for attestation, which has not been followed. The rule also provides that postal ballots should be kept in envelop but they have not been kept in the envelop. In absence of Form 13-B and 13-C, the said 955 postal ballots cannot be counted because they were bogus or vague votes. Therefore, they have been rightly rejected by the Returning Officer. Lastly, he has submitted that the entries of Form 20 have not been challenged, therefore, the petition is liable to be dismissed.

24. Section 60 of the Act of 1951 provides special procedure for voting by certain classes of persons, which further provides that provision may be made by rules made under this Act. The Rules of 1961 have been enacted and Rule 19 provides that if a special voter who wishes to vote by post at an election, then he shall send an intimation in Form 12 to the Returning Officer. Rule 20 provides that a voter on election duty, who wishes to vote by post at an election, shall send an application in Form 12 to the Returning Officer. In both these rules the word 'shall' has been used. Therefore, the voter is duty bound to send the intimation in Form 12 to the Returning Officer. Although, the petitioner (PW-1) has shown his ignorance about the issuance of Form 12 as well as submission of Form 13-A by the concerned voter. Vinod Pandey (PW-3) who was the Election Agent for the petitioner has stated that he had raised objection regarding non-counting of postal ballots.

25. Certainly, the issuance of Form 12 and Form 13-A along with the envelop in Form 13-B and 13-C is the duty of the Returning Officer, which has been admitted by Sri Sharda Prasad Yadav (DW-2), who was the Returning Officer regarding the Election of 2012 for 249 Patti Assembly Constituency of District Pratapgarh. Sri Sharda Prasad Yadav (DW-2) has stated that taking into consideration the convenience of voters, postal ballots were issued on the date of training and no such voter had given any such application separately that he should be issued the postal ballot. He has further admitted that no declaration form was given to the voters. He has further admitted that 955 votes were declared invalid because they did not contain the Form 13-A. However, in the cross examination, he has given a different statement stating that postal ballots were to be issued to the voters who had deposited Form 12. He has further admitted in the cross examination that all the persons, to whom the postal ballots were issued, had given Form 13 but had not issued Form 13-A to any of the voter because it was not given in any other Constituency and it was decided that Form 13-A shall not be issued. He has further clarified it in the cross examination that because identification of the voters was done by the duty card and the voter identity card. Therefore, Form 13-A was not issued.

26. Certainly, the election machinery, which also includes the Returning Officer, are duty bound to follow procedure as mentioned in the Act of 1951 and Rules of 1961. The defence witness Sri Sharda Prasad Yadav has given both way statement regarding Form 12. In the examination in Chief, he has stated that no voter involved in the election duty had given any separate application for issuance of postal ballot, but in the cross examination he has admitted that whenever postal ballots were issued, the concerned persons had given the Form 12. His statement appears to be totally false in view of the information procured by the opposite party through R.T.I. The information procured on the RTI has been submitted by the supplementary affidavit filed under order VIII Rule 1-A read with Order XI Rule 15 CPC on 08.02.2016, which has been permitted by the Court.

27. A perusal of the letter No.70 dated 03.02.2016 issued by the Assistant District Election Officer of Pratapgarh shows that Form 12 was not given by any of the official who were on training of election duty. Any of 955 officials to whom the postal ballot was given, had not submitted the Form 12. This has further been clarified by letter no.77 dated 03.02.2016 stating clearly that no official, who were engaged in the election duty, was either given or required to filling Form 12. Certainly, the documentary evidence as will prevail over the oral evidence. By the documentary evidence, it is proved that Form 12 was not issued to any of the voters, who were given postal ballot. Therefore, the statement of Sri Sharda Prasad Yadav (DW-2) in the cross examination is absolutely false. On the other hand, he has admitted that Form 13-A was also not issued to any of the voters because it was not given in any other Constituency.

28. It is relevant to mention that Rule 19 and 20 of the Rules 1961 provides for letter of intimation to the Returning Officer by a person who wants to cast his vote in Form 12. However, Rule 23 (1) (a) of the Rules of 1961 provides the procedure for declaration by elector and his signatures have to be attested by the attesting officer. Form 13-A also contains certificate regarding some facts.

29. As mentioned above, requirement of submission of intimation to the Returning Officer in Form 12 is mandatory. Further, the requirement of Rule 23 (1) (a) of the Rules 1961 is also mandatory and the DEO or the Returning Officer have no option to evolve their own procedure. It is also not disputed that non-counting of 955 postal ballots was objected by the Election Agent of the petitioner. The hand-book for Returning Officer 2009 also provides the procedure and the instruction No.10.3 is absolutely clear in this regard and there is no ambiguity. The guidance 10.3 starts with mandatory clause that all polling officials should, without exception, be provided the Form 12 for applying for postal ballot paper along with their appointment letter. The language of the said Hand-Book is in accordance with the provisions of Act 1951 as well as the provisions of Rule 1961. The word "without exception" requires that the issuance of Form 12 and submission of Form 12 cannot be waived. In the same way, the guidelines of 10.3 further provides for attestation of Form 13-A. Although in the case of **Ram Sukh vs. Dinesh Aggarwal; (2009) 10 SCC 541**; Hon'ble the Apex Court in paragraph 23 has held as under:

"There is no quarrel with the proposition that the instructions contained in the Handbook for the Returning Officers are issued by the Election Commission in exercise of its statutory functions and are, therefore, binding on the Returning Officers. They are obliged to follow them in letter and spirit. But the question for consideration is whether the afore-extracted paragraphs of the election petition disclose material facts so as to constitute a complete cause of action. In other words, the question is whether the alleged omission on the part of the Returning Officer ipso facto "materially affected" the election result. It goes without saying that the averments in the said two paragraphs are to be read in conjunction with the preceding paragraphs in the election petition. What is stated in the preceding paragraphs, as can be noticed from grounds (i) and (ii) reproduced above, is that by the time specimen signature of the polling agent were circulated 80% of the polling was over and because of the absence of the polling agent the voters got confused and voted in favour of the first respondent. In our opinion, to say the least, the pleading is vague and does not spell out as to how the election results were materially affected because of these two factors. These facts fall short of being "material facts" as contemplated in Section 83(1)(a) of the Act to constitute a complete cause of action in relation to allegation under Section 100(1)(d)(iv) of the Act. It is not the case of the election petitioner that in the absence of his election agent there was some malpractice at the polling stations during the polling."

30. In accordance with the said decision also, the guidelines issued by the Election Commission have also statutory effect.

31. It is also relevant to mention that when the objection was raised by the election agent of the petitioner for not-counting the 955 postal ballots, the Deputy Election Officer, Pratapgarh had sent a letter No.1502-Nirvachan-2012 dated 23.02.2012 to O.S.D. of Chief Election Officer, Uttar Pradesh seeking some clarification regarding Form 12 and Form 13-A, who had send the letter No.678 (CRO-3) dated 01.05.2012 to the Principal Secretary of Election Commission of India for seeking instructions in this regard. M. Dev Raj, who was the District Election Officer at that time had also sent e-mail message dated 04.03.2012 at 11.41 PM seeking clarification in view of the aforesaid letters in which he has specifically stated that Form 13-A were not issued by the RO/ARO

because separate registration of identification was maintained. He was also aware of the instructions of the Election Commission and has further stated that "if one were to go by the above mentioned instructions, then the said votes may have to be rejected for lack of Form 13-A, B and C". He had requested the Election Commission of India for further directions. The Election Commission of India had given the immediate response on 05.03.2012 and has issued a letter to the Chief Electoral Officer, U.P., which is reproduced as under:

"Dated : 5th March 2015

To,

*The Chief Electoral Officer,
Uttar Pradesh,
Lucknow.*

*Sub: General Election to U.P. Legislative Assembly, 2012 - counting of
postal ballot in ACs comprised in district Pratapgarh - regarding*

Sir,

I am directed to refer to your letter number 678/CEO-3 dated 1st March 2012, received today, on the subject cited, read with e-mail dated 4th March 2012 of DM-cum-DEO, Pratapgarh to DEC(VZ) and to state that the Commission has noted with the surprise that the DEO Pratapgarh has mentioned that there is no instruction in the matter either in HB or ROs or in ECI's instruction dated 05th May 2011. He should be directed to read carefully Para 27 and 28 of our aforesaid instruction and also Para 14.3 of Chapter XIV of ROs Hand Book. The Commission cannot allow District Election Officers to devise their own systems and mechanism. It is clear that District Election Machinery of Pratapgarh has not followed the instructions of Election Commission and the Prescribed law in the matter of issuing postal ballot to poll personnel in the District and which is a serious matter.

The Commission would like to reiterate its earlier instructions that only and only such postal ballot papers, which have been issued and received back as per statutory requirements shall be counted tomorrow.

You may please reiterate these instructions to all the districts of the state and ensure that prescribed legal provisions and ECI instructions are strictly followed by all DEOs during the counting tomorrow. DEOs may be directed to bring this to be notice of all counting observers.

*Yours Faithfully
Sd/-
HARBANS SINGH*

SECRETARY

Copy to : The DM-cum-CEO, Pratapgarh, Uttar Pradesh."

32. The Election Commission of India has specifically directed the Chief Electoral Officer, U.P. that Commission cannot allow the District Election Officer to device their own system and mechanism and it is clear that the district election machinery of Pratapgarh has not followed the instructions of Election Commission and the prescribed law in that manner of issuing postal ballots to poll personnel in the district and which is a serious matter. The directions in the Rules of 1961 as well as Hand Book for Returning Officers 2009 were clear, even then the Returning Officer of 249 Patti Consistency Pratapgarh had devised his own system and mechanism, which was at all not permitted under the Rules of 1961 as well as Hand Book of 2009.

33. In these circumstances, it was incumbent upon the authorities including the Election Commission of India to have acted in accordance with Section 58 of the Act 1951 because in view of the provisions of Section 58 (1) (b), there was error or irregularity in the procedure as is likely to vitiate the poll at a polling station. In view of the provisions of section 58(1) (a), it was the duty of the Election Commission to have appointed a day and fix the hours for taking a fresh poll at that polling station regarding postal ballots but unfortunately, it has not been done.

34. The grounds have been mentioned in section 100 of the Act of 1951 and Section 100(1)(d)(iv) provides that if the High Court is of opinion that by any non-compliance with the provisions of Constitution or of this Act or any rules or orders made under this act, even committed, then the election of the returned candidate shall be declared void.

35. In view of the above above discussion, it is clear that DEO or the Returning Officer have no option to evolve their own device. It is also proved beyond any doubt that the voters had not given any letter of intimation in Form 12. It is also proved that Form 13-A were neither provided to the voters nor they submitted the declaration, though, it was incumbent upon the DEO as well as Returning Officer to have provided the Form 12 to the Election Personnel who were involved in the duty to submit their letter of intimation to the Returning Officer.

Certainly, in absence of Form 12 and Form 13-A, their postal ballots cannot be treated to be a valid vote but at the same time, the lapses have been committed by the DEO and the concerned Returning Officer, which cannot be excused for any ground. Therefore, I am of the view that the result of the election, in so far as it relates to the returned candidate, has been materially affected on account of non-compliance of the provisions of the 1951 Act read with Rules of 1961 as well as Hand Book for Returning Officer 2009, issue no. 1 is accordingly decided in "affirmative".

36. Issuance of Form 12 and 13-A to the electors of election duty was mandatory requirement and the non-compliance of it, has resulted in material irregularity. Thus, the issue no.2 is accordingly decided in "affirmative".

37. Rejection of 955 postal ballot papers for want of Form 13-A cannot be said to be improper but the election result has been materially affected by non-issuance of Form 12 and Form 13-A. Thus, the issue no.3 is accordingly decided in "affirmative".

In view of the above discussion, issue no.4 is decided in "affirmative". Issue no. 5 is also decided accordingly in "affirmative" holding that the Election Commission of India was required to appoint a day and fix hours for taking fresh polls in view of the provisions of Section 58 (2) of the Representation of the People Act, 1951.

38. The issue no.7 is accordingly decided in "negative" holding that the provision of Rule 54-A of the Rules 1961 have not been followed by the Returning Officer.

39. Issue no.10 & 11 are accordingly, decided in "negative" holding that 955 postal ballot papers were not in order as per statutory requirement and statutory requirement of Form 12 and 13-A have not been followed.

Issue no. 16 is decided accordingly that because provisions of Rule 54-A have not been followed, therefore, the said votes cannot be counted.

Issue no. 18 is accordingly decided that 955 postal ballot papers were not in order as per the statutory requirement.

Issue no. 19 is decided in "negative" that the postal ballot papers have not been properly identified and the procedure has not been properly adopted.

40. Issue no.6:

This issue relates to the non-compliance of the provisions of Order VI Rule 2(3) of Code of Civil Procedure as well as mandatory provision of Section 83(1)(c) of the Act of 1951. In the present election petition, the provisions of Order VI Rule (2)(3) as well as provisions of Section 83(1) (c) have been followed. Therefore, the petition is not liable to be dismissed for non-compliance of the aforesaid provisions. The issue is accordingly decided in "negative".

41. Issue no. 8 and 9:

No arguments on this issue has been advanced by any of the parties and no evidence has been led on these points. Therefore, the issues are decided in "affirmative".

42. Issue no. 12:

This issue is regarding non-joinder of necessary party. The provision of Section 82 of the Act of 1951 are clear that a petitioner shall join as respondents to his petition or all the contesting candidates and any other candidate against whom allegations of corrupt practice are made. In the present petition, all the

contesting candidates have been made parties. Therefore, the suit is not barred by any non-joinder of necessary party. The issue is decided in "negative".

43. Issue no.13:

No personal allegations have been made against the Chief Electoral Officer, therefore, in my opinion, the Chief Electoral Officer is not a necessary party. Issue is accordingly decided in "negative".

44. Issue no.14:

The petitioner has complied with the provisions of Section 83 of the Act of 1951 and the pleadings are proper. Therefore, this issue is accordingly decided.

45. Issue no.15:

It is not disputed that Sri Vinod Pandey was the election agent of the petitioner, who had raised objection before the Returning Officer for non-counting of 955 postal ballots. Therefore, the issue is accordingly decided in "positive".

46. Issue no.17:

From the aforesaid discussions, it is not disputed that counting started on 06.03.2012 at 8.00 AM and continued upto 3.30 PM. Certainly, the result has been declared by the Returning Officer in Form 21-C and the opposite party no.1 has been declared as duly elected returned candidate of 249 Patti Assembly Constituency of District Pratapgarh but as discussed above, the procedure regarding postal ballot papers have not been properly followed. The issue is decided accordingly.

47. Issue no.20:

This issue is the repetition of issue no.13. Therefore, the issue is decided in terms of decision of issue no.13.

48. Issue no.21:

It is not necessary that in every election petition, there has to be an allegation of corrupt practices. The allegation may be challenged on other grounds also as mentioned in 1951 Act. Therefore, by not making any allegation of corruption, the petition cannot be said to be not maintainable. Thus, the issue is accordingly decided in "negative".

49. Now the question arise as to which relief, if any, the petitioner is entitled. From the aforesaid discussion, it is clear that the rules regarding the postal ballot papers has not been followed, which is a mandatory requirement. It is also clear that the Returning Officer has evolved his own procedure to which the Election Commission of India has also objected.

50. Non-issuance of Form 12 and Form 13-A are such material irregularities, which have vitiated the election process. In view of the provisions of Section 58 of the Act 1951, when the matter was reported to the Election Commission of India, the Election Commission should have taken steps in view of the provisions of Section 58 of the Act 1951 for appointing a day and fixed time for fresh poll regarding 955 postal ballots but unfortunately, it has not been done.

51. Before parting with, I would like to record that the then Returning Officer, namely, Sri Sharda Prasad Yadav, who is presently reported to be posted as A.D.M. (Civil Supplies) Kanpur, who has also been examined as DW-2, has grossly violated the provisions of Rule 19, 20 and 23 (1)(a) of the Rules of 1961; as well as the Hand Book for Returning Officer 2009, which has statutory force and instead evolved his own procedure unknown to the Act and Rules. The Election Commission of India by letter dated 05.03.2012 has only shown his concern about this unknown procedure but has not further acted in accordance with the provisions of Section 58 of the 1951 Act. Due to non-compliance of the aforesaid Rules, the election process is vitiated resulting in unlawful enjoyment by the respondent no.1 being Member of Legislative Assembly of 249 Patti Constituency, District Pratapgarh.

52. The Statutory authorities are bound to act strictly in consonance with the Act, Rules and procedure prescribed therein for a particular purpose. Further, the State authorities are to act in a fair and transparent manner. Here, the authorities aforesaid, has acted in gross violation of the procedures laid down in the statute and invented his own procedure.

Needless to mention here that when the statute prescribed certain thing to be done in a particular manner, the same shall be done in that manner alone and not in any other manner.

53. I have also no hesitation to mention that during the proceedings of this election petition, the respondent no.1 adopted numberless delaying tactics by taking number of adjournments; by moving number of applications under various provisions of CPC; and by not cooperating for early disposal of this election petition. Even on 03.03.2016 the court was compelled to pass the following order:

"(Misc.Application No. Nil of 2016)

The application for adjournment has been moved by learned counsel for the respondent No.1, which has been strongly opposed by learned counsel for the petitioner on the ground that petition is pending since 2012 and the respondent No.1 is delaying the hearing of the said election petition.

Today, the date is fixed for further cross-examination of the petitioner and it has been clarified on previous dates also that delaying tactics may not be adopted. There are so many counsel engaged on behalf of the respondents, namely, Sri Ashok Kumar Tripathi, Sri Manoj Verma and others. Needless to say that the proceedings are also delayed by filing various applications one-by-one.

The application for adjournment is allowed subject to payment of Rs.10,000/- as cost to be deposited by the respondent No.1 in the Library Fund of Oudh Bar Association on or before the next date of listing.

It is further made clear that if hindrances are created in the disposal of this petition, then this Court shall be constrained to pass such orders, which may result to withhold the salary, the perquisite as well as the Vidhyak Nidhi and other facilities of respondent No.1 because the term of present election is likely to end in March, 2017.

List the case on 29.03.2016, at 2:00 p.m. for further cross-examination of PW-1."

54. From the discussion aforesaid, I am of the view that there has been non-compliance of the provisions of 1951 Act; Rules of 1961; as well as Hand Book for Returning Officer 2009. Therefore, in view of the provision of Section 100 (1)(d) (iv) read with provisions of Section 98 of the Act, the election of the returned candidate is liable to be declared as void.

As far as the second part of relief 'A' is concerned, the petitioner cannot be declared as duly elected Member of Legislative Assembly from 249 Patti Assembly Constituency, District Pratapgarh because I do not know that how many votes out of 955 rejected postal ballots, he has received.

Relief 'B' can also not be granted for the reason that the said 955 postal ballots were casted against the Rules of 1961, therefore, they cannot be counted.

ORDER

55. The petition is **allowed with costs**. The Election for Legislative Assembly of Uttar Pradesh 2012 of respondent no.1 as Member of Legislative Assembly from 249 Patti Constituency Assembly Pratapgarh, District Pratapgarh is declared as void.

As the election of respondent no.1 is being declared void, therefore, respondent no.1 must not be allowed any benefits of this election and also pension as Member of Legislative Assembly and all other such benefits, which are admissible to an Ex-Member of Legislative Assembly. It is clarified that this period shall confined to General Elections for Legislative Assembly of Uttar Pradesh 2012.

56. For non-compliance and violation of the procedure and Rules, strict action must be taken by the State Government against Sri Sharda Prasad Yadav, ADM (Civil Supplies) Kanpur (the then Returning Officer for 249 Patti Assembly Constituency, District Pratapgarh) and in future, he must not be assigned any important duties or posted on a significant post.

Let a copy of this order be sent immediately to the Election Commission of India; Principal Secretary, Vidhan Sabha, U.P. Legislative Assembly; Chief Secretary, Government of U.P.; Chief Electoral Officer, U.P., Lucknow; and District Magistrate Pratapgarh for necessary action and compliance.

(2016) 8 ILRA 860
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.08.2016

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

First Appeal No.- 818 Of 2004

State Of U.P.

...Appellant

Versus

Khempal & Ors.

...Respondents

Counsel for Appellant/Petitioner:

S.C. (Standing Counsel), Sri S.S. Srinet

Counsel for Respondents:

None appeared / not contested

Land Acquisition – First Appeal by State Against Marginal Enhancement of Compensation – Smallness of Amount Involved — Appeal filed in 1990 by the State against an order dated 31.5.1990 of the Reference Court marginally enhancing land acquisition compensation, the total disputed amount being merely Rs. 1,334.88 – Held: Where the amount involved in an appeal by the State is trivial and the cost of protracted litigation (spanning over two decades) manifestly exceeds the amount in dispute, continuation of such appeal amounts to compulsive and wasteful litigation contrary to the State's own declared litigation policy. [Paras 2, 3, 16 and 23]

State as a Litigant – National and State Litigation Policy – Duty to Act as a Model/Responsible Litigant — Court noted that acquisition of agricultural land, particularly of small farmers, affects their fundamental right to livelihood, and that filing of routine appeals over marginal enhancements imposes disproportionate cost on the public exchequer and on poor litigants – Reliance placed on Mahanadi Coal Fields Ltd. vs. Mathias Oram (2010) 11 SCC 269; Bhusawal Municipal Council vs. Nivrutti Ramchandra Phalak, 2014(2) AWC 1407 (SC); Dilbagh Rai Jerry vs. Union of India (1974) 3 SCC 554; Mundrika Prasad Singh vs. State of Bihar (1979) 4 SCC 701; Urban Improvement Trust, Bikaner vs. Mohan Lal (2010) 1 SCC 512; Gurgaon Gramin Bank vs. Khajani (2012) 8 SCC 781; and Punjab State Power Corporation Ltd. vs. Atma Singh Grewal (2014) 13 SCC 666 – Held: The State/its instrumentalities are obliged to function as efficient and responsible litigants in terms of the National Litigation Policy, 2010 and the U.P. State Litigation Policy, 2011, and ought not to pursue appeals of trivial or marginal valuation merely because a technical right of appeal exists. [Paras 4 to 15 and 18]

Recovery of Costs from Erring Officers – Accountability — Held: Mere imposition of costs on the State exchequer has proved an insufficient deterrent to frivolous appeals since the officers sanctioning such appeals are not personally affected – Following Punjab State Power Corporation Ltd. (supra), the Court reiterated that recovery of costs from officers responsible for palpably irrational and uncalled-for decisions to file appeals may be warranted in appropriate cases, while directing implementation of the State Litigation Policy, 2011 in letter and spirit. [Paras 15 and 18]

Directions to State Government – Mandamus in Appellate Jurisdiction — Held: Though ordinarily no mandamus can be issued while deciding an appeal, in larger public interest and looking to the prevailing situation, the High Court has jurisdiction to issue appropriate directions even in an appeal (relying on Smt. Abida Begam vs. R.C. & E. Officer, AIR 1959 All 675; Dr. Ravindra Kumar Goel vs. State of U.P., 2004(5) AWC 4707; U.P. Nursing Home Association vs. Rajesh Kumar Srivastava, 2004(2) UPLBEC 1404) – State Government directed to implement its Litigation Policy, discourage unnecessary appeals over marginal amounts, and fix accountability of officers sanctioning frivolous litigation. [Paras 19 to 22]

First Appeal dismissed

Case Law Discussed

1. Mahanadi Coal Fields Ltd. & Anr. vs. Mathias Oram & Ors. (2010) 11 SCC 269
2. Bhusawal Municipal Council vs. Nivrutti Ramchandra Phalak and Others 2014 (2) AWC 1407 (SC)
3. Dilbagh Rai Jerry vs. Union of India and Others (1974) 3 SCC 554
4. Mundrika Prasad Singh vs. State of Bihar (1979) 4 SCC 701
5. Urban Improvement Trust, Bikaner vs. Mohan Lal (2010) 1 SCC 512
6. Gurgaon Gramin Bank vs. Khajani (2012) 8 SCC 781
7. Punjab State Power Corporation Ltd. vs. Atma Singh Grewal (2014) 13 SCC 666
8. Smt. Abida Begam vs. R.C. & E. Officer AIR 1959 All 675
9. Dr. Ravindra Kumar Goel vs. State of U.P. 2004 (5) AWC 4707
10. U.P. Nursing Home Association and Others vs. Rajesh Kumar Srivastava and Others 2004 (2) UPLBEC 1404
11. State of U.P. through Collector vs. Fateh Singh (First Appeal Defective No. 761 of 1991, order dated 22.11.2012)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri S.S. Srinet, learned standing counsel for the appellant.
2. This appeal was filed on 22.10.1990 challenging the judgment dated 31.05.1990 passed by the Court of 7th Additional District and Sessions Judge, Bulandshahr in L.A. Reference No.155 of 1987 marginally enhancing the compensation.
3. About twenty six years have passed since the date of filing this first appeal involving valuation of merely Rs.1334.88. This court is frequently coming across several first appeals where the disputed amount is less than Rs.1000/- or even less than Rs.500/-.
4. Acquisition of land of farmers by Government, particularly small farmers, in the process of development not only deprives them of their fundamental right to cultivate their agricultural land as part of their right to livelihood (which is the foundation for their sense of economic security, peace, prosperity and social status) but also creates a difficult situation for them by dragging them in luxury litigation without realising that poor farmers can not afford the exorbitant cost of litigation. Such litigations are also burden on public exchequer since cost of litigation for several years is much more than the valuation of appeal.
5. In the case of **Mahanadi Coal Fields Ltd. & Anr Vs. Mathias Oram & Ors. 2010 (11) SCC 269** (paras 10 and 11) after quoting the remarks of Dr. B.R. Ambedkar, the chief architect of

the Constitution of India, Hon'ble Supreme Court while considering a land acquisition matter, observed that it is very often the process of development that most starkly confirms the fears expressed by Dr. Ambedkar about our democracy. A blinkered vision of development, complete apathy towards those who are highly adversely affected by the development process and a cynical unconcern for the enforcement of the laws lead to a situation where the rights and benefits promised and guaranteed under the constitution hardly ever reach the most marginalized citizens. Even when laws relating to land acquisition and resettlement are implemented perfectly and comprehensively which happens rarely, uncomfortable questions remain. For people whose lives and livelihoods are intrinsically connected to the land, the economic and cultural shift to a market economy can be traumatic.

6. In the case of **Bhusawal Municipal Council Vs Nivrutti Ramchandra Phalak and others, 2014(2) AWC 1407 (SC)** (paras 16,17,18), Hon'ble Supreme Court considered the plight of farmers affected by land acquisition and creation of compulsive situation to indulge in luxury litigation and held as under :

*16. The judicial process of the court cannot subvert justice for the reason that the court exercises its jurisdiction only in furtherance of justice. **The State/authority often drags poor uprooted claimants even for payment of a paltry amount upto this Court, wasting the public money in such luxury litigation without realising that poor citizens cannot afford the exorbitant costs of litigation and, unfortunately, no superior officer of the State is accountable for such unreasonable conduct.** It would be apt to quote the well known words of Justice Brennan:*

*"Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with. But injustice makes us want to pull things down. **When only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to the continued existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness.**"*

*17. **The fundamental right of a farmer to cultivate his land is a part of right to livelihood** "Agricultural land is the foundation for a sense of security and freedom from fear. Assured possession is a lasting source for peace and prosperity." India being predominantly an agricultural society, there is a "strong linkage between the land and the person's status in the social system." "A blinkered vision of development, complete apathy towards those who are highly adversely affected by the development process and a cynical unconcern for the enforcement of the laws lead to a situation where the rights and benefits promised and guaranteed under the Constitution hardly ever reach the most marginalised citizens. For people whose lives and livelihoods are intrinsically connected to the land. the economic and cultural shift to a market economy can be traumatic." (Vide: Mahanadi Coal Fields Ltd. & Anr. v. Mathias Oram & Ors., (2010) 11 SCC 269; and Narmada Bachao Andolan v. State of Madhya Pradesh & Anr., AIR 2011 SC 1989)*

18. A farmer's life is a tale of continuous experimentation and struggle for existence. Mere words or a visual can never convey what it means to live a life as an Indian farmer. **Unless one experiences their struggle, that headache he will never know how it feels.** The risks faced by the farming community are many; they relate to natural calamities such as drought and floods; high fluctuation in the prices of input as well as output, over which he has no control whatsoever; a credit system which never extends a helping hand to the neediest; domination by middlemen who enjoy the fruits of a farmer's hard work; spurious inputs, and the recent phenomenon of labour shortages, which can be conveniently added to his tale of woes. Of late, there have been many cases of desperate farmers ending their lives in different parts of the country. **The Principles of Economics provides for the producer of a commodity to determine his prices but an Indian farmer perhaps is the only exception to this principle of economics, for even getting a decent price for their produce is difficult for them.** Economic growth through the 1990's had made India a more market- oriented economy, but had failed to benefit all Indians equally. The problems that plagued the farmers several decades ago are still glaringly present today; there is little credit available. What is available is very expensive. There is no advice on best practice in conducting agriculture operations. Income through farming is not enough to meet even the minimum needs of a farming family. Support systems like free health facilities from the government are virtually non-existent. The drama of millions leaving their homes in search of jobs, which are non existent of villages swiftly losing able-bodies of adults, leaving behind the old, hungry and vulnerable. Families break up as their members head in diverse directions.
(Emphasis supplied by me)

7. Keeping in mind the afore-quoted observations of Hon'ble Supreme Court and the fact of routine filing of First Appeals by the State Government and its instrumentalities to challenge the judgment and decree passed by Reference Court, I proceed to discuss the facts and prevailing situation as well as the question "whether the State Government being an efficient and responsible litigant should file appeal against the judgment of Reference Court where the enhancement of compensation is marginal or valuation of the appeal is small?"

8. On marginal enhancement of compensation by Reference Court by few hundred or few thousand rupees, the State Government or its instrumentalities, in a routine manner; used to file first appeals before the High Court, compelling poor farmers/claimants to indulge in litigation for several decades. It appears that in doing so the State Government feels it wise enough to spend an amount much more than the valuation of the appeal, as cost of litigation which includes cost of huge time of officers and employee in obtaining permission to file appeal, travelling allowance and daily allowance of gazetted officer in contacting Government counsel for preparation of appeal, typing expenses, court fees, process fee, expenses in preparation of paper book, affidavits and applications and cost of time spent by Government Officers, employees and counsels in doing 'PAIRVI' of such appeals for fifteen, twenty or thirty years. Such an approach of the State Government in our sovereign Socialist Secular Democratic Republic, cannot be appreciated particularly in view of the National Litigation Policy, 2009 and the U.P. State Litigation Policy, 2011 whereby the State Government claims itself to be an efficient and responsible litigant with the declaration not to pursue cases like an ordinary litigant and not to resort to litigation for the sake of

litigation. Objectives as mentioned in the policy includes expeditious disposal of cases, efforts to overcome the huge pendency of cases and mission to reduce average period of pendency of cases from 15 years to 3 years.

9. This Court takes judicial notice of a Government Order No.1647/11-2-13-9(208)/2013 dated 02.01.2014 issued by the State Government under Section 58A of the U.P. VAT Act (inserted by U.P. Act No.18 of 2013) taking decision not to file revision before the High Court where disputed tax or penalty is Rs.1,00,000/- or below. But in the matter of small farmers who have been deprived of their source of livelihood by way of compulsory acquisition of their small holdings, the State Government finds it appropriate to compel them to indulge in long litigation for twenty years or thirty years or more and to spend as cost of litigation an amount much more than the amount received by them as compensation. This prevailing situation becomes more alarming when the State Government has framed its 'State Litigation Policy -2011' but is acting in disregard of that policy.

10. Perusal of the aforesaid "State Litigation Policy" shows that it has been formulated with the purpose that **the State Government should not involve in frivolous litigation, especially where the stakes are not high. The policy aimed to transform the government into an efficient and responsible litigant.** The underlying purpose of the policy is to reduce the government litigation in Courts so that valuable court time is spent in resolving other pending issues to enable the average pendency of a case in a court reduced from 15 years to 3 years. The policy, therefore, provided that the government would identify bottlenecks and that appeals would not be filed where stakes are not high. The policy also formulated that all pending cases involving the government would be reviewed to filter frivolous and vexatious matters from the meritorious one. Cases so identified would be withdrawn, which would also include cases covered by previous decisions of Courts. Such withdrawal of the cases would be done in a time bound fashion. However, it appears that the State Government is not adhering to its own Policy.

11. In the case of **Dilbagh Rai Jerry Vs. Union of India and others, (1974) 3 SCC 554**, Hon'ble Krishna Iyer J. (concurring) considered that what should be the approach of Government in litigation and observed as under:

"The judgment just delivered has my full concurrence but I feel impelled to make a few observations not on the merits but on governmental disposition to litigation, the present case being symptomatic of a serious deficiency. In this country the State is the largest litigant to-day and the huge expenditure involved makes a big draft on the public exchequer. In the context of expanding dimensions of State activity and responsibility, is it unfair to expect finer sense and sensibility in its litigation policy, the absence of which, in the present case, has led the Railway callously and cantankerously to resist an action by its own employee, a small man, by urging a mere technical plea which has been pursued right up to the summit court here and has been negatived in the judgment just pronounced. Instances of this type are legion as is evidenced by the fact that the Law Commission of India in a recent report on amendments to the Civil Procedure Code has suggested the deletion of Section 80, finding that wholesome provision hardly ever utilised by Government, and has gone further to provide a special procedure for government

litigation to highlight the need for an activist policy of just settlement of claims where the State is a party. It is not right for a welfare' State like ours to be Janus-faced, and while formulating the humanist project of legal aid to the poor, contest the claims of poor employees under it pleading limitation and the like. That the tendency is chronic flows from certain observations I had made in a Kerala High Court decision which I may usefully excerpt here "The State, under our Constitution, undertakes economic activities in a vast and widening public sector and inevitably gets involved in disputes with private individuals. But it must be remembered that the State is no ordinary party trying to win a case against one of its own citizens by hook or by crook; for the State's interest is to meet honest claims, vindicate a substantial defence and never to score a technical point or overreach a weaker party to avoid a just liability or secure an unfair advantage, simply because legal devices provide such an opportunity. The State is a virtuous litigant and looks with unconcern on immoral forensic successes so that if on the merits the case is weak, government shows a willingness to settle the dispute regardless of prestige and other lesser motivations which move, private parties to fight in court. The lay-out on litigation costs and executive time by the State and its agencies is so staggering these days because of the large amount of litigation in which it is involved that a positive and wholesome policy of cutting back on the volume of law suits by the twin methods of not being tempted into forensic show-downs where a reasonable adjustment is feasible and ever offering to extinguish a pending proceeding on just terms, giving the legal mentors of government some initiative and authority in this behalf. I am not indulging in any judicial homily but only echoing the dynamic national policy on State litigation evolved at a Conference of Law Ministers of India way back in 1957. This second appeal strikes me as an instance of disregard of that policy."

(Emphasis supplied by me)

12. In the case of **Mundrika Prasad Singh Vs. State of Bihar**, (1979) 4 SCC 701 (para-5, 6, 7), Hon'ble Supreme Court held as under:

"5. The State of Bihar, like many other States in the country, has an enormous volume of litigation. Government litigation policy is vital for any State if resources are to be husbanded to reduce rather than increase its involvement in court proceedings. It is lamentable that despite a national litigation policy for the States having been evolved at an all-India Law Ministers' Conference way back in 1957 and despite the recommendations of the Central Law Commission to promote settlement of disputes where Government is a party what we find in actual practice is a proliferation of government cases in courts uninformed by any such policy. Indeed, in this country where government litigation constitutes a sizeable bulk of the total volume, it is important that the State should be a model litigant with accent on settlement. The Central Law Commission, recalling a Kerala decision, emphasised this aspect in 1973 and went to the extent of recommending a new provision to be read as Order 27 Rule 5B. The Commission observed:

27.9. We are of the view that there should be some provision emphasising the need for positive efforts at settlement, in suits to which the Government is a party.

27.10. With the above end in view, we recommend the insertion of the following rule :-

5-B(1) In every suit or proceeding to which the Government is a party or a public officer acting in his official capacity is a party, it shall be the duty of the Court in the first instance, in every case where it is possible to do so consistently with the nature of the circumstances of the case, to make every endeavour to assist the parties in arriving at a settlement in respect of the subject-matter of the suit.

(2) If, in any such suit or proceeding, at any stage it appears to the court that there is a reasonable possibility of a settlement between the parties, the court may adjourn the proceeding for such period as it thinks fit, to enable attempts to be made to effect such a settlement.

(3) The power conferred by Sub-rule (2) is in addition to any other power of the court to adjourn the proceedings.

6. The relevance of these wider observations is that avoidable litigation holds out money by way of fees and more fees if they are contested cases and this lures a lawyer, like any other homo economicus, to calculate income on a speculative basis, as this Government Pleader has done in hoping for a lakh of rupees.

7. We have been taken through the Bihar Government's rubs for fees of Government Pleaders in subordinate courts. Rule 115 appetises and is unrelated to the quantum or quality of work involved nor the time spent. Ad valorem calculation in fixing fees for land acquisition cases has a tendency to promote unearned income for lawyers. The petitioner here has presumably fallen victim to this proclivity. The time has come for State Governments to have a second economic look not only at litigation policy but lawyer's fees rules (like Rule 115 in the Bihar instance) especially in mass litigation involving ad valorem enormity and mechanical professionalism. Even a ceiling on income from public sector sources may be a healthy contribution to toning up the moral level of the professional system. **After all, the cost of justice is the ultimate measure of the rule of law for a groaning people.** Government and other public sector undertakings should not pamper and thereby inflate the system of costs. May be, this petition would not have been filed had the prospect of income without effort not been offered by Government Rules."

(Emphasis supplied by me)

13. In the case of **Urban Improvement Trust, Bikaner Vs. Mohan Lal, (2010) 1 SCC 512** (paras-10,11, 12), Hon'ble Supreme Court took notice of unwarranted litigation by Governments and State authorities and held as under:

"10. Unwarranted litigation by governments and statutory authorities basically stem from the two general baseless assumptions by their officers. They are:

(i) All claims against the government/statutory authorities should be viewed as illegal and should be resisted and fought up to the highest court of the land.

(ii) If taking a decision on an issue could be avoided, then it is prudent not to decide the issue and let the aggrieved party approach the Court and secure a decision.

The reluctance to take decisions, or tendency to challenge all orders against them, is not the policy of the governments or statutory authorities, but is attributable to some officers who are responsible for taking decisions and/or officers in charge of litigation. Their reluctance arises from an instinctive tendency to protect themselves against any future accusations of wrong decision making, or worse, of improper motives for any decision making. Unless their insecurity and fear is addressed, officers will continue to pass on the responsibility of decision-making to courts and Tribunals.

11. The Central Government is now attempting to deal with this issue by formulating realistic and practical norms for defending cases filed against the government and for filing appeals and revisions against adverse decisions, thereby, eliminating unnecessary litigation. But, it is not sufficient if the Central Government alone undertakes such an exercise. The State Governments and the statutory authorities, who have more litigations than the Central Government, should also make genuine efforts to eliminate unnecessary litigation. Vexatious and unnecessary litigations have been clogging the wheels of justice, for too long making it difficult for courts and Tribunals to provide easy and speedy access to justice to bona fide and needy litigants.

12. In this case, what is granted by the State Commission is the minimum relief in the facts and circumstances, that is to direct allotment of an alternative plot with a nominal compensation of Rs. 5000/- But instead of remedying the wrong, by complying with the decision of the Consumer fora, the Improvement Trust is trying to brazen out its illegal act by contending that the allottee should have been protested when it illegally laid the road in his plot. It has persisted with its unreasonable and unjust stand by indulging in unnecessary litigation by approaching the National Commission and then this Court. The Trust should sensitise its officers to serve the public rather than justify their dictatorial acts. It should avoid such an unnecessary litigation."

14. In the case of Gurgaon Gramin Bank Vs. Khajani, (2012) 8 SCC 781 (para-2), Hon'ble Supreme Court considered the approach of Government to litigate in small and trivial matters and held as under:

"2. Number of litigations in our country is on the rise, for small and trivial matters, people and sometimes Central and State Governments and their instrumentalities Banks, nationalized or private, come to courts may be due to ego clash or to save the Officers' skin.

Judicial system is over-burdened, naturally causes delay in adjudication of disputes. Mediation centers opened in various parts of our country have, to some extent, eased the burden of the courts but we are still in the tunnel and the light is far away. On more than one occasion, this Court has reminded the Central Government, State Governments and other instrumentalities as well as to the various banking institutions to take earnest efforts to resolve the disputes at their end. At times, some give and take attitude should be adopted or both will sink. Unless, serious questions of law of general importance arise for consideration or a question which affects a large number of persons or the stakes are very high, courts' jurisdiction cannot be invoked for resolution of small and trivial matters. We are really disturbed by the manner in which those types of matters are being brought to courts even at the level of Supreme Court of India and this case falls in that category."

(Emphasis supplied by me)

15. In the case of **Punjab State Power Corporation Ltd. Vs. Atma Singh Grewal, (2014) 13 SCC 666** (paras 8 to 14), Hon'ble Supreme Court noted the fact that courts are burdened with unnecessary litigation primarily for the reason that the Government or P.S.U.s., etc. decide to file appeals even when there is absolutely no merit therein. Hon'ble Supreme Court further observed as under:

*"8. It is not the first time that the Court had to express its anguish. We would like to observe that the mind set of the Government agencies/undertakings in filing unnecessarily appeals was taken note of by the Law Commission of India way back in 1973, in its 54th report. Taking cognizance of the aforesaid report of the Law Commission as well as National Litigation Policy for the States which was evolved at an All India Law Ministers Conference in the year 1972, this Court had to emphasize that there should not be unnecessary litigation or appeals. It was so done in the case of **Mundrika Prasad Singh v. State of Bihar, 1979 (4) SCC 701**. We would also like to reproduce the following words of wisdom expressed by Justice V.R. Krishna Iyer, who spoke for the Bench, in **Dilbagh Rai Jarry v. Union of India and Ors. 1974 (3) SCC 554**:(SCC p.562, para 25).*

But it must be remembered that the State is no ordinary party trying to win a case against one of its own citizens by hook or by crook; for the State's interest is to meet honest claims, vindicate a substantial defence and never to score a technical point or overreach a weaker party to avoid a just liability or secure an unfair advantage, simply because legal devices provide such an opportunity. The State is a virtuous litigant and looks with unconcern on immoral forensic successes so that if on the merits the case is weak, government shows a willingness to settle the dispute regardless of prestige and other lesser motivations which move private parties to fight in court. The lay out on litigation costs and executive time by the State and its agencies is so staggering these days because of the large amount of litigation in which it is involved that a positive and wholesome policy of cutting back on the volume of law suits by the twin methods of not being tempted into forensic show downs where a reasonable adjustment is feasible and ever

offering to extinguish a pending proceeding on just terms, giving the legal mentors of government some initiative and authority in this behalf.

9. In its 126th Report (1988), the Law Commission of India adversely commented upon the reckless manner in which appeals are filed routinely. We quote hereunder the relevant passage therefrom:

"2.5. The litigation is thus sometimes engendered by failing to perform duty as if discharging a trust. Power inheres a kind of trust. The State enjoys the power to deal with public property. That power has to be discharged like a trust keeping in view the interests of the cesti que trust. Failure on this front has been more often commented upon by the court which, if it was taken in the spirit in which it was made, would have long back energised the Government and the public sector to draw up its litigation policy. When entirely frivolous litigation reaches the doorsteps of the Supreme Court, one feels exasperated by the inaction and the policy of do nothingness evidenced by blindly following litigation from court to court. Dismissing a Special Leave Petition by the State of Punjab, the Court observed that the deserved defeat of the State in the courts below demonstrates the gross indifference of the administration towards litigative diligence. The court then suggested effective remedial measures. It may be extracted: (SCC p.69, para 4)

'4. We [would] like to emphasize that Government must be made accountable by parliamentary Social audit for wasteful litigative expenditure inflicted on the community by inaction. A statutory notice of the proposed action under Section 80 CPC is intended to alert the state to negotiate a just settlement or at least have the courtesy to tell the potential outsider why the claim is being resisted. Now Section 80 has become a ritual because the administration is often unresponsive and hardly lives up to parliament's expectation in continuing Section 80 in the Code despite the Central Law Commission's recommendations for its deletion. An opportunity for setting the dispute through arbitration was thrown away by sheer inaction. A litigative policy for the State involves settlement of governmental disputes with citizens in a sense of conciliation rather than in a fighting mood. Indeed, it should be a directive on the part of the State to empower its law officer to take steps to compose disputes rather than continue them in court. We are constrained to make these observations because much of the litigation in which governments are involved adds to the case load accumulation in courts for which there is public criticism. We hope that a more responsive spirit will be brought to bear upon governmental litigation so as to avoid waste of public money and promote expeditious work in courts of cases which deserve to be attended to.

Nearly a decade has passed since the observations but not a leaf has turned, not a step has been taken, and the Law Commission is asked to deal with the problem!

2.6. A little care, a touch of humanism, a dossier of constitutional philosophy and awareness of futility of public litigation would considerably improve the situation which today is distressing. More often it is found that utterly unsustainable contentions are taken on behalf of Government and public sector undertakings.

10. Even when Courts have, time and again, lamented about the frivolous appeals filed by the Government authorities, it has no effect on the bureaucratic psyche. It is not that there is no realisation at the level of policy makers to curtail unwanted Government litigation and there are deliberations in this behalf from time to time. Few years ago only, the Central Government formulated National Litigation Policy, 2010 with the "vision/mission" to transform the Government into an efficient and responsible litigant. This policy formulated by the Central Government is based on the recognition that it was its primary responsibility to protect the rights of citizens, and to respect their fundamental rights and in the process it should become "responsible litigant". The policy even defines the expression 'responsible litigant' as under:

"Responsible litigant" means-

- (i) That litigation will not be resorted to for the sake of litigating.*
- (ii) That false pleas and technical points will not be taken and shall be discouraged.*
- (iii) Ensuring that the correct facts and all relevant documents will be placed before the Court.*
- (iv) That nothing will be suppressed from the Court and there will not attempt to mislead any court or tribunal.*

2. That Government must cease to be a compulsive litigant. The philosophy that matters should be left to the courts for ultimate decision has to be discarded. The easy approach, "Let the Court decide", must be eschewed and condemned.

3. The purpose underlying this policy is also to reduce government litigation in courts so that valuable court time would be spent in resolving other pending cases so as to achieve the goal in the national legal mission to reduce average pendency time from 15 years to 3 years. Litigators on behalf of the Government have to keep in mind the principles incorporated in the national mission for judicial reforms which includes identifying bottlenecks which the Government and its agencies may be concerned with and also removing unnecessary government cases.

Prioritisation in litigation has to be achieved with particular emphasis on welfare legislation, social reform, weaker sections and senior citizens and other categories requiring assistance must be given utmost priority."

11. This policy recognises the fact that its success will depend upon its strict implementation. Pertinently there is even a provision of accountability on the part of the officers who have to take requisite steps in this behalf. The policy also contains the provision for filing of appeals indicating as to under what circumstances appeal should be filed. In so far as service

matters are concerned, this provision lays down that further proceedings will not be filed in service matters merely because the order of the Administrative Tribunal affects a number of employees. Also, appeals will not be filed to espouse the cause of one section of employees against another.

12. The aforesaid litigation policy was seen as a silver lining to curb unnecessary and uncalled for litigation by this Court in the matter of Urban Improvement Trust, Bikaner v. Mohan Lal 2010 (1) SCC 512 in the following manner:(SCC p. 516, para 11)

"11. The Central Government is now attempting to deal with this issue by formulating realistic and practical norms for defending cases filed against the Government and for filing appeals and revisions against adverse decisions, thereby eliminating unnecessary litigation. But it is not sufficient if the Central Government alone undertakes such an exercise. The State Governments and the statutory authorities, who have more litigations than the Central Government, should also make genuine efforts to eliminate unnecessary litigations. Vexatious and unnecessary litigations have been clogging the wheels of justice for too long, making it difficult for courts and tribunals to provide easy and speedy access to justice to bona fide and needy litigants."

13. Alas, inspite of the Government's own policy and reprimand from this Court, on numerous occasions, there is no significant positive effect on various Government officials who continue to take decision to file frivolous and vexatious appeals. **It imposes unnecessary burden on the Courts. The opposite party which has succeeded in the Court below is also made to incur avoidable expenditure.** Further, it causes delay in allowing the successful litigant to reap the fruits of the judgment rendered by the Court below.

14. No doubt, when a case is decided in favour of a party, the Court can award cost as well in his favour. It is stressed by this Court that such cost should be in real and compensatory terms and not merely symbolic. There can be exemplary costs as well when the appeal is completely devoid of any merit. [See Rameshwari Devi v. Nirmala Devi (2011) 8 SCC 249]. However, **the moot question is as to whether imposition of costs alone will prove deterrent? We do not think so. We are of the firm opinion that imposition of cost on the State/PSU's alone is not going to make much difference as the officers taking such irresponsible decisions to file appeals are not personally affected because of the reason that cost, if imposed, comes from the government's coffers. Time has, therefore, come to take next step viz. recovery of cost from such officers who take such frivolous decisions of filing appeals, even after knowing well that these are totally vexatious and uncalled for appeals.** We clarify that such an order of recovery of cost from the officer concerned be passed only in those cases where appeal is found to be ex-facie frivolous and the decision to file the appeal is also found to be palpably irrational and uncalled for."

(Emphasis supplied by me)

16. It is relevant to mention that earlier also this Court considered the issue of dismissal of appeal on the ground of smallness of the amount involved in the appeal and dismissed the appeal by order dated 22.11.2012 passed in First Appeal Defective No.761 of 1991 (State of U.P. through Collector Vs. Fateh Singh) observing as under:

*"No useful purpose is going to be served by again directing the appellant to take steps to serve the respondents in view of the fact that only a small amount of Rs.9,288/- is involved in the appeal. **Looking to the smallness of the amount involved in the appeal and the time already spent it would be travesty of justice by calling the respondents to come and contest the appeal itself on merits.** The learned standing counsel could not state as to what happened in other similar matters."*

(Emphasis supplied by me)

17. Learned standing counsel could not show that the aforequoted judgment and order has been either set aside or modified by any higher Court. It appears that the said judgment has been accepted by the State Government.

18. Above noted judgments of Hon'ble Supreme Court and the prevailing situation as afore-noted clearly indicates that today State is the largest litigant. It appears to be acting as an ordinary litigant in contrast to a model litigant. It incurs huge public money on litigation which could have been avoided to a great extent if the State Government would have adhered to the National Litigation Policy 1957, National Litigation Policy 1972, its own litigation policy 2011 and directions/observations made by Hon'ble Supreme Court in the case of **Dilbagh Rai Jerry (supra)**, **Mundrika Prasad Singh (supra)**, **Urban Improvement Trust (supra)**, **Gurgaon Gramin Bank (supra)** and **Punjab State Power Corporation Ltd. (supra)**. The Government must be made accountable for such wasteful litigative expenditure inflicted on the community by inaction. The State Litigation Policy emphasising the State Government to be an efficient and responsible litigant is based on the recognition of principles that its primary responsibility is to protect the rights of citizens, and to respect their fundamental rights. Therefore, State Government must take decisions to avoid unwarranted litigation which mainly flows on account of baseless assumptions of its officers that all claims against the Government/Statutory authorities should be viewed as illegal and should be resisted and fought up to the highest court. The reluctance to take decisions, and increasing tendency to challenge every order does not seem to be policy of the State Government in view of the litigation policy 2011 and, therefore such practice needs to be stopped. The state Government should make genuine efforts to eliminate unnecessary litigation which clogs the wheels of justice making it difficult for courts to provide easy and speedy access to justice to bona fide and needy litigants. Because of prevailing situation of litigation by Governments, Hon'ble Supreme Court in the case of **Punjab State Power Corporation Ltd.(supra)** observed that time has, therefore, come to take next step viz. recovery of cost from such officers who take such frivolous decisions of filing appeals, even after knowing well that these are totally vexatious and uncalled for appeals.

19. This Court is conscious of the fact that ordinarily no mandamus can be issued in appeal but in the larger public interest and looking into the prevailing situations as afore-noted, this Court deems it fit to issue certain directions to the State Government. In the case of **Smt. Abida Begam Vs. R.C. & E. Officer AIR 1959 (ALLD) 675** (Para 27), a Division Bench of this Court has considered the question of issuing mandamus in appeal and held as under :

"27. It may not be possible for us to grant a decree in the suit, but, in spite of that fact, we think that this Court has a jurisdiction under Art, 226 of the Constitution to grant the relief as against the defendant No. 1, even though this matter had not come in its writ jurisdiction on an application under Article 226. This we think necessary because if in the office of the Rent Control Officer the allotment order continues in favour of Ram Khelawan and Ram Khelawan is restrained from taking possession, there is likely to be a conflict and it may be difficult for the Rent Control Officer to have any further allotment order."

(Emphasis supplied by me)

20. In **Dr. Ravindra Kumar Goel Vs. State of U.P. 2004(5) AWC 4707** (para 19,22,23,26,29,30) another Division Bench followed the law laid down in the case of **Smt. Abida Begam(supra)** and held that in exceptional cases a Judge sitting in a particular jurisdiction can issue a directive relating to another jurisdiction so as to do justice or if there is pressing urgency or alarming situation. It was further held that extra ordinary situation requires extra ordinary remedies.

21. Aforesaid two decisions were further followed by a Division Bench in the case of **U.P. Nursing Home Association and others Vs. Rajesh Kumar Srivastava and others 2004(2) UPLBEC 1404.**

22. **In view of the above discussion, this court feels that it is now high time that the State Government should be directed and is hereby directed to implement forthwith in true sense its State Litigation Policy, keeping in view the observations/directions of Hon'ble Supreme Court in the judgments afore-noted, discourage unnecessary litigation, act as an efficient and responsible litigant and fix accountability of officers filing frivolous cases.**

23. In view of the aforesaid, this appeal is **dismissed** on account of small disputed amount involved in the appeal. It is clarified that dismissal of this appeal on the ground of smallness of disputed amount shall not come in the way of the State Government to contest appeals of high valuation, if any, relating to the same acquisition and of the same area or where pure question of law is involved in the appeal.

24. Let a copy of this judgment be sent by the Registrar General of this Court to the Chief Secretary, Government of U.P. and Principal Secretary (Law), Government of U.P. for compliance.

(2016) 8 ILRA 874
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.08.2016

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SHAMSHER BAHADUR SINGH, J.

Habeas Corpus Writ Petition No.- 65648 Of 2015

Neeraj **...Petitioner**
Versus
Union Of India & Ors. **...Respondents**

Counsel for Petitioner:

Avinash Chandra Srivastava, Anay Kumar Srivastava

Counsel for Respondents:

G.A., A.S.G.I., J.K. Mishra, Jitendra Prasad Mishra

Preventive Detention — National Security Act, 1980 — Section 3 — Detention Order on Ground of Public Order/Security of State — Petitioner arrested with counterfeit currency of Rs. 2,94,000/- along with two associates and chargesheeted under Sections 489B/489C IPC — Earlier also involved in similar Crime No. 592 of 2012 concerning circulation of counterfeit currency worth Rs. 20,50,000/- — Detaining authority apprehending release on bail and continuation of activities of transportation and supply of counterfeit currency — Held: Circulation of counterfeit currency has a deleterious effect on national economy and constitutes a serious threat to security of the State and public order — Involvement in two similar offences within three years justified subjective satisfaction of District Magistrate — Detention not illegal merely because grounded on prevention of prejudicial activity to public order/security of State. (Paras 10 & 16)

Preventive Detention — Mutual Exclusivity of Grounds — Subjective Satisfaction — Judicial Review — Contention that grounds under Section 3 NSA (security of State, public order, essential supplies) are mutually exclusive and detaining authority must specify precise ground — Held: Facts of cases relied upon by petitioner (Rajesh Gulati, Fazal Ghosi, Pebam Ningol Mikoi Devi) were of a different nature from present case — Subjective satisfaction of detaining authority, though not open to appellate scrutiny, must be based on pertinent material — Court's role limited to examining whether detaining authority stretched its jurisdiction illegitimately, and not to reassess probative value of material. (Paras 12, 13 & 15)

Preventive Detention — Procedural Safeguards — Right to Make Representation — Supply of Documents — Contention that petitioner was not supplied copy of report of Station House Officer — Report and all relevant papers were supplied to petitioner through Jail Superintendent on the same day as the detention order — Representation was duly processed and forwarded to State and Central Government — Petitioner also afforded hearing before Advisory Board — No violation of petitioner's fundamental right to make representation. (Para 17)

Writ Petition dismissed.

Case Law Discussed

1. Sunita Kumari Kashyap vs. State of Bihar and Another, Criminal Appeal No. 917 of 2011

2. Rajesh Gulati vs. Govt. of N.C.T. of Delhi and Another, Appeal (Criminal) No. 866 of 2002
3. Fazal Ghosi, Wahid, Ayaz Ahmad and Riaz Ahmad vs. State of U.P. and Others, Appeal (Cri.) Nos. 301 & 302 of 1986
4. Smt. Pebam Ningol Mikoi Devi vs. State of Manipur and Others, Appeal (Cri.) No. 1849 of 2010
5. Ahmad Nassar vs. State of Tamil Nadu AIR 1999 SC 3897

(Delivered by Hon'ble Shamsher Bahadur Singh, J.)

1. Heard Sri Avinash Chandra Srivastava, learned counsel for the petitioner and Sri Jitendra Prasad Mishra, learned counsel for the Union of India and Sri Vikas Sahai, learned AGA for the State and perused the materiel available on record.

2. This Habeas Corpus Writ Petition has been filed by the petitioner with a prayer to issue a writ, order or direction in the nature of Habeas Corpus commanding the respondents to set at liberty forthwith, the petitioner-Neeraj, who is detained in District Jail, Gautambudh Nagar, as per order dated 28.08.2015 passed by the District Magistrate, Gautambudh Nagar (respondent no.3) in exercise of power under Section 3 of the National Security Act, 1980 (hereinafter referred to as the 'NSA') and also to quash the above order.

3. Facts giving rise to the present petition are that the petitioner-Neeraj was arrested by the police of P.S.-Ecotec-III, Gautambudh Nagar along with his two associates namely Raju @ Abid and Ajay Singh while going on a motorcycle and scooty on 16.07.2015 and counterfeit currency of Rs. 2,94,000/- in total were recovered from their possession. All the three accused persons belongs to District Mainpuri, U.P., Katihar, Bihar and Farrukhabad, U.P. respectively but at the time of arrest petitioner-Neeraj and co-accused Ajay Singh were residing at Sector 5, Gurgaon in front of S.B.R. School and Raju @ Abid was found residing at Sector 49, NOIDA. The police registered a case at Crime No. 240 of 2015, under Section 489B/489C IPC. The investigation was in progress on the date of detention order dated 28.08.2015.

4. The background of the impugned order is that the Station House Officer, P.S.-Ecotec-III, Gautambudh Nagar submitted a report to the Superintendent of Police, Gautambudh Nagar through proper channel on 19.08.2015 stating therein that the petitioner is trying to bail out himself through his relatives. Hearing of bail application has been fixed on 31.08.2015 and there is every possibility of his release. The activities of accused Neeraj in possessing counterfeit currency and its supply in the area National Capital Region will be a threat to the security of the State and maintenance of public order. The Circle Officer, Greater NOIDA- 3, Gautambudh Nagar forwarded above report on 20.08.2015 to Senior Superintendent of Police through S.P. (Rural), Gautambudh Nagar.

5. The District Magistrate, Gautambudh Nagar took cognizance of the matter and on satisfaction that the activities of the petitioner would grossly affect the security of State and maintenance of the public order as there will be every possibility of petitioner being engaged in

activities of transportation and supply of counterfeit currency in the area after released on bail, passed the detention order of the petitioner on 28.08.2015, which was subsequently confirmed by the State Government by order dated 16.10.2015.

6. With this backdrop, the learned counsel for the petitioner submits that the impugned order is not sustainable in the eye of law as no such incident took place, wherein the petitioner's involvement was found prejudicial to the security to the State or maintenance of the public order or maintenance of supply and services essential to the community.

7. Now, we are come to the moot controversy raised by learned counsel for the petitioner with reference to the provision of Section 3 of NSA. It is pointed out that under the said provision, an order with respect to any person for detention may be passed with a view to preventing him from acting, in any manner, prejudicial;

(i) to the Security of the State;

(ii) to the maintenance of the public order;

(iii) to the maintenance of supplies and services essential to the community.

8. Learned counsel for the petitioner submits that above three categories are mutually exclusive and detaining authority has to be satisfied on the fact as to under which of three grounds mentioned above, a person is required to be detained. He further submits that petitioner has been falsely implicated in Crime No.240 of 2015, under Section 489B and 489C IPC by Police Ecotec-III, Gautambudh Nagar and nothing was recovered from his possession. He further pointed out that in the year 2012 on the basis of statement of co-accused, petitioner's name surfaced in Crime No. 592 of 2012, under Sections 489B and 489C IPC, P.S. Soorajpur, District Gautambudh Nagar, wherein petitioner was released on bail. In above case also petitioner was falsely implicated.

9. From the perusal of the records, it transpires that in Case Crime No. 592 of 2012 against 11 accused persons, the first information report was registered and on tips of informant that some persons are involved in transportation and supply of counterfeit currency from Malda, West Bengal to National Capital Region, a Special Task Force Team conducted arrest and an Innova Car without papers and Rs.20,50,000/- counterfeit currency were recovered from the possession of 6 accused persons who were arrested on the spot. During investigation, the name of petitioner surfaced in conspiracy and commission of offence and Investigating Officer submitted chargesheet against petitioner, his real brother Sonu and his mother Smt. Kamla Aunty along with others. Accused named in the first information report were also chargesheeted and trial is pending. Whether the petitioner has been falsely implicated in both cases is matter to be considered and decided during the trial after following due procedure of law. Till date of detention order, there was no finding in favour of accused. Trial in both cases is pending.

10. Economic de-establishing is deadly poison for health and existence of a developing country. Certainly, economic disorder, in contradiction to the criminal activities backed by use of force, results in serious prejudice to 'public order'. Therefore, the detention will not be illegal merely because order of the detention is passed only to prevent the detenu from acting prejudicially to the maintenance of 'public order' or the security of State.

11. Learned counsel for the petitioner further submits that in Case Crime No.592 of 2012, the petitioner was granted bail 21.04.2014 and the report of Station House Officer of Police Station-Ecotec-III, Gautambudh Nagar dated 19.08.2015 endorsed by Circle Officer, Superintendent of Police (Rural) and Senior Superintendent of Police, Gautambudh Nagar is just a malafide exercise to detain the petitioner under 'NSA'. There was no such material before the District Magistrate to accord his subjective satisfaction. The report submitted by Station House Officer and endorsed by Superior Officer does not disclose any activities relating to supply of counterfeit currency to some others till imposition of detention order. The investigating Officer has not recorded the statement of any witnesses to whom counterfeit currency have been supplied or handed by the petitioner.

12. Learned counsel for the petitioner has placed reliance on the cases of **Rajesh Gulati vs. Govt. of N.C.T. Of Delhi and another** passed in Appeal (Criminal) No. 866 of 2002 dated 29.08.2002, **Fazal Ghosi, Wahid, Ayaz Ahmad and Riaz Ahmad vs. State of U.P. and others** passed in Appeal (Cri.) Nos. 301 and 302 of 1986 on 29.06.1987 and **Smt. Pebam Ningol Mikoi Devi vs. state of Manipur and others passed in Appeal (Cri.) No. 1849 of 2010** decided on 14.09.2010, wherein it has been held by Hon'ble Apex Court that power of detention under the NSA can be exercised only with a view to preventing a person from acting in a manner which may be prejudicial any of the considerations set forth in Section 3 of NSA and thereby, preventive detention is not intended as a punitive measure, as a curtailment of liberty by way of punishment for an offence already committed and punishable under Common Criminal Law of Nation or State. No doubt the satisfaction of the District Magistrate making the detention order is subjective in nature, but, even subjective satisfaction, must be based upon some pertinent material.

13. In the light of above law as propounded by Hon'ble Apex Court now the case of present petitioner has to be seen and assessed. The nature of offences in aforesaid three decisions were altogether different from the nature of offences against the petitioner under common criminal law.

14. On behalf of respondent no.3, a counter affidavit dated 29.01.2016 sworn by Sri N.P. Singh, District Magistrate, Gautambudh Nagar is on record. From perusal of the aforesaid counter affidavit, it transpires that police thoroughly investigated the case of Crime no. 240 of 2015 and chargesheet has already been submitted. The District Magistrate further stated that detention order dated 28.08.2015 was approved by the State Government. On 07.09.2015 an undated representation of petitioner was forwarded to the State Government which was duly considered. The petitioner also appeared before the Advisory Board (Detention), Lucknow on 30.09.2015 and full opportunity of hearing was provided by the Board. The detention order dated 28.08.2015 was confirmed by the State Government on 16.10.2015 for a period of 12 months and all orders pertaining to detention passed by the District Magistrate himself as well as Advisory Board and State Government were

communicated to the petitioner through Jail Superintendent, Gautambudh Nagar almost on the same day.

15. It is true that the personal liberty is more cherished than all other freedoms taken together. Detention without trial is a serious matter and the order of detention must be justified by the detaining authority, whenever human liberty is in peril and justice is threatened, the citizen should receive the fullest protection from the Court within the four corners of Article 21 of the Constitution benignantly stretched and all the safeguards of the NSA liberally interpreted, of course, within the legitimate limit. This is one aspect of the matter when we view the rights of individual who is in our focus. The liberties and the privileges which an individual enjoys are, however, subject to the larger interest of the society. Though the liberty of an individual under our Constitution is very sacrosanct and authorities concerned have a constitutional duty to respect the same, the concept of individual liberty should not be so stretched to such unreasonable extent to force the detaining authority to sacrifice the National Interest or the 'public order'. If the detaining authority feels satisfied in passing the detention order, the facts which impelled him to take such a drastic step cannot be sifted or probed by this Court since it has a limited role in the matter of examining validity or otherwise of the detention order. This Court does not sit in appeal over the detention order and it is not for this Court to go into and assess probative value of evidence available to the detaining authority. The Hon'ble Apex Court in **Ahmad Nassar vs. State of Tamilandu reported in AIR 1999 SC 3897** has taken view that when one's liberty is to be curtailed on the subjective satisfaction of the detaining authority with area of interference by the Court being limited, then within this limitation Court must see in the privileged areas that the detaining authority does not stretch illegitimately in exercise of its jurisdiction. Though the jurisdiction of the Court in the matter is limited with regard to the scanning of the facts which led to the satisfaction of the detaining authority it cannot be asserted or argued that the detention order is beyond the pale of scrutiny.

16. In the background of the aforesaid view expressed by Hon'ble Apex Court as economic order is the basic need of any organized and civilized society and circulation of counterfeit currency is having an increasingly deleterious effect on the national economy and thereby a serious effect on security of the State. Therefore, as in span of three years the petitioner was arrested in two cases pertaining to offence of similar nature, therefore, the satisfaction of the District Magistrate that the petitioner would involve in supply of counterfeit currency after release based on material placed before him cannot be said to be a satisfaction based on surmise. We have no hesitation, in our mind, that here it is a case in which on the basis of facts and circumstances stated above and entire material placed before the District Magistrate, he could reasonably be satisfied that unless the petitioner is detained, the petitioner may continue the activity of circulating the counterfeit currency in the area and thereby eroding public faith in governance by State and financial institutions. One cannot escape to other conclusion that the activities of the petitioner were highly prejudicial to the State and maintenance of 'public order' and, therefore, his detention, in the circumstances, was justified because possession of counterfeit currency has no other purpose unless the counterfeit currency is put in circulation, as the same has no face value till it is in possession of an individual. The animus of possessing counterfeit currency is certainly with motive to exchange the same.

17. Lastly, learned counsel for the petitioner submits that petitioner was never supplied copy of any report of inspector, incharge of Police Station- Ecotec-III but perusal of annexures to the writ petition transpires that District Magistrate, Gautambudh Nagar, passing the detention order supplied the report of Station House Officer as well as all papers to the petitioner through Jail Superintendent on the same day of passing of impugned order and in counter affidavit the District Magistrate has stated that undated representation of petitioner was received in office on 07.09.2015. The aforesaid representation was processed and sent to the Government of India, New Delhi and to the State Government, U.P., Lucknow on 29.09.2015. In view of above, the petitioner's right to make the representation against the order of detention being fundamental right finds safeguard from furnishing of the copies of the relevant annexures along with detention order through Jail Superintendent to the petitioner.

18. No other argument is pressed before us.

19. In the result, the petitioner is not successful in challenging the detention order on any count whatsoever. His detention is clearly in accordance with procedure as established by law. The writ petition has no merit, therefore, fails and is, accordingly, **dismissed**.

(2016) 8 ILRA 880
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.08.2016

BEFORE

THE HON'BLE PANKAJ MITHAL, J.

Matters Under Article 227 No.- 2961 Of 2016

Heera Lal Chaurasiya & Ors. ...Petitioners
Pradeep Kumar Chaudhary & Ors. ...Respondents
Versus

Counsel for the Petitioners:

Ramendra Asthana, V.S. Kushwaha, Veer Bhagat Singh Kushwah

Counsel for the Respondents:

Manish Kumar Jain; Sri P.K. Jain, Senior Counsel assisted at hearing

Small Cause Court Suit – Rent and eviction decree challenged under Article 227; tenants questioned rate of rent, validity of notice determining tenancy, and contended that the Small Causes Court had not formulated points of determination before pronouncing judgment – Held, prior framing of issues or prior formulation of points of determination is not mandatory in a summary suit under Section 15 of the Provincial Small Cause Courts Act, 1887; Order XIV Rule 1 CPC stands excluded by Order L Rule 1(a) CPC, and compliance with Order XX Rule 4 CPC is sufficient if the judgment itself states the points for determination and the decision thereon; earlier dismissal of tenants' declaratory suit regarding rent was a material piece of evidence on rate of rent; no defect in notice was pleaded or proved; petition dismissed, though four months' time granted to vacate on undertaking and payment of damages at Rs. 1,000/- per month from 1.8.2016. (Paras 7–25)

Petition Dismissed

Case Law discussed:

Dau Dayal Tandon v. Additional District Judge, Naini Tal and others, 1982 ARC 356

Mazahar Husain v. Smt. Kaneej Zairab, 1999 (2) LCD 317

Yasin and another v. Murari Lal, 2013 (2) ARC 376

Kamla Verma (Smt.) v. Union of India, 2015 (2) ARC 514

Rameshwar Dayal v. Banda through his [L.Rs.](#) and another, 1993 (1) ARC 249

(Delivered by Hon'ble Pankaj Mithal, J.)

1. Heard Sri Ramendra Asthana, learned counsel for the petitioners. Sri P.K. Jain, Senior Counsel, assisted by Sri Manish Kumar Jain, has appeared for the contesting respondents.

2. The dispute is in respect of a shop between the owners and landlords on one side and the tenant on the other side.

3. The suit of the owners and landlords for rent eviction has been decreed by the courts below whereupon this petition has been preferred by the tenant under Article 227 of the Constitution of India.

4. Sri Ramendra Asthana, learned counsel for the petitioner-tenants has raised three points; the first about the rate of the rent; the other about the validity of the notice determining the tenancy; and lastly that the trial court has failed to formulate the points of determination prior to passing the final judgement.

5. He adds that the same revisional court in similar circumstances where points of determination were not framed prior to passing the final judgement had remanded the matter, but in the present case it has been dismissed.

6. Sri P.K. Jain, in response, has submitted that all the three arguments advanced on behalf of the petitioners-tenants have been dealt with by the courts below and that there is no error or irregularity in the reasoning given by them.

7. The petitioner-tenants had contended that the rent of the shop was Rs. 17.25 whereas the landlords had pleaded that it was Rs. 60/- per month.

8. There was no dispute that the petitioners-tenants had filed a suit for declaring the rent of the shop to be Rs. 17.25 per month. The said suit was dismissed on 25.08.2004. The owners and landlords brought on record the certified copy of the said judgement which clearly established that the rent of the shop in dispute was not found to be Rs. 17.25 per month as alleged by the petitioner-tenants. The decision of the aforesaid suit may not operate as res-judicata but it is certainly a material piece of evidence with regard to the rate of rent of the shop in question which has not been controverted by any evidence.

9. Accordingly, the finding recorded by the trial court as affirmed by the appellate court on point no. 3 regarding the rate of rent does not suffer from any error of law.

10. The tenancy of the petitioner-tenants was determined vide notice dated 01.07.1997. The said notice was served upon them on 06.09.1997. The service of the aforesaid notice was not denied by the petitioner-tenants. No defect in the notice was pleaded in the written statement. The petitioner-tenants even otherwise have not pointed out any defect in the aforesaid notice.

11. Sri Asthana, learned counsel for the petitioners even at this stage has failed to point out any illegality in the notice which may compel one to hold it to be invalid.

12. Lastly, on the question of framing of issues or formulation of points of determination in deciding the suit, there is no dispute that the suit was one under Section 15 of the Provincial Small Causes Court Act, 1887 which was of a summary nature.

13. Order XIV Rule 1 CPC provides for the framing of the issues during the trial of the suit but Order L Rule 1 (a) CPC exempts application of the above rule upon judgements and orders of the Small Causes Courts. Only Order XX Rule 4 applies to the judgement and order of the Small Causes Court which provides that judgement of the court of Small Causes need not contain more than the points for determination and the decision thereof.

14. In ***Dau Dayal Tandon vs. Additional District Judge, Naini Tal and others* 1982 ARC 356** it has been held that the provisions of Order XIV Rule 1 CPC relating to the settlement of issues are not applicable to the proceedings/judgements of the Small Causes Court in view of the Order L Rule 1 (a) CPC. A judgement given by Small Causes Court without framing issues arising out of the pleadings, but dealing with all such points that arise for determination is not illegal and erroneous.

15. In ***Mazahar Husain vs. Smt. Kaneej Zairab* 1999 (2) LCD 317** it has been held that in view of provisions of Order L Rule 1 CPC the provisions of Order XIV CPC does not apply to the proceedings and judgements of small Cause Courts and it is not necessary for the court to frame any issue.

16. Accordingly, framing of issues in a suit before Small Causes Court is not mandatory and the formulation of the points of determination and recording findings thereon are sufficient. This is also the view taken by me in ***Yasin and another vs. Murari Lal* 2013 (2) ARC 376**. In the above case following the law laid down in *Dau Dyal Dandon* (supra) it was held that it is not mandatory to settle issues in a Small Causes Court Suit and the only thing that is required is to indicate the points of determination arising on the basis of the pleadings.

17. In ***Kamla Verma (Smt.) vs. Union of India* 2015 (2) ARC 514**, it has been clearly laid down that in view of the Order XX Rule 4 CPC a judge of Small Causes Court is required to state the points for determination and the decision thereon. It is necessary so as to indicate that the judge has understood the case and the points arising thereof have been considered and decided. The judgement which does not specify the points for determination or the decision thereof, would be illegal or no judgement in the eye of law and justify the remand of the case for retrial.

18. The decision of the Supreme Court in ***Rameshwar Dayal vs. Banda through his L.Rs. And another* 1993 (1) ARC 249**, which has been relied upon by Sri Asthana lays down that a judgement and order of the Small Causes Court which does not contain the points of determination and the decision of the court thereof would not be a judgement within the meaning of Section 2 (a) of the CPC and a such would not be a decree. It nowhere lays down that the points of determination arising in the suit are to be formulated by the court prior to the final hearing or the pronouncement of the judgement.

19. In view of the above, the said decision is of no help to the petitioner-tenants rather it fortifies that it is not mandatory to frame issues in proceedings before Small Causes Court. The formulation of points of determination which may show that the court has understood the controversy before it and has decided it is sufficient.

20. Thus, only the points for determination and the decision of the court on each of the said points is material for the purpose of deciding suit by the the Small Causes Court. There is no provision of law which specifically provide that points for determination have to be formulated by the Small Causes Court prior to the pronouncement of the judgement and should be made known to the parties. The reason is simple, all points arising in summary suits lie in a very narrow compass and are ordinarily limited. Those points are implicit and generally known to the parties going to the trial. Therefore the expression of those points which fell for consideration and addressed by the parties, in the judgement and that they have been decided is more than sufficient. The settlement of issues or the points of determination prior to the judgement and making them known to the parties expressly would frustrate the purpose of summary trial and make it a trial of regular civil suit. Accordingly, neither the settlement of issues nor the formulation of the points of determination prior to writing & pronouncement of the judgement is mandatory in a small cause suit of a summary nature.

21. In the instant case, a bare reading of the judgement and order of the Small Causes Court dated 05.03.2008 reveals that the court below has not only formulated the points of determination but has also recorded its finding on the above points on the basis of the evidence of the parties.

22. In view of the aforesaid facts and circumstance as in the present case the judgement and order of the Small Causes Court contains the points of issues and decision in respect of each one of them, this submission of Sri Asthana also fail.

23. Lastly, it may not be out of context to mention that the revisional court in one SCC revision decided on 22.05.2015 had remanded the matter to the Small Causes Court for re-trial in the absence of points for determination. The present revisional order has been passed on 11.03.2016 much after the aforesaid decision. The aforesaid decision cannot act as a binding precedent inasmuch as every court has inherent power to rectify its wrong doings in the subsequent proceedings. Since there is no error or illegality in the revisional judgement and order merely for the reason that in some other case wrong decision was taken by the revisional court would not be sufficient to hold the decision of the revisional court to be incorrect.

24. In the end, Sri Asthana prays that the petitioners-tenants be allowed some reasonable time to vacate the shop in dispute. Sri Jain has no objection if the Court grants some reasonable time.

25. In the interest of justice as the petitioner-tenants have to make alternative arrangement to shift their business, four months time from today is allowed to vacate the shop in dispute provided petitioner-tenants furnish an undertaking on affidavit before the trial court within three weeks from today that he will vacate and hand over peaceful possession of the shop to the respondent-landlords within the time allowed and to pay the rent/damages for its use and occupation w.e.f. 1st August, 2016 @ Rs. 1,000/- per month.

26. In the facts and circumstance there is no merit in the petition and it is accordingly dismissed with the above liberty.

(2016) 8 ILRA 884
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.08.2016

BEFORE

THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE DR. VIJAY LAXMI, J.

Misc. Bench No.- 13648 Of 2016

Dr. Md. Ayub

...Petitioner

Versus

The Speaker, U.P. Legislative Assembly, Vidhan Bhawan, U.P. Dr.

...Respondent

Counsel for Petitioner:

Ved Prakash Nag

Counsel for Respondent:

Abhinav N. Trivedi

Constitution of India — Tenth Schedule — Disqualification on Ground of Defection — Mandamus to Speaker — Petitioner, President of a political party, sought direction to Speaker of U.P. Legislative Assembly to decide pending disqualification petition against two members alleged to have defected — Respondent relying on Articles 212 and Rule 6 of Tenth Schedule to contend that such direction impermissible — Held: Speaker acts as a Tribunal while deciding disqualification petitions under Rule 6 and is obliged to perform this duty in accordance with law — Where such obligation remains unfulfilled, a mandamus directing the Speaker to decide within a reasonable time is permissible, though the High Court cannot direct or pre-judge the outcome of the decision itself. (Paras 4 & 5)

Article 212 — Bar on Judicial Interference with Legislative Proceedings — Limited Scope — Article 212 bars inquiry into validity of legislative proceedings on ground of irregularity of procedure and ousts jurisdiction of courts over exercise of procedural powers by Speaker; however, this does not preclude a mandamus compelling the Speaker to decide a pending disqualification petition within a reasonable time, as clarified by the Apex Court, since the Speaker's failure to decide amounts to non-performance of a statutory/tribunal function distinct from internal legislative procedure. (Paras 3, 4 & 6)

Case Law Discussed

1. Utkal Keshari Parida vs. Speaker, Orissa Legislative Assembly, Writ Petition (Civil) Nos. 14868, 14869, 14870 & 14871 of 2012
2. Speaker, Haryana Vidhan Sabha vs. Kuldeep Bishnoi and Others AIR 2013 SC 120

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.
 &
 Hon'ble Dr. Vijay Laxmi, J.)

1. Heard Shri Ved Prakash Nag, learned counsel for the petitioner.

2. The petitioner claims himself to be the President of the Peace Party which is a political party. He urges that the respondents no.2 and 3, who were members of his party have allegedly defected and joined another political party as a result whereof they have incurred disqualifications keeping in view the provisions of the Tenth Schedule appended to the Constitution of India. For this, a petition has been filed before the Speaker of the UP Legislative Assembly and which is pending consideration without any orders. Keeping in view the prayers made in this petition, a direction be issued to the Speaker of the Assembly for taking a decision in this regard.

3. The petition has been opposed by Shri Abhinav N. Trivedi, learned counsel on behalf of the State contending that such a direction would not be permissible keeping in view the provisions of Article 212 of the Constitution of India read with Rule 6 of the Tenth Schedule of the Constitution of India. Both the aforesaid provisions are extracted herein under:

"212. Courts not to inquire into proceedings of the Legislature.-(1) The validity of any proceedings in the Legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure.

(2) No officer or member of the Legislature of a State in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in the Legislature shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers."

4. Rule 6 of the 10th Schedule to the Constitution of India:

"6. Decision on questions as to disqualification on ground of defection.-(1) If any question arises as to whether a member of a House has become subject to disqualification under this schedule, the question shall be referred for the decision of the Chairman or, as the case may be, the Speaker of such House and his decision shall be final.

Provided that where the question which has arisen is as to whether the Chairman or the Speaker of a House has become subject to such disqualification, the question shall be referred for the decision of such member of the House as the House may elect in this behalf and his decision shall be final.

(2) All proceedings under sub-paragraph (1) of this paragraph in relation to any question as to disqualification of a member of a House under this schedule shall be deemed to be proceedings in Parliament within the meaning of article 122 or, as the case may be, proceedings in the Legislature of a State within the meaning of article 212."

5. Learned counsel for the petitioner has, therefore, relied upon the decision of the Orissa High Court in the Case of Utkal Keshari Parida versus Speaker, Orissa Legislative Assembly

passed in Writ Petition No. (Civil) Nos. 14868,14869,14870 and 14871 of 2012, decided on 27.09.2012 to contend that such a mandamus can be issued as the Speaker of the Legislative Assembly acts as a Tribunal while taking a decision with regard to the disqualification and hence, he is obliged to perform the duty in accordance with law. In such circumstances if the obligation is not fulfilled, a mandamus can be issued.

6. He has further relied on another Apex Court decision in the case of Speaker, Haryana Vidhan Sabha versus Kuldeep Bishnoi and others reported in AIR 2013 Supreme Court 120, paragraph 48 to contend that such a direction issued by the High Court has been upheld by the Apex Court in the aforesaid decision. Paragraph 48 of the same is extracted herein under:

*"In our view, the High Court had no jurisdiction to pass such an order, which was in the domain of the Speaker. The High Court assumed the jurisdiction which it never had in making the interim order which had the effect of preventing the five MLAs in question from effectively functioning as Members of the Haryana Vidhan Sabha. **The direction given by the learned Single Judge to the Speaker, as endorsed by the Division Bench, is, therefore, upheld to the extent that it directs the Speaker to decide the petitions for disqualification of the five MLAs within a period of four months. The said direction shall, therefore, be given effect to by Speaker.** The remaining portion of the order disqualifying the five MLAs from effectively functioning as Members of the Haryana Vidhan Sabha is set aside. The said five MLAs would, therefore, be entitled to fully function as Members of the Haryana Vidhan Sabha without any restrictions, subject to the final decision that may be rendered by the Speaker in the disqualification petitions filed under paragraph 6 of the Tenth Schedule to the Constitution."*

7. Shri Trivedi, however, informs upon instructions that the respondents no.2 and 3 have already been put to notice by the Speaker and since the principles of natural justice have to be complied with, therefore, the procedure as prescribed has to be followed. Consequently, the decision is likely to be taken within a reasonable time.

8. In view of the aforesaid submissions raised, the writ petition is disposed of with a liberty to the first respondent to proceed to take a decision keeping in view the observations made hereinabove within a reasonable time.

(2016) 8 ILRA 887
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.08.2016

BEFORE

THE HON'BLE RITU RAJ AWASTHI, J.

Second Appeal No.- 77 Of 2014

Jiya Lal & Ors.

...Appellants
Versus

Ayodhya & Anr.

...Respondents

Counsel for Appellants:

Adnan Ahmad

Counsel for Respondents:

Ratnesh Chandra

Civil Procedure Code — Order 41 Rule 17(1) — Dismissal of Appeal for Appellant's Default —

Explanation Barring Decision on Merits in Absence of Appellant — 1st appellate court decided appeal under Section 96 C.P.C. on merits despite non-appearance of appellants — Held: Explanation to Order 41 Rule 17(1) C.P.C., inserted by Act No. 104 of 1976, makes it explicit that the appellate court cannot dismiss the appeal on merits where appellant remains absent or unrepresented on date fixed for hearing — Only option available is dismissal for default/non-prosecution, not adjudication on merits — Purpose of Explanation is to preserve appellant's opportunity to show sufficient cause for non-appearance, which is lost if appeal is decided on merits in his absence. (Point on substantial question of law)

Substantial Question of Law — First Appellate Court's Error — Held: 1st appellate court fell in error in deciding the appeal on merits in the absence of the appellants, contrary to the mandatory bar under the Explanation to Order 41 Rule 17(1) C.P.C. — Judgment and decree of 1st appellate court set aside and matter remanded for fresh decision in accordance with law — Court clarified that it had not expressed any opinion on the merits of the case.

Second appeal allowed

Case Law Discussed

1. Ghanshya Dass Gupta vs. Makhan Lal (2012) 8 SCC 745
2. Abdur Rahman and Others vs. Athifa Begum and Others (1996) 6 SCC 62

(Delivered by Hon'ble Ritu Raj Awasthi, J.)

1. Affidavit of service filed today is taken on record.
2. Heard learned counsel for the appellants as well as Mr.Ratnesh Chandra, learned counsel appearing for the respondent no.1.
3. In spite of service of notice no one has put in appearance on behalf of the respondent no. 2.

4. This second appeal has been filed under Section 100 C.P.C. against the judgment and decree dated 28.11.2013 passed in Civil Appeal No. 76 of 2011; Jiya Lal & others Vs. Ayodhya & another by which the 1st appellate court under Section 96 C.P.C. has dismissed the appeal preferred against the judgment and decree dated 18.10.2011 passed by the Civil Judge (J.D.), South, Unnao in Civil Suit No. 77 of 2010.

5. The appeal has been admitted vide order dated 25.2.2014 on the following substantial question of law:

(a) Whether appellate court was justified in dismissing the appeal on merits in the absence of appellants on the face of Order 41 Rule 17(1) explanation?

The Order 41 Rule 17 C.P.C., as existing today after the amendment vide Act No. 104 of 1976 (w.e.f. 1.2.1977), reads as under:

"17. Dismissal of appeal for appellant's default:- (1) *Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.*

(Explanation.- Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits.)

(2) Hearing appeal ex parte.- Where the appellant appears and the respondent does not appear, the appeal shall be heard ex parte."

6. The learned 1st appellate court by the impugned order has decided the appeal under Section 96 C.P.C. on merits in the absence of the appellants.

7. Learned counsel for the appellants submits that in view of the explanation to Order 41, Rule 17 (1) C.P.C., the 1st appellate court has fallen in error by deciding the appeal on merits in the absence of the appellants. In case no one was present to press the appeal the only option left with the appellate court was to dismiss the appeal in default instead of deciding the same on merits.

8 In support of his submissions, learned counsel for the appellants has placed reliance on the judgment of the Apex Court in the case of Ghanshya Dass Gupta Vs. Makhan Lal; 2012 (8) SCC 745, wherein it has been held that the Courts below cannot go into the merits of the case if there was no appearance on behalf of the appellant. The relevant paragraphs 2, 9 & 10 in Ghanshya Dass Gupta (Supra), on reproduction read as under:

2. The question that arises for consideration in this case is whether the High Court was justified in deciding the appeal on merits when there was no appearance on behalf of the appellant, in view of the explanation to Order 41 Rule 17(1) of the Code of Civil Procedure. (CPC).

9. Rule 17 (1) of Order 41 deals with the dismissal of appeal for appellant's default. The above mentioned provision, even without explanation, if literally read, would clearly indicate that if the

appellant does not appear when the appeal is called for hearing, the court has to dismiss the appeal. The provision does not postulate a situation where, the appeal has to be decided on merits, because possibility of allowing of the appeal is also there, if the appellant has a good case on merits; even if no body had appeared for the appellant. Prior to 1976, conflicting views were expressed by different High Courts in the country as to the purport and meaning of sub-rule (1) of Rule 17 of Order 41 CPC. Some High Courts had taken the view that it was open to the appellate court to consider the appeal on merits, even though there was no appearance on behalf of the appellant at the time of hearing. Some High Courts had taken the view that the High Court cannot decide the matter on merits, but could only dismiss the appeal for appellant's default. Conflicting views raised by the various High Courts gave rise to more litigation. The Legislature, therefore, in its wisdom, felt that it should clarify the position beyond doubt. Consequently, Explanation to sub-rule (1) of Rule 17 of Order 41 CPC was added by Act 104 of 1976, making it explicit that nothing in sub-rule (1) of Rule 17 of Order 41 CPC should be construed as empowering the appellate court to dismiss the appeal on merits where the appellant remained absent or left un-represented on the day fixed for hearing the appeal. The reason for introduction of such an explanation is due to the fact that it gives an opportunity to the appellant to convince the appellate court that there was sufficient cause for non-appearance. Such an opportunity is lost, if the courts decide the appeal on merits in absence of the counsel for the appellant.

10. We may, in this connection, refer to a judgment of this Court in Abdur Rahman and Others v. Athifa Begum and Others (1996) 6 SCC 62, wherein the scope of explanation to Rule 17(1) of Order 41 CPC came up for consideration. While interpreting the said provision, this Court took the view that the High Court could not go into the merits of the case if there was no appearance on behalf of the appellant. We also endorse that view.

9. Mr. Ratnesh Chandra, learned counsel appearing for respondent no. 1 has very fairly agreed that after the amendment the Court has no option but to dismiss the appeal in default i.e. for want of prosecution in case no one has appeared on behalf of the appellants to press the appeal on merits.

10. The perusal of Order 41, Rule 17 C.P.C. clearly indicates that where on the day fixed or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called for hearing, the Court may make an order that the appeal be dismissed. The explanation to Order 41, Rule 17 (1) C.P.C. provides that nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits. The explanation to Order 41, Rule 17 (1) C.P.C. clearly makes that the appellate Court has to dismiss the appeal for non-prosecution and in default in case no one has appeared on behalf of the appellant to press the appeal on merits.

11. In view of above, the second appeal is allowed.

12. The judgment and order dated 28.11.2013 passed by the Additional District Judge, Unnao in Civil Appeal No. 76 of 2011, is hereby set aside. The matter is remanded back to the 1st appellate Court to decide the same afresh in accordance with law expeditiously, as early as possible.

13. It is, however, made clear that this Court has not addressed itself on the merits of the case.

(2016) 8 ILRA 890
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.08.2016

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.

Writ A No.- 32138 Of 2007

Rajendra Prasad	...Petitioner
	Versus
Narendra Mittal & Ors.	...Respondents

Counsel for Petitioner:

Ajit Kumar, Radha Kamal Saraswat, Shashi Nandan

Counsel for Respondents:

A.K. Gupta, A.K. Gupta, S.C.

Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 – Section 21(1)(a) – Release Application – Bonafide Need – Joint Family Business

— Release application filed by three landlord-brothers for release of a godown for establishing three adult sons in an independent business of sale of empty tin cans — Sons at time of filing unemployed and not engaged in any business — Prescribed Authority rejected release application holding sons engaged in joint family business hence need not genuine — Appellate Court reversed finding, holding large joint family business does not extinguish independent need of adult sons to start new venture — Held: Merely because sons engaged themselves in joint family business as stop-gap arrangement, their need for independent business cannot be held to be not bonafide — Every adult member of family has right to start his own independent business. (Para 1)

Subsequent Events – Death of Original Applicants – Effect on Bonafide Need — Original applicants-landlords died during pendency of writ petition, succeeded by their sons and other legal heirs — Contention raised that need set up in release application stood eclipsed by subsequent event of death and consequent engagement of successor-sons in family business — Held: Crucial date for testing bonafide need of landlord is date of filing of release application — Subsequent events can affect such need only where they are of such nature and dimension as to completely eclipse the need altogether — Death of original applicant-landlords, followed by successor-sons continuing family business for want of alternative livelihood, does not amount to complete eclipse of need originally pleaded. (Para 2)

Partition of Joint Family Property During Pendency of Litigation – Effect on Need — Partition amongst joint family members during pendency of writ petition resulted in disputed godown falling to share of specific successor — Held: Partition of joint family property/business during interregnum of long-drawn litigation does not by itself frustrate need of landlords since other members of family, including person in whose share property fell, remain entitled to press same need for independent business. (Para 3)

Non-Disclosure of Other Accommodation – Effect — Tenant contended landlords possessed other business and residential premises not disclosed in release application, and that such non-disclosure vitiated bonafide need — Held: Non-disclosure of other premises in occupation of large joint family is not fatal where such premises are shown to be unsuitable for proposed business — Appellate Court having examined each such property in detail and found none suitable, no adverse inference could be drawn against landlords. (Para 4)

Comparative Hardship – Godown – No Goodwill Attached — Held: Since disputed accommodation is a godown, to which no goodwill is attached unlike a retail shop, it can conveniently be shifted to alternative premises — Comparative hardship rightly held in favour of landlords — Tenant possessing sufficient alternative accommodation, no hardship shown to be caused to him. (Para 5)

Rent Control Act – Applicability – Interim Enhancement of Rent by High Court — Rent enhanced by High Court under interim order as condition for staying dispossession during pendency of writ petition — Contention that such enhancement took premises out of purview of Rent Control Act — Held: Rent enhanced under interim order to protect tenant from eviction pendente lite does not amount to enhancement of rent "under the Act" so as to oust applicability of the Rent Control Act. (Para 6)

Practice – Bulky Compilations – Repetitive and Misleading Citations — Counsel for petitioner supplied seven compilations containing approximately hundred judgments, with same judgment cited twice under different equivalent citations creating false impression of separate rulings — Held: Such practice makes record unnecessarily bulky, delays adjudication and amounts to an attempt either to mislead the Court or to make record difficult to decide — Court confined itself only to judgments relevant to controversy. (Para 7)
Writ Petition Dismissed — Release application allowed by Appellate Court upheld — Petitioner-tenant directed to hand over vacant peaceful possession of disputed godown within thirty days, subject to payment of up-to-date rent as fixed by interim order till date of vacation, failing which decree to become executable forthwith.

Case Law Discussed

1. Saroj Kumari (deceased) and others vs. Suresh Chand and others, Writ Petition No. 8017 of 2003, decided 20.12.2012
2. Ram Gulam Gupta vs. Additional District Judge, Kanpur and others, 1990 (1) ARC 565
3. Ramesh Kumar vs. Kesho Ram, 1992 Suppl. (2) SCC 623
4. Kamleshwar Prasad vs. Pradumanju Agarwal, 1997 (4) SCC 413
5. Gaya Prasad vs. Pradeep Srivastava, 2001 (1) ARC 352 (SC)
6. Ansuyaben Kantilal Bhatt vs. Rashiklal Manilal Shah, 1997 5 SCC 457
7. Ramkubai (Smt.) Deceased By Lrs. And others vs. Hajarimal Dhokalchand Chandak, 1999 (6) SCC 540
8. Pratap Rai Tanwani and another vs. Uttam Chand and another, 2004 (8) SCC 490

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.)

1. Before going to the matter of merits of the case in view of the arguments raised by the learned counsel for the parties, this Court is constrained to put on record that Sri Ajit Kumar Singh, learned counsel for the petitioner was heard at length. He had supplied seven compilations from compilation No. 1 to Compilation No. 7 containing synopsis of the case laws in addition to a written submissions in support of the oral submissions made by him in the Court. This has resulted in making the record too bulky. Each compilation contains number of judgements on each point. For example, in compilation no.2, on the question of consideration of subsequent events, he had referred to ten judgements of this Court and the Supreme Court. In fact one judgement of this Court in the case of **Saroj Kumari (deceased) and others Vs. Suresh Chand and others in Writ Petition no.8017 of 2003** passed by Hon'ble Mr. Justice Sudhir Agarwal on 20.12.2012 has been referred at two places with two different equivalent citations and by mentioning different paragraph of the same judgement giving an impression that these are two different judgements on the same point. The Court is constrained to record that this approach of the counsel is nothing but an effort either to mislead the Court or to make the record so bulky as to make it difficult for the Court to

decide the matter. Similarly on the point of "duties of Appellate Court to discuss the reasons assigned by the Trial Court while upsetting its finding and to consider the evidence of the parties", nineteen judgements of this Court and the Supreme Court have been given in compilation no.4. In compilation no.1, there are fourteen judgements on four different points and in compilation no.7 there are twenty seven judgements on different points. There are two other compilations i.e. compilation nos.3 and 6 which also contain four judgements, thus approximately hundred judgements have been cited by learned counsel for the petitioner in seven compilations supplied by him before oral argument in the matter had started.

2. After the arguments were over on 05.01.2016, he again passed on a written submission in support of his oral submission citing a number of judgements in various paragraph of the written submissions.

3. This Court may note that the bulky records took lot of precious time of the Court to go through the case laws cited by the counsel and this has caused delay in delivery of the judgement.

4. This Court may further record that after going through the entire pleadings in the writ petition and also the supporting material supplied by the learned counsel for the petitioner in the nature of compilation nos.1 to 7 and written submission dated 05.01.2016 in support of oral submission, the Court would deal with each point argued by the learned counsel for the petitioner but will only refer to those judgements which it think are relevant to deal with the controversy, so as not to make the judgement too long and cumbersome.

5. This writ petition is directed against the judgement and order dated 26.05.2007 passed by Special Judge (E.C. Act), Bareilly in Rent Control Appeal 6 of 2004 (**Nand Kishore Vs. Rajesh Prasad**). The brief facts of the case relevant to decide the controversy are:-

6. The release application under section 21(1)(a) of U.P. Act No. 13 of 1972 was filed by three brothers namely Nand Kishore, Sundar Lal, Jagdish Saran all sons of Tara Chand residents of Maarwariganj, Bareilly, for release of a godown situated in Marwariganj, Bareilly on the ground of their personal need. The need set up was for three sons of applicant no.1, 2 and 3 namely Sri Vishnu Kumar, Narendra Kumar, Dheeraj Kumar. It was categorically stated in the release application that sons of the applicants had completed their education but they could not settle in their career and they want to establish a new venture for the sale of Empty Tin Cans. As a larger area was required for storage of tin cans, the godown in question was needed. It was stated that for running the business proposed by three younger members of the joint family, only an office space is available with the landlords.

7. The godown in question exists in a house user of which was of mixed nature. At the first floor, the applicants were residing and at the ground floor a large portion was in the tenancy of the petitioner. It was further stated that the petitioner tenant already possessed a big shop at one side of the godown and the godown in question was not required by him.

8. The release application was contested on the ground that it was defective for non impleadment of the necessary party. The petitioner Rajendra Prasad had wrongly been impleaded as tenant whereas the tenancy was in the name of M/s Satish Tea Company. The application dated 10.10.1995 moved by the petitioner raising issue of maintainability of the release application was rejected vide order dated 14.07.1998 passed by the Prescribed Authority.

9. In support of the release application, the affidavits of Nand Kishore, applicant no.1, Vishnu Mittal son of Sundar Lal, Narendra Mittal son of Nand Kishore, and Dheeraj Kumar son of Jagdish Saran were filed. Vishnu Mittal son of Sundar Lal categorically stated in the affidavit filed on 08.12.1999 that he needed the disputed godown to establish him in an independent business as there was no other place available with him. Shri Dheeraj Mittal also averred in his affidavit that he needed the disputed accommodation for doing business of sale of empty tin Can.

10. In the counter affidavit filed by the tenant Rajendra Prasad, a stand was taken that the release application was malafide, it could not be maintained as M/s Satish Tea Company was the tenant. As the tenant refused to accept the illegal demand of the landlords for enhancement of rent and, therefore, they filed the release application based on a concocted story. It was further stated that two Daal Mills were being run by the applicants, one Mill manufacturing Bhoora, Kulia was also being run in Bareilly. This apart two other firms namely M/s Ram Swaroop Tara Chand Marwariganj, Bareilly and M/s Tara Chand Sundar Lal, Marwariganj, Bareilly were owned by different set of partners being the members of a joint family. The building in question is residential in nature and no commercial activity could be permitted. The applicant's sons were not sitting idle rather they were already engaged in two firms mentioned above. There are other accommodation in possession of the large joint family of the applicants wherein their sons could be accommodated. He also raised a doubt on the willingness shown by the applicants to start a business of sale and purchase of empty tins that too near a residential portion of the family in the building. In the crux, his submission was that the applicants landlord were men of means, they had sufficient sources and place to establish their sons who may also join the joint family business, they had voluminous wealth and none of them were unemployed.

11. In the written statement filed on 13.09.1999 it was stated by the tenant that the landlord had purchased a plot of measuring 800 square yards in Deshmeshnagar, Mohalla Madhobari, Bareilly within the limits of Nagar Nigam, Bareilly. They had recently constructed a shop and godown while the remaining land was lying vacant at the disposal of the landlords. Had the landlords needed the space for business they would not have left the said plot vacant.

12. In replication, it was stated by the applicants-landlords that the property/plot mentioned in paragraph no.9-A of the written statement filed on 13.09.1999 was a property which was purchased by Tara Chand, the applicant's father in the year 1959. There were five co-owners of this property comprising of four sons and five daughters of Tara Chand. In one portion of this property, Smt. Kamlesh Kumari wife of Sri Sushil Kumar had constructed her residential house and was using another portion being a shop to meet her daily need. It was also stated that the said property was situated at the distance of approximately 1200 meters from the disputed property and

moreover, the said area was predominantly residential in nature. It was further stated that the open land could not be used for godown purpose.

13. The petitioner in another affidavit filed on 06.11.2003 reiterated the fact of alternative land of 800 square yard in Deshmeshnagar being in possession of the landlord. The petitioner then moved an application on 14.08.2000 with the prayer to appoint an Amin Commissioner to inspect the properties namely Daal mills, the plot at Deshmeshnagar, the building no. 16, Marwariganj, Bareilly and building No.18, Marwariganj, Bareilly in possession of the landlords and tenants to ascertain the vacant area and the tenanted portion. This application was rejected on 02.09.2000 on the ground that it was moved with a view to delay the disposal of the release matters sufficient evidences were already on record and in view of the affidavits filed by the parties, matter can be decided.

14. The records further indicates that several applications one after the other were moved by the petitioner on different grounds which were finally rejected and the dates 25.03.2004 and 31.03.2004 were fixed for final argument.

15. The Prescribed authority vide judgement and order dated 16.04.2004 rejected the release application with the reasoning that the applicant's sons namely Dheeraj Kumar, Vishnu Kumar and Narendra Kumar whose need was set up in the release application were found engaged in the joint family business run by the partnership firms namely M/s Tara Chand Sundar Lal. It was also recorded that the applicant's family was a joint family and all in the family were engaged in vast business ventures owned by the family, therefore, the need set up for independent business of three sons was not genuine. On comparative hardship, the affidavit of applicants paper no.76 was considered and rejected on the ground that no documentary evidence was produced in support thereof. The disputed godown was being used by the tenant for his tea business.

16. In appeal, the Court below after consideration of the pleading of the parties and the material on record found that indisputably the applicant's family was a joint family and they had joint business. The contention of the tenant that the need of the members of the joint family had to be determined looking to the requirement of the joint family and the joint family business which they were already carrying on was also noted. It was discussed that in the firm namely M/s Ram Swaroop Tara Chand, three appellants namely Nand Kishore, Sundar Lal, Jagdish Saran were partners. In another firm M/s Tara Chand Sunder Lal, Smt. Tara Mani wife of Sundar Lal, Smt. Siromati wife of Nand Kishore and Vivek Kumar son of Nand Kishore were partners. There was one residential accommodation namely house no. 23 Marwariganj, Bareilly. The disputed godown is situated in house no.16, Marwariganj, Bareilly. The $\frac{1}{4}$ portion of the said house No. 16 was in the share of one brother Ram Gopal who had let out it to one Mangli Ram. The portion which was earlier occupied as PCF godown came in possession of the appellants after release and was being used for residential purposes. At the first floor of the said house no.16 Marwariganj, the family of appellant no.2 was residing and the remaining portion was being used for storage of Daal etc. Fourth property at Dasmeshnagar, Bareilly was an open piece of land which was owned by seven co-sharers and in a portion whereof, residential house had been constructed by one of the co-sharer.

Fifth property at 17 Madhobari, Bareilly was an open land of 300 Square meter purchased on 28.06.2001 there existed only gates and a dilapidated building. Sixth property was a shop at Shyamganj which was taken on rent by the appellants for keeping the raw material and manufactured goods of the firm M/s Tara Chand Sundar Lal. There was no accommodation suitable for the business proposed by the landlord.

17. The lower appellate Court after having discussed each property in detail came to the conclusion that looking to the large number of members of the family and the fact that three adult members of the family want to establish themselves in an independent business and that they filed their affidavits paper no.77-A, 78-A, 79-A, the release application could not have been rejected by the Prescribed Authority on the ground that the applicants sons were engaged in the joint family business. It was also recorded that none of the applicants/sons were partner in the two firms named above. Merely because they were involved/engaged in the family business as a stop gap arrangement their need cannot but be bonafide.

18. It was also recorded that the properties which were in possession of the landlord were not suitable for the business of Tin Can proposed by them. Three adult members of the family were competent to start their business.

19. On comparative hardship, it was recorded that the disputed accommodation was a godown. Placing reliance upon the judgment of this Court in **Ram Gulam Gupta Vs. Additional District Judge, Kanpur and others**¹, it was held by the lower Appellate Court that the godown can be shifted easily at any other place as no goodwill was attached to the building/place. It was also recorded that looking to the pleadings of the parties the tenant would not suffer any hardship in case, he was asked to leave the godown.

20. Having discussed the release application on both points of bonafide need and comparative hardship it was held that the need set up by the landlords in the release application was not only genuine but pressing. The release application was wrongly rejected by the Prescribed Authority and was liable to be allowed.

21. Challenging the release order passed by the lower appellate Court, the submissions of learned counsel for the petitioner are as under:-

1. The release application has become infructuous as bonafide need set up by the landlord had eclipsed on account of subsequent events taken place during the pendency of the application. The original applicants had died and their sons whose need was set up have engaged themselves in joint family business. Their need to start a new venture of sale of empty tin now does not exist.

2. Other accommodations are available with the landlord details of which have been given in different paragraphs of the writ petition as well as supplementary affidavit filed before this Court. These alternative premises in possession of the landlords are not denied.

3. M/s Satish Tea Company and wife of the petitioner are the tenants. The petitioner has wrongly been impleaded as tenant.

4. The tenanted accommodation namely the godown was initially let out at the rent of Rs.4000 per annum but now the rent has been enhanced by this Court to Rs.10,000/- per month i.e. one lac twenty thousand per annum. Thus, on account of said enhancement, the premises has gone out of the purview of the Rent Control Act (U.P. Act No.13 of 1972).

5. The need set up in the release application was for Narendra Kumar son of application No.1, Vishnu Kumar son of applicant no.2 and Dheeraj Kumar son of applicant no.3, their need has vanished on account of subsequent event of the death of the applicants/landlords.

6. By means of the supplementary affidavit dated 18.01.2015, the petitioner submitted that a partition has been arrived between the joint family members with regard to the joint family business and the properties owned by joint Hindu family. As a result of the said partition, disputed property namely, the godown situated in house no.18, Marwariganj, Bareilly has fallen in the share of three sons of late Sundar lal namely Vivek Kumar, Vishnu Mittal and Mukesh Mittal. Vivek Kumar has started a firm in October, 2014 in the nomenclature of M/s Sunder Lal Vivek Kumar and running the business of the firm. He has also opened an office and godown in the same building namely house no.16, Marwariganj, Bareilly adjacent to the property in question. He also opened a godown in two big rooms and is running his office in one room relating to Daal mill business in the same building. On the said basis, it is stated that the need of landlords set up in the release application has vanished.

7. Sri Vishnu Kumar has never contested the proceeding before this Court, the reply namely the counter affidavit to the writ petition has been filed by Narendra Mittal only on behalf of the respondent no.1 to 4.

8. The landlords were under obligation to disclose the accommodation in their possession but they had intentionally not done so and this fact would lead to an assumption of non-existence of bonafide need of the landlords.

9. The question of hardship was to be considered strictly in terms of the provision of section 21 (1) (a) read with Rule 16 of U.P. Act no.13 of 1972 which has not been considered by the Appellate Authority, this fact itself vitiates the order passed by it.

10. The Rent Control Legislation is for the benefit of the tenant. It is for the landlord to establish his bonafide need which must be real and compelling. If not actual and genuine, the release application needs to be rejected, being a mere desire. Subsequent need cannot be considered.

11. The Appellate Court without reversing the findings of the trial Court has allowed the release application ignoring the evidence of the petitioner.

22. At the cost of repetition it is noted that in support of these submissions, compilation no.1 to compilation no. 7 have been supplied by the learned counsel for the petitioner wherein more than 100 rulings have been referred on the points noted above. Further in the written submission passed on in support of the oral submission made by the learned counsel for the petitioner more than twenty case laws have been mentioned. It is not possible for the court to deal with each judgement on the law point placed by the learned counsel. And further this Court does not find it relevant to discuss each and every case law relied upon by the learned counsel with a view not to burden this judgement. It may also be noteworthy that some of the judgment are not relevant for the facts of the present case.

23. Now dealing with the arguments of learned counsel for the petitioner.

24. First submission of learned counsel for the petitioner is regarding applicability of the Act on account of enhancement of rent by this Court, this submission is misconceived in as much as the rent has been enhanced by this Court under an interim order dated 19.07.2007 as a condition to stay the eviction of the petitioner-tenant. The tenant namely the petitioner at the time of hearing on the stay application had offered Rs.10,000/- per month as compensation for the use and occupation of the godown from the month of July, 2007. The petitioner has already been evicted by the Appellate Court, however, the condition put in the interim order to save the petitioner from eviction during the pendency of the writ petition would not mean that the rent of the premises has been enhanced under the provisions of the Act which would result in the premises to go out of the purview of the Rent Control Act' 1972.

25. The second submission is with reference to the events occurred during the pendency of the present petition.

26. The subsequent events which have been brought to the knowledge of the Court is that out of the three applicants/landlords, Sri Nand Kishore, and Sunder lal had expired. They are succeeded by their sons namely Narendra Mittal, Vivek Kumar, Vishnu Mittal, Mukesh Mittal and Smt. Taramani (wife) and daughter Smt. Saroj Agarwal. It is stated that the accommodation in question was required by Vishnu Mittal son of late Shri Sunder Lal, but no counter affidavit has been filed by him till date. The petitioner has brought the subsequent events before this Court by means of supplementary affidavits. In the second supplementary affidavit dated 18.01.2015, it has been stated in paragraph no.4 that the property in question has been settled with Sri Vivek Kumar, Sri Visnlu Mittal, Vishnu Kumar and Sri Mukesh Mittal and thus the counter affidavit of Sri Narendra Mittal who has no concern with the property in question cannot be treated to dispute the averments in the writ petition. Narendra Mittal who has nothing to do with the property in question cannot continue to oppose the writ petition on behalf of all the landlords/respondents. Under section 58 of the Evidence Act, nothing remains to be adjudicated because the factum of vanishing the need of the landlord is already admitted, in reply to the supplementary affidavits filed by the respondent.

27. The only affidavit filed by Narendra Mittal is neither on behalf of Sundar Lal nor for Jagish Saran nor for Vishnu Mittal and thus is not on behalf of heirs of Sunder Lal. This Court has no option but to dismiss the release application as having become infructuous.

28. The applicants are worthy people having movable and immovable property in abundance, they own highly lucrative business, there is a big building at Marwariganj, Bareilly in which the business under the name and style of M/s Tara Chand Ram Swarup is being run. In another premises at Deshmeshnagar in the city of Bareilly, lot of space is available. One shop at Bazar Shyamganj, Bareilly is also in possession of the landlord. Another mill namely Daal manufacturing mill is being run by Vishnu Kumar son of Sundar Lal.

29. Thus a false story has been set up by the applicants/landlords for unemployment of their sons. The properties, details of which have been given hereinabove are admitted to the landlords. The Prescribed authority after consideration of these materials rightly came to the conclusion that looking to the large joint family business, the need to set up an independent business for sons of the applicants/landlords cannot be accepted. These findings have not been reversed by the Appellate Court. The applicants/landlords did not disclose their business premises in the release application and as such it is a clear case of concealment of material facts. The need, therefore, cannot be termed as bonafide.

30. Considering these submission of learned counsel for the petitioner in the light of the evidence on record, it is relevant to note that the Appellate court has discussed in detail each and every property/business premises owned by the landlords and the business which were being run by them. There is no dispute about the fact that the business which are being run in the family are joint family business. On account of death of their father, the sons whose need has been set up started looking/managing their father's business and are not unemployed as on date. This fact is of no relevance as at the time of filing of the release application they were not engaged in the business or were employed.

31. The settled law is that the crucial date for looking to the need of the landlord is the date of filing of the petition for release. The normal rule is that the rights and obligation of the parties are to be determined as they were when the lis commenced. The only exception is that the Court is not precluded from moulding relief(s) appropriately in consideration of the subsequent events provided such events had an impact on those rights and obligations. Subsequent event may change but only if they are of such nature and dimension so as to completely vanish the need of the landlord, it can be said that the need of the applicant/landlords has eclipsed.

32. In **Ramesh Kumar Vs. Kesho Ram**², the then Chief Justice M.N. Venkatachalia, speaking for the bench held that where the subsequent events of fact or law which have a material bearing on the entitlement of the parties to relief or on aspect which bear on the moulding of the relief occur, the Court is not precluded from taking a "cautious cognizance" of the subsequent changes of fact and law to mould the relief.

33. In **Kamleshwar Prasad Vs. Pradumanju Agarwal**³, the Apex Court has held that even the subsequent events of death of the landlord who wanted to start a business in the tenanted premises is not sufficient to dislodge the bonafide need established by him earlier as the business in question can be carried on by his widow or any other son. It has been held that the subsequent events to over shadow the genuineness of the need must be of such nature and of such a dimension that the need propounded by the petitioning party should have been completely eclipsed by such subsequent events.

34. In paragraph no. 15 of **Gaya Prasad Vs. Pradeep Srivastava**⁴, the Court has expressed its concern over long drawn judicial process which create an impact on the rights of the litigating parties. Paragraph no.16 of the said judgement are quoted below;-

16. Of course a two-Judge Bench (K. Ramaswamy and D.P. Wadhwa, JJ) pointed out in another case Ansuyaben Kantilal Bhatt vs. Rashiklal Manilal Shah [1997 5 SCC 457] that the pendency of a lis for a record period of thirty one years has transformed a middle aged landlord to advanced stage of gerentry and at that stage he could not start a new business venture. After lamenting over the system which caused a whopping delay of thirty-one years the Bench made two directions. The first was that the son of the landlord who by that time had four and a half years more to go for reaching the superannuation age could consider starting the business in the tenanted premises after retirement. The second was that in the meanwhile the rent for the building would stand enhanced from Rs.101/- to Rs.3500/- per month.

35. In **Ramkubai (Smt) Deceased By Lrs. And others Vs. Hajarimal Dhokalchand Chandak**⁵, it was noticed by the Apex Court that the landlord was unemployed on the date of filing of the suit but he could not be expected to idle away the time by remaining unemployed till the case is finally decided. It took about 25 years to reach the case at the final stage. Therefore, the contractor work which was taken by the landlord, in the meanwhile, will not militate against the need set up by him for carrying on the business of Kirana.

36. In **Pratap Rai Tanwani and another Vs. Uttam Chand and another**⁶, The Apex Court while considering the contention of the appellant that the landlord's son had taken a temporary employment with Visa for a limited period and went abroad observed that while considering the bonafide need of the landlord the crucial date is the date of the petition. It has observed in paragraph no.7 and 10 as quoted below;-

7. It is a stark reality that the longer is the life of the litigation the more would be the number of developments sprouting up during the long interregnum. If a young entrepreneur decides to launch a new enterprise and on that ground he or his father seeks eviction of a tenant from the building, the proposed enterprise would not get faded out by subsequent developments during the traditional lengthy longevity of the litigation. His need may get dusted, patina might stick on its surface, nonetheless the need would remain intact. All that is needed is to erase the patina and see the gloss. It is pernicious, and we may say, unjust to shut the door before an applicant just on the eve of his reaching the finale after passing through all the previous levels of

the litigation merely on the ground that certain developments occurred pendente lite, because the opposite party succeeded in prolonging the matter for such unduly long period.

10. The judicial tardiness, for which unfortunately our system has acquired notoriety, causes the lis to creep through the line for long long years from the start to the ultimate termini, is a malady afflicting the system. During this long interval many many events are bound to take place which might happen in relation to the parties as well as the subject- matter of the lis. If the cause of action is to be submerged in such subsequent events on account of the malady of the system it shatters the confidence of the litigant, despite the impairment already caused.

37. Considering the law in this regard in the background of the factual matrix of the instant case, it is evident that three sons of the applicants/landlords who were unemployed on the date of release application could not engage themselves in an independent business. Because of death of their father and that there was no other business, they joined the joint family business. Their wish to start an independent business remained a dream. In the release application, specific need of three sons of the applicants/landlords namely Vishnu Kumar @ Vishnu Mittal son of Sundar Lal, Narendra Kumar, son of Nand Kishore and Dheeraj Kumar son of Jagdish Saran was set up. These three sons of the applicants-landlords namely Vishnu Mittal, Narendra Kumar and Dheeraj Mittal had filed their own affidavits before the Prescribed Authority in the year 1999 to state that they needed the shop in question to start an independent business. Sri Narendra Kumar, one of the son of the applicant/landlord filed his affidavit in support of the need set up by the landlords. It cannot be said that since others did not file their independent affidavits before this Court in the present petition, their need had eclipsed.

37A. Moreover it is settled law that every adult member of the family has a right to start his own independent business. Even for expansion of the family business, the premises can be required. The partition of the joint family property, if any, took place during interregnum, long period of litigation, would again does not frustrate the need of the landlords because there are many members of the family including the respondents herein who can start their business in the disputed accommodation. Even Vishnu Kumar who is stated to have got the disputed property as a result of partition in the joint family is not precluded from starting a new venture. Thus it cannot be accepted that since the applicants/landlords are no more and their sons are carrying on the joint family business for the reason that the godown in question could not be released, the need setup in the release application to start a new venture stood satisfied or eclipsed. The contention of the learned counsel for the petitioner in this regard are thoroughly misconceived.

38. As far as the contention of the petitioner regarding availability of other accommodations to the landlord and non-disclosure of the said fact in the release application, it is sufficient to note that non disclosure of all the business premises and all the residential accommodation in occupation of the applicants/landlords i.e. members of the joint family could not be a factor relevant to reflect upon their bonafide need for the reason that according to the applicants/landlords these premises are not of such nature which would have satisfied their need and further the tenant has not been able to establish that these premises can be utilized by the

landlords for the business proposed in the release application. The Appellate Court below has considered in detail each and every accommodations/business premises in possession of the landlords and recorded a categorical finding of fact that they are not sufficient to satisfy the need of the landlords set up in the release application.

39. Now the contention of the learned counsel for the petitioner that the appellate Court has not followed the procedure prescribed under law while deciding the appeal in not reversing the findings of the trial Court and the evidence on record has been ignored, its order, therefore, is illegal. To deal with the submission, it is important to note that the proceedings before the Appellate Authority are in the nature of continuation of the release proceeding. The entire evidence on record was examined by the appellate Court and after discussion on each evidence it came to the conclusion that the findings recorded by the trial Court could not be sustained. On comparative hardship a categorical finding has been recorded to the effect that since the disputed accommodation is a godown, it can be shifted elsewhere by the tenant as no good will is attached to the place as in case of retail business. Moreover, the tenant possess ample accommodation in which he can carve out a separate space for the godown. The Comparative hardship was, therefore, tilted in favour of the landlords.

40. It may also be noted that the learned counsel for the petitioner took much time of the Court to place several supplementary affidavits to state that the income from salary and interest from the joint family business in which the applicant's sons are now partner and assets of the landlords are sufficient for their need. Attention of the Court was invited to the income tax returns and other related documents.

41. In this regard it is relevant to note that this Court is not going to review the income of the parties and to examine as to whether their earning is increased during the course of long litigation to hold that their need for starting a new venture is satisfied or not. The only bone of contention of the applicants/landlords was that their sons wanted to start an independent business a new venture. Even to augment the income from the joint family business, in the opinion of the Court, the disputed accommodation can be released.

42. Moreover, there is nothing on record that Vishnu Kumar s/o Sundar Lal in whose share this disputed premises came on account of the partition of the joint family property/business could start or has started a new venture as proposed by him at the time of release. As per own case of the tenant he is engaged in the same partnership business which was earlier being run by his ancestors jointly. This fact further substantiate that the need set up in the release application is still alive and the release application cannot be rejected as having become infructuous with the passage of time.

43. Vishnu Kumar in the affidavit filed before the Prescribed Authority had categorically submitted that he needed the disputed property to start a new business, therefore, it cannot be said that he never came forward to press his need.

44. Learned counsel for the petitioner has further urged that the release application was itself defective, tenancy was in the name of M/s Satish Tea Company and the petitioner was only a partner. The release application could not have been filed against him as the tenant. It is liable to be rejected for non-joinder of parties.

45. This submission does not appeal to the Court at all for the reason that the petitioner has failed to bring any material on record to prove that the tenancy was in the name of M/s Satish Chand & Company and further that this plea was not accepted by the trial Court.

46. Lastly on the question of hardship, it is stated by the learned counsel for the petitioner that no hardship would be caused to the landlords as the landlord's business would not be affected by not collecting empty tins or keeping them at a different place owned by him. In other words what he suggested is that the proposed business could be run by keeping the empty tins at a different business premises in which other business are being run. Such a suggestion is totally ridiculous.

47. For all above noted reasons, this Court does not find any infirmity in the findings recorded by the appellate Court below and further is of the opinion that the landlords have established their bonafide need for the godown in question and in case the release application is rejected, the landlord would be deprived of starting a new venture which would cause more hardship to him in comparison to the tenant.

48. It is noted that the appellate Court has granted thirty days time to the applicant/petitioner to vacate the disputed accommodation and handover its possession. A condition was also put that the landlord would pay an amount of Rs.8000/- towards two years of rent to the tenant as a consequence of release of the commercial accommodation. The tenant was required to handover vacant peaceful possession of the disputed accommodation to the landlords. As learned counsel for the petitioner did not make a submission for extension of time and as such no further time is being granted to the petitioner. Consequently, the petitioner has to handover peaceful vacant possession of the disputed accommodation namely the godown in question to the landlords within a period of thirty days. Till the date of vacation of the disputed accommodation, up to date rent as fixed by this Court in the interim order dated 19.07.2007 shall be paid by the petitioner to the landlords.

49. In case of non compliance of any of the above conditions, the decree shall become executable forthwith.

50. With the above observations and directions, the writ petition is dismissed.

(2016) 8 ILRA 903
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.08.2016

BEFORE

THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Writ A No.- 52546 Of 2015
&
Connected With Other Cases

Vandana **...Petitioner**
State Of U.P. & Ors. **Versus**
...Respondents

Counsel for Petitioner:
Vijay Gautam, Anand Ji Mishra, Kaushal Pandey

Counsel for Respondents:
C.S.C.

U.P. Police Constables and Head Constables Service Rules, 2008 – Rule 15 – Appendix-5 – Medical Examination – Rejection – Oral Communication – No Reasons Recorded — Petitioners, candidates for post of Constable, cleared Preliminary Examination, Physical Efficiency Test and Main Written Examination but declared medically unfit by Medical Board and thereafter by Appellate Medical Board, without any written or reasoned order, only oral intimation given — Appendix-5(3)(d) to Rule 15 requiring appeal to be filed on same day as examination — Held: Recording of reasons is fundamental to fair administrative action and natural justice, required even where statute is silent — Absence of reasoned order renders statutory right of appeal illusory and empty formality. (Para 1)

Constitution of India – Article 14 – Subordinate Legislation – Arbitrariness – Appendix-5(3)(d) to Rule 15 – Validity — Provision requiring candidate dissatisfied with medical examination to file appeal on same day, without corresponding requirement of furnishing reasons for rejection — Held: Subordinate legislation, though entitled to some latitude, can be struck down where it offends Article 14 of the Constitution — Provision requiring appeal on same day without reasoned order is manifestly arbitrary and unreasonable, rendering right of appeal illusory — Struck down as unconstitutional to that extent. (Para 2)

Fairness of Medical Board – Allegations of Corruption – Effect on Selection Process — Petitioners alleged widespread corruption amongst doctors constituting District-level Medical Boards, supported by newspaper reports and registration of first information report against certain doctors — Held: Material on record insufficient to vitiate entire selection process, but raises legitimate question as to credibility of functioning of Medical Boards, particularly where petitioners had cleared physically gruelling Physical Efficiency Test. (Para 3)

Constitution of Appellate Medical Board – Direction for Inclusion of Expert — Rules and Appendix-5 silent regarding composition of Appellate Medical Board — Held: Appellate Medical Board must be reconstituted comprising doctor of the rank of Professor of a Medical College, to ensure transparency and credibility of re-examination of candidates rejected on medical grounds. (Para 4)

Judicial Review of Medical Opinion – Scope — Held: Opinion of medical experts deserves respect and not worship — Courts are not precluded from examining record of Medical Board to determine whether conclusion reached is legally sustainable, particularly where fairness of procedure is under challenge. (Para 5)

Writ Petitions Partly Allowed — Provision of Appendix-5(3)(d) to Rule 15 of the Rules, 2008 requiring appeal to be filed on day of examination itself, without reasoned order, struck down as arbitrary and ultra vires — Fresh Appellate Medical Board, including a doctor of the rank of Professor, to be constituted within two months — Petitioners' appeals to be considered afresh by newly constituted Appellate Medical Board — Parties to bear their own costs.

Case Law Discussed

1. Ashok Kumar Singh Constable vs. State of U.P. & others, Writ-A No. 30417 of 2011
2. Rahul Kumar vs. State of U.P. and others, Writ-A No. 16288 of 2011
3. Arvind Kumar Sonkar vs. State of U.P. and others, Special Appeal No. 1573 of 2007
4. Union of India and others vs. Parul Punia, 2016 (2) ADJ 14 (DB)
5. Arjun Singh vs. State of U.P. & others, Special Appeal Defective No. 540 of 2015
6. Ravi Shankar Dubey vs. U.P. State Road Transport Corporation and others, Writ-A No. 38185 of 2015
7. Breen vs. Amalgamated Engineering Union, [1971] 2 Q.B. 175
8. Union of India vs. Mohan Lal Capoor and others, (1973) 2 SCC 836
9. S.N. Mukherjee vs. Union of India, AIR 1990 SC 1984
10. Ravi Yashwant Bhoir vs. District Collector, Raigad and others, (2012) 4 SCC 407
11. Sant Lal Gupta and others vs. Modern Cooperative Group Housing Society Limited and others, (2010) 13 SCC 336
12. Kranti Associates Private Limited and another vs. Masood Ahmed Khan and others, (2010) 9 SCC 496
13. Mohinder Singh Gill and others vs. The Chief Election Commissioner, New Delhi and others, (1978) 1 SCC 405
14. Veer Pal Singh vs. Secretary, Ministry of Defence, (2013) 8 SCC 83
15. Union of India and others vs. Manjeet Singh, (2015) 12 SCC 257
16. Indian Express Newspapers (Bombay) Private Ltd. and others vs. Union of India and others, (1985) 1 SCC 641
17. Dev Dutta vs. Union of India and others, (2008) 8 SCC 725

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J.)

1. In this batch of petitions, the petitioners are candidates for appointment on the posts of Constables in U.P. Police and other equivalent posts. The candidature of all the petitioners has been rejected on medical grounds.

2. Before advertizing to the issue involved in the petitions, the brief common facts of the case are necessary to be referred as under:

3. The Additional Secretary (Recruitment), U.P. Police Recruitment and Promotion Board, Lucknow issued a notification on 14th May, 2013, which was amended on 20th June, 2013 to initiate recruitment process for filling the posts of Constables in U.P. Police. Pursuant thereto an advertisement was issued inviting applications from the candidates against 20000 posts of Police Constables.

4. By the aforesaid subsequent notification dated 20th June, 2013, the posts of Police Constables were increased from 20000 to 35500, and 4033 posts were advertised for Constables in Provincial Armed Constabulary and 2077 posts of Firemen. It was mentioned in the advertisement that the candidates who had applied for the posts of Constables in pursuance of the earlier advertisement issued in the year 2011, their candidature will be considered as per the advertisement of 2011 and they were required to fill another form for which no fee was directed to be charged from them.

5. The candidates who had applied for the posts of Constables in pursuance of earlier advertisement were provided the age relaxation also. The recruitment process consists of a preliminary examination of 300 marks followed by a Physical Efficiency Test¹, Main Written Examination, Scrutiny of Documents and Medical Examination.

6. In the notification dated 14th May, 2013 it was provided that the Joint Examination-2011 was cancelled on 15th July, 2011 and a fresh advertisement was made for the Police Constables in the Pay Band Rs. 5200-20200 with Grade Pay of Rs. 2000. In the said advertisement for the posts of Constables, 10000 posts were unreserved, 5400 posts were reserved for the Other Backward Classes, 4200 posts under the Scheduled Castes Category and 400 posts under Scheduled Tribes. 2% horizontal reservation was also provided to the dependents of Freedom Fighters, 5% for Ex-Army Personnel and 5% for Homeguards and 20% for Female category.

7. It was also made clear that the number of the vacancies can be varied before the preliminary examination. The last date for submission of the form was 18th August, 2013. A brochure was issued containing detailed instructions and requirements under the relevant rules regarding physical and written examinations. It provided that minimum height of the male candidates of General, Other Backward Classes and Scheduled Castes should be 168 centimeters and of the female candidate 152 centimeters; for the candidates under the Scheduled Tribes category it was 160 centimeters for male and 147 centimeters for female candidate. It was also mentioned that the examination shall be of 300 marks, wherein 150 marks were assigned for General Knowledge and Current Affairs, 75 for Reasoning Ability and 75 for Numerical Ability. Thirty-five percent of the marks was the minimum qualifying marks in the preliminary examination.

8. It further provided that out of the successful candidates in the preliminary examination against the existing vacancies, ten times candidates equivalent to ten times of the vacancies on the basis of the reservation would be called to participate in the next step of examination i.e. Physical Efficiency Test. The candidates who qualify the Preliminary Examination and PET, had to appear in the Main Written Examination, which is of 300 marks. The Main Written Examination consists of general awareness, mental ability, reasoning and comprehension. Thirty-five percent of the total marks is the qualifying marks and it is not necessary to secure 35% in each paper. The Main Written Examination is based on objective system. After the main written examination, a select list is prepared and the testimonials are verified on the day when they are medically examined.

9. The instructions contain details about the medical examination. The medical examination of a candidate is conducted by the Board of Doctors. The instructions provide that the medical examination shall be conducted in terms of the provisions of Health Manual. It would include the height of the male and female candidates. It provides that the Medical Board shall follow the instructions of 'iqfyl HkrhZ fpdRlk ijh{kk izi=' (Police Recruitment Medical Test Proforma).

10. In the medical examination the following physical standards are to be examined:

Knock knee, bow legs, flat feet, and varicose veins, distant and near vision, colour blindness, hearing test comprising Rinne's test, Webber's test and tests for vertigo etc. in terms of the orders issued by the State Government from time to time.

11. The instruction further provides that the candidate who is dissatisfied with his medical examination, can file an appeal on the same day. It further provides that if on the same day a candidate fails to make an appeal, no appeal shall be entertained.

12. All the petitioners in this batch of writ petitions have cleared Preliminary Written Test, Physical Efficiency Test, Main Written Examination but they have been declared medically unfit by the Medical Board.

13. On 16th July, 2015 the select list was declared and total 38191 candidates were declared selected on the post of Constable in Civil Police, Constable in PAC and Firemen in U.P. Fire Services Department. In the said result it is mentioned that the following number of posts are vacant:

Constable Civil Police 1894

Constable PAC 278

Firemen 140

Thus total 2312 posts are still vacant.

14. All the petitioners in the writ petitions have been rejected in medical test.

15. It would be appropriate to mention the brief facts of each writ petition of this batch of writ petitions which are enumerated below:

(I) Writ-A No. 52546 of 2015:

16. The petitioner is an OBC female category candidate. She had cleared all the tests but was rejected in the medical test. It is stated that after her success in the main examination under the OBC category a call letter was issued to her for appearing in the last stage of selection i.e. for

document verification and the medical examination, which was scheduled to be held on 01st April, 2015 at Police Lines Amroha. On the scheduled date her documents were verified and after the medical examination she was orally informed by the medical authority that she has knock-knee and accordingly she was declared unfit. The petitioner has stated in the petition that immediately thereafter the authorities issued instructions for unsuccessful candidates, who had been disqualified in the medical examination, that if they desire, they can undergo for the re-medical examination. In pursuance of the said instructions she get herself medically examined again. The examination was conducted without any proper procedure or taking care of the instructions for conducting medical examinations and she was again declared medically unfit due to knock-knee.

17. The grievance of the petitioner is that the said re-medical examination was nothing but an empty formality and was conducted without following the procedure, the rules and the instructions given in the brochure.

18. The petitioner states that since she was not satisfied with the manner in which the medical examination was conducted, later she got herself medically examined by an Orthopedic Surgeon, wherein she was found to be medically fit.

19. Learned Counsel for the petitioner submitted that the medical examination of the petitioner was totally illegal, arbitrary and against the provisions of the U.P. Police Constables and Head Constables Services Rules, 20082. He submitted that Rule 11 of Chapter-III Part-II of Vol. V of the Financial Handbook provides a detailed procedure for the medical examination, required to be followed by the Medical Board. He has invited the attention of the Court to an order of a Division Bench of this Court dated 21st November, 2007 passed in a batch of special appeals led by **Special Appeal No. 1573 of 2007 (Arvind Kumar Sonkar v. State of U.P. & others)**, wherein the Division Bench has directed the Government to conduct re-medical examination by the newly constituted Medical Board. He has also invited the attention of the Court to a large number of interim orders passed in various writ petitions following the order of the Division Bench.

20. Learned Counsel for the petitioner has also relied on a judgment of a learned Single Judge of this Court dated 29.3.2011 passed in a batch of writ petitions led by Writ-A No. 16288 of 2011 (Rahul Kumar v. State of U.P. & others), wherein this Court after examining the Rules, 2008 has found that there is no provision for re-examination by Medical Board.

21. In paragraph-75 of the writ petition an allegation has been made that at the time of medical examination, a doctor of District Hospital, Amroha, who has been made party in personal capacity as respondent no. 9 in writ petition, had made demand of an illegal gratification for an amount of Rs. 15,000 from the petitioner and the petitioner has refused the same, therefore, the petitioner has been declared medically unfit by an oral order.

22. It is also stated that in several districts in the State of U.P., doctors were caught red-handed and cash money was recovered from their possession. In support of the said statement the petitioner has brought on the record a copy of the first information report relating to Case Crime

No. 220 of 2015, Police Station Civil Lines, District Aligarh under Section 7, 8, 10 & 13 of the Prevention of the Corruption Act, as annexure-14 to the writ petition.

23. The petitioner has also brought on the record the clippings of various news items published in National newspapers Amar Ujla and Dainik Jagran that in district Sant Kabir Nagar the District Magistrate directed to conduct a raid on the members of the Medical Board and on their search a sum of Rs. 1,21,000/- was found in their possession, with regard to which a first information report has been lodged against those doctors.

(II) Writ-A No. 51517 of 2015:

24. Seven petitioners have joined this writ petition. All the petitioners have qualified the Preliminary Examination, Physical Efficiency Test, Written Test. All of them have been rejected in the medical examination.

25. The grievance of the petitioners is that they have not been communicated any reason for their rejection by the Medical Board and by the oral order they were informed that they have been found medically unfit.

26. This Court on 17th September, 2015 had asked the learned Standing Counsel to seek instructions in the matter. Learned Standing Counsel has produced the instructions which have been taken on the record. In the instructions it is mentioned that the petitioner nos. 1, 2, 3 & 4 have been rejected on the ground of knock-knee. The petitioner no. 5 has been rejected on the ground of distance vision (left eye-6.9: Right eye-6.12), petitioner no. 6 on the ground of colour blindness, and the petitioner no. 7 has been declared unfit on the ground of flat-feet.

27. It is averred that the petitioners had filed their appeal and in their fresh medical examination, which was held at Moradabad, they were again rejected. All the petitioners have disputed the findings of Medical Board and they have brought on the record the medical certificates issued by the private medical doctors showing the petitioners medically fit.

28. Learned Counsel for the petitioners has placed reliance on a judgement of a Division Bench of this Court dated 21st November, 2007 passed in a batch of special appeals led by **Special Appeal No. 1573 of 2007 (Arvind Kumar Sonkar v. State of U.P. & others)**.

(III) Writ-A No. 52743 of 2015:

29. The petitioner had applied in pursuance of the advertisement dated 14th May, 2013. He belongs to OBC Male category. He had obtained 310.0637 marks. He was declared unsuccessful on the medical ground. The petitioner's medical test was conducted at Reserve Police Lines, Mati, Kanpur Dehat on 10th June, 2015 in which he was declared unsuccessful. The petitioner was informed about the said fact on 13th July, 2015 by the second respondent from Mobile No.

9454401472 that the petitioner was not present at the time of medical examination and his medical papers have not been traced out.

30. It is submitted by the petitioner that he was present at the time of document verification and he was declared successful in the document verification and in medical examination by an oral order he was declared unfit.

31. The petitioner has impleaded the Incharge Doctor of Kanpur Dehat Selection Board in his personal capacity and has made serious allegations of malafide in paragraph nos. 67 to 70 of the writ petition. He has also brought on the record the newspaper clippings published in several national newspapers regarding the serious allegations of gratification against the doctors who have been the members of Medical Board.

32. I have heard Sri Vijay Gautam, Sri Anand Ji Mishra, Sri Kaushal Pandey, learned counsel for the petitioners, and Sri Vikram Bahadur Yadav and Sri Aditya Kumar Yadav, learned Standing Counsel appearing for the State.

33. Learned Counsel for the petitioners submitted that the petitioners have qualified all the stages of recruitment but in the medical examination they have been rejected illegally. The medical examination was not conducted fairly and the petitioners were orally informed by the medical authorities that they are medically unfit.

34. It is stated that no written order was furnished thus, without disclosing reason, they have been declared unsuccessful illegally. It is further submitted that in absence of any reason furnished to them, the provision for filing an appeal on the same day is illusory and empty formality.

35. Learned Counsel for the petitioners further submitted that the medical examination was not fair and transparent and has been conducted contrary to the provisions of the statutory rules. The procedure for medical examination has been laid down under Appendix-3, 4 & 5 to Rule 15 of the Rules, 2008 particularly the Appendix-5, which has been violated.

36. They further submitted that Appendix-5(d) provides that any candidate who is not satisfied by his medical examination, shall file an appeal on the date of examination. According to learned counsel for the petitioners, the said clause is arbitrary and ultra-vires as well as it is unreasonable as it does not give any sufficient reasonable time to a candidate to file an appeal.

37. Amplifying the submissions, they urged that providing such a short time makes the provision of the appeal mere empty formality. He urged that on this ground alone the Appendix-V to Rule-15 of the Rules, 2008 suffers from vice of arbitrariness and may be declared as ultra-vires. It was contended that in view of wide spread allegations which have been highlighted by the national newspapers, the candidates do not have any faith in the Medical Board which is constituted to re-examine the candidates on their appeal. Lastly they urged that even the Medical Board simply

repeats the same finding of earlier medical examination and it does only formality. The result of the Medical Board is not communicated to a candidate in writing and no reason is furnished to the candidates, however, they are only orally informed about their rejection. It was also submitted that the fact that all appeals have been rejected, itself shows that the medical appeal is an eye wash.

38. It was urged that Appendix-5 to the Rules, 2008 provides only standardized equipments having Indian Standard Institute certification or duly certified by the Directorate of Weight and Measure are to be used for Physical Standard Test Examination. However, the respondents have not used the standardized equipments and the measurement of their heights was done manually.

39. Learned Standing Counsel, who has received instructions, which have been taken on the record, submits that the petitioners have not been found medically fit and the candidates who have been rejected in medical examination, can file an appeal before the Medical Board on the same day. The petitioners have been re-examined by the Medical Board and they have been found medically unfit, hence their appeals were rejected. He has drawn the attention of the Court to the original record produced by him and the instructions wherein the name of deficiency in respect of each candidate has been recorded. Lastly, he urged that for appointment on the post of constables in the police force, medical fitness is a paramount consideration. According to him, the Rules do not require giving reason at first instance by the Medical Board or by Appellate Medical Board. In case reasons are furnished to each candidate, it would cause unnecessary delay in completing the recruitment process.

40. Learned Standing Counsel has vehemently opposed the submission of learned counsel for the petitioners for re-constitution of a fresh Medical Board to re-examine the petitioners.

41. I have considered the submissions of learned Counsel for the parties and perused the record.

42. The recruitment on the post of Constable in Civil Police is regulated by the Uttar Pradesh Police Constables and Head Constables Service Rules, 2008. The said Rules have been framed under Section 46 read with sub-section (3) of Section 2 of the Police Act, 1861. Part-III of the Rules, 2008 deals with recruitment. Rule-5 provides the source of recruitment on the post of constable. The post of constable is filled by 100 per cent direct recruitment. Part-V lays down the procedure for recruitment. Rule-15 provides the detailed procedure for direct recruitment of constables.

43. Regard may be had to the fact that there are three recent amendments in the Rules, 2008. The relevant amendments in respect of the recruitment for our purposes are; (i) the Uttar Pradesh Police Constables and Head Constables Service (Third Amendment) Rules, 2013, which was published in the gazette on 09th April, 2013; (ii) the Uttar Pradesh Police Constables and Head Constables Service (Fourth Amendment) Rules, 2013, published on 10th May, 2013; and (iii) the Uttar Pradesh Police Constables and Head Constables Service (Fifth Amendment) Rules, 2013, published on 04th June, 2013.

44. To answer of the aforesaid question, it will be necessary to have the benefit of relevant sets of rules governing the subject :

"15. Procedure for direct recruitment of Constable.---(a) Application.--- (i) A candidate shall fill the application form from one District only. Regarding allocation of Examination Center, the candidate may give more than one option. However, Board may allocate center other than those indicated by the candidate.

(ii) The details of the information regarding educational qualification, age, minimum qualifying standards for each category of examination, including physical, written, medical etc., minimum qualifying marks for Written Examination subject wise, copy of O.M.R. sheet for practice and other important guidelines as may be determined by the Board from time to time shall be provided by the Board on its web-site or any other method as it deems necessary.

(iii) The applications shall be invited by the Board giving the applicants adequate time for application. The candidate shall be personally and solely responsible for its accuracy and completeness, if Form of any candidate Found incomplete, wrong or having inaccurate information, this Form shall be cancelled.

(iv) An applicant shall certify himself all his certificates and documents and be responsible for their genuineness and correctness.

(v) The application form may also include identification details like Unique Identity Number, thumb and finger impressions, photograph or bio metrics in appropriate manner as prescribed by the Board from time to time.

(vi) The head of the department may fix an application fee for any recruitment.

(vii) The Board shall have the right to summarily reject the candidature of an applicant for any incompleteness or inaccuracy or variation or conflict with any previous or subsequent information submitted by the candidate.

(viii) The Government may change the number of vacancies for any recruitment at any time before the first examination and may also cancel any recruitment at any time or stage of recruitment without assigning any reason thereof.

(b) **Call Letter**--Call letters for candidate shall be made available at least ten days before the examination.

(c) **Preliminary Written Test.---**Candidates whose applications are found to be correct may be required to appear in an objective type preliminary written test of qualifying nature. The test shall be of one paper of 300 marks and contain questions on general knowledge, current affairs, reasoning ability and numeric ability of appropriate level, the detailed syllabus for which

shall be notified by the Board from time to time. The candidate who fails to obtain 35% marks shall not be eligible for recruitment. From the candidates who pass the preliminary written test, a number equal to ten times the number of vacancies shall be eligible for the physical Efficiency Test.

(d) **Physical Efficiency Test.**---The eligible candidates shall be required to appear in a Physical Efficiency Test which shall be of 100 marks. The procedure for conducting the Physical Efficiency Test shall be such as prescribed in Appendix-2.

(e) **Main Written Examination.**---The eligible candidates who qualify Physical Efficient Test shall be required to appear in the main written examination which will be of objective type shall carry 300 marks. The written paper will consist of questions covering, general awareness, mental ability, reasoning and comprehension. The detailed syllabus for the examination shall be notified by the Board. The procedure for conducting written examination shall be such as mentioned in Appendix-3. Candidates who fail to obtain 35% marks in the main written examination shall not be eligible for recruitment.

(f) **Scrutiny of Document and Medical Examination.**---The Board shall prepare a merit list for each category of candidates on the basis of total marks obtained by the candidates according to the orders of the State Government and the provisions of enactments for the time being in force.

The scrutiny of documents of the above candidates shall be carried out as per Appendix-4. In case any document is found to be manipulated, inaccurate or forged during the scrutiny or at any time after the scrutiny, the candidature of the applicant will be cancelled at the discretion of the Board and Head of Department. Those candidates whose documents are found in order will undergo for Medical Examination as per Appendix-5.

Note.- The Medical Board shall examine the candidate and deficiencies thereof such as knock knee, bow-legs, flat feet, varicose veins, distant and near vision, colour blindness, hearing test comprising of Rinne's test, Webber's test and shall also tests for vertigo, speech defects etc. of the candidate as may be notified from time to time by the State Government.

(g) **Selection and Merit List.**---The Board shall prepare a final select list of candidates in order of their merit, keeping in view the reservation policy of the State.

If two or more candidates obtain equal marks, preference will be given to the candidates who have obtained higher marks in the main written examination. If two or more candidates secure the same marks in main written examination then the candidate who are older will be placed higher in the merit list. In case two or more candidates have the same date of birth, the candidates possessing preferential qualification as mentioned in Rule 9 will be placed higher in the merit list.

The final list shall be published in Website/Notice Board. This list shall be forwarded to the Head of Department, who will forward it to the Appointing Authority for further action.

Note.---If two or more candidates obtain equal marks then the merit list would be finalized, according to the following procedure:-

(i) Such candidate will be given preference, having Preferential qualification, if any. A candidate having more than one preferential qualification will get benefit of only one preferential qualification.

(ii) If despite the above, two or more candidates have the same rank then such candidate will be given preference who secures higher marks in main written examination.

(iii) If despite the above two or more candidates have equal marks then such candidate will be given preference who is older in age.

(iv) If in spite of above, consideration still the marks are equal, and date of birth is same and marks in the main written examination are also the same then such candidate will be given preference in order of the first letter of the English alphabet of the first name as mentioned in High School Certificate.

The merit-list shall be published in website/ Notice Board.

(ii) The Board shall prepare a select list of candidates in order of the merit, keeping in view the reservation policy guidelines and the total number of vacancies notified to the Board which will be subject to character verification by the Appointing Authority. The select list shall be forwarded to the Head of Department who will after approval forward it to the Appointing Authority for further action."

45. The details of the procedure to be followed for conducting the physical efficiency test, the main written examination, the scrutiny of the documents and medical examinations are further given in detail in Appendix-2, 3, 4 & 5 to Rule 15 of the Rules, 2008.

46. The Appendix-2 provides that the physical efficiency test will be conducted by a team comprising of six officers. One of them is a Medical Officer nominated by the Chief Medical Officer. It requires amongst others that physical efficiency test for constables shall consist of 4.8 km. run for male candidates to be completed within 30 minutes, and 2.5 km. run for female candidates to be completed within 18 minutes. It further provides that manual timing shall not be permitted and the standardized electronic timing equipment along with CCTV coverage and biometric with adequate equipment will be used to ensure accuracy, transparency and avoid impersonation. The Appendix further lays down the detailed process which is to be followed by the team.

47. A candidate who is successful in the Physical Efficiency Test is required to appear in written examination. The written test carries 300 marks, 35% marks is the minimum required marks for being successful in the said examination. The Appendix-4 provides the procedure for scrutiny of the documents with regard to eligibility, relaxation and preferential qualification. The scrutiny of the documents is done before the candidate is medically examined. The documents are scrutinized by a committee consisting of, amongst others, District Magistrate or an officer nominated by him not below the rank of Sub-Divisional Magistrate, Deputy Superintendent of Police, District Inspector of Schools and others.

48. The Appendix-5 gives a detailed procedure for physical standard test and medical examination of the candidate. The issue raised in this batch of petitions relates to medical examination of the candidates, hence Appendix-5 is necessary to be quoted as under:

"Appendix-5

Procedure for Physical Standards Test and Medical Examination of the Candidates

1. Medical Examination Board.---Candidates found eligible in the prescribed written examination and physical examinations and short listed and whose documents have been found to be in order after the scrutiny vide.

Appendix 4 will undergo the Medical Examination.

2. Physical Standards Test.---The Medical Examination shall, in addition to parameters prescribed vide Point III below, include the Physical Standards Test consisting of a height, chest and weight measurement for male and female candidate as the case may be.

(1) The minimum physical standard for male candidates are as follows:---

(a) Measurement of Height.---(i) For General/ other Backward classes and Scheduled Castes candidates shall be 168 Centimetres.

(ii) For tribal candidates the minimum height is 160 Centimetres.

(b) Measurement of Chest.---For the candidates belonging to General / Other Backward Classes and Scheduled Castes minimum chest measurement shall be 79 Centimeters without expansion and at least 84 Centimeters with expansion and for Scheduled Tribes 77 Centimeters without expansion and not less than 82 Centimeters on expansion.

Note.---Minimum 5 Centimeters chest expansion is essential.

(2) The minimum physical standard for female candidates.

(a) Measurement of Height.---(i) The minimum height for General/Other Backward Classes and Scheduled Castes women candidates is 152 Centimeters.

(ii) The minimum height for Scheduled Tribes women is 147 Centimeters.

(b) Measurement of Weight.---Minimum 40 Kg.

(3) The minimum Physical Standards of qualification of each test is to be displayed very prominently on boards in the Stadium/ Police Line wherever the test is conducted before conducting the examination.

3. Doctors to examine as per Medical Manual.

Note.---(1) Only standardized equipment having Indian Standard Institute certification or duly certified by the Directorate of Weights and Measures are to be used for Physical Standard Test Examination.

(4) The Medical Board comprising one representative each belonging to Minority, Other Backward Class and Scheduled Caste shall examine candidates according to "Police Recruitment Medical Examination Form" as prescribed and codified by the Head of the Department in consultation with Director General Medical Health. This Form will be available on the Board website and also displayed at the place of medical examination.

(a) The Doctors will examine the candidates in accordance with the Medical Manual, if any, and announce the result on the day of the Medical Examination.

(b) The result of medical examination will be displayed on the notice Board outside the premises at the end of the day.

(c) The Board will explore and try to institute a system of on-line record of medical examination directly on a remote server with auditable trail of changes and each change bearing a time stamp. No changes will be allowed after final submission of a record.

(d) Any candidate not satisfied by his medical examination, shall file an appeal on the day of examination itself. No appeal with respect to the medical examination shall be entertained if the Candidate fails to appeal on the day of his medical examination and announcement of the result of the same. The appeal should be disposed of by the medical Board constituted for the purpose within one month of the appeal being filed.

(e) The members of the medical board who are found to give the wrong report willfully will be liable for criminal proceedings.

(f) The Medical Examination is only qualifying in nature and it has no effect on the merit list."

49. As can be seen from a bare reading of the Rules, 2008 that a detailed and exhaustive procedure has been laid down for a fair selection.

50. Learned counsel for the petitioners has placed reliance on a judgement of this Court in the case of **Ashok Kumar Singh Constable v. State of U.P. & others, Writ-A No. 30417 of 2011**, wherein the petitioner, a candidate for the post of Constable, was rejected on medical ground. He was found fit by the Medical Board and was appointed on 10th July, 2005 as Constable in Civil Police. However, his services were terminated after completing training in the year 2007 on the ground that he is colour blind. It was challenged on the ground that no opportunity was afforded. The said case is clearly distinguishable. In the present case, the petitioners have not been appointed as they have been declared medically unfit.

51. In another judgement in the batch of writ petitions led by **Writ-A No. 16288 of 2011 (Rahul Kumar v. State of U.P. and others)**, the Court has directed for further medical examination. In the said case the petitioners were declared medically unfit by the Regional Medical Board constituted at the training centre. Initially the petitioners were declared fit by the Medical Board. Later, they were further medically tested and were declared unfit and they were prevented from completing their training on the ground that the second medical examination was not warranted. It was urged that under the service rules there is no provision for re-examination by the Medical Board. The learned Single Judge in the said case relied on a judgement in **Arvind Kumar Sonkar (supra)**. The said judgement has been distinguished by the latter Division Bench in **Parul Punia (supra)**, wherein it was found that **Arvind Kumar Sonkar's** case was decided on the basis of consent.

52. In the next case relied upon by the learned counsel for the petitioners i.e. **Arvind Kumar Sonkar v. State of U.P. And others, Special Appeal No. 1573 of 2007**, the selection was in respect of the year 2006 and it was a case before the amendment was made in the Rules in 2009, 2011 and 2013. Moreover, the impugned orders were set aside on the ground of violation of principles of natural justice. In that case also, the petitioners were selected against regular posts and they were working as constable and without affording any opportunity their services were terminated. In view of the said facts, the said case is distinguishable.

53. There is another aspect of the matter. In the present case, there are serious allegations about the conduct of doctors which is also evident from the reports published in national newspapers and the fact that the first information reports have been lodged against the doctors and some of them have been found in possession of illegal huge amount in cash. These facts further require that there should be a Medical Board of Experts.

54. A Division Bench of this Court in the case of **Arjun Singh v. State of U.P. & others, Special Appeal Defective No. 540 of 2015**, had an occasion to consider the issue with regard to

interference under Article 226 of the Constitution in the matter of re-medical test. The Court has held that it would not be open for the Court to substitute its own opinion for the opinion of the medical authorities. However, the Court has further held that it can only interfere where there has been a violation of legal provisions or the **decision has been arbitrarily taken.**

Emphasis supplied

55. It was also provided in the interim order that the date fixed by the Principal was to be informed to the Inspector General-cum-Chief Security Commissioner of the Railway Protection Force. In the re-medical examination, the team of the doctors nominated by the Principal, KGMC found that the candidate's eye sight was within normal vision hence the writ petition was allowed.

56. In the Special Appeal the Court set aside the order of the learned Single Judge, principally on two grounds that in compliance of the interim order the officials of the Railways were not informed about the time when fresh re-medical was conducted and the order of the learned Single Judge was based on an order in the case of **Arvind Kumar Sonkar v. State of U.P. & others³**, wherein a similar direction was issued to constitute a three-member Board to re-examine a candidate who was rejected by the Medical Board of the Railways.

57. The first question which needs to be answered is as to whether non-furnishing reason is arbitrary. Concededly, after a candidate is rejected by the Medical Board at district level, no order is served upon him. He is orally informed that he can file an appeal on the same day.

58. It is true that the Rules, 2008 do not provide to furnish reasoned order to a candidate for his rejection on medical ground. The rule is silent presumably on the ground that in such administrative matters, there is no need to furnish the reasons. This appears to be on the premise that the authorities concerned, are not required to consider that fairness or natural justice demands that while rejecting a candidate on medical ground, they have to record the reason. But the present trend is otherwise.

59. In England in Common Law, the administrative authority was not required to give reason in its decision. For the first time, Lord Denning M.R. in *Breen V Amalgamated Engineering Union* [1971] 2 Q.B. 175 observed thus:

"The giving of reasons is one of the fundamentals of good administration"

60. However, the Courts in United States did not follow British law. They emphasized the need to record reasons in the orders. According to them, recording of the reasons serves following purposes:

(a) Decisions of authorities are subject to judicial reviews. The courts cannot exercise their duties of review unless order contains reasons.

(b) The authority should give clear indication that it has exercised the discretion within the four corners of law.

(c) The reason promotes the thought by the authority and eschews irrelevancies and assures careful administrative consideration.

61. Prof. H.W.R. Wade in his classic work (Administrative Law, 6th Edition,) has expressed his view that recording reasons is a part of natural justice. The Supreme Court approved those principles in the case of **Union of India v. Mohan Lal Capoor and others**⁴ and in a Constitution Bench in the case of **S.N. Mukherjee v. Union of India**⁵. The Constitution Bench has held that giving reasons facilitate appellate or revisional authority to decide the matter and it also eschew arbitrariness. The Court followed the view which the American Courts have taken. The relevant paragraph of **S.N. Mukherjee (supra)** reads as under:

"36. Reasons, when recorded by an administrative authority in an order passed by it while exercising quasi-judicial functions, would no doubt facilitate the exercise of its jurisdiction by the appellate or supervisory authority. But the other considerations, referred to above, which have also weighed with this Court in holding that an administrative authority must record reasons for its decision, are of no less significance. These considerations show that the recording of reasons by an administrative authority serves a salutary purpose, namely, it excludes chances of arbitrariness and ensures a degree of fairness in the process of decision-making. The said purpose would apply equally to all decisions and its application cannot be confined to decisions which are subject to appeal, revision or judicial review. In our opinion, therefore, the requirement that reasons be recorded should govern the decisions of an administrative authority exercising quasi-judicial functions irrespective of the fact whether the decision is subject to appeal, revision or judicial review. It may, however, be added that it is not required that the reasons should be as elaborate as in the decision of a court of law. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage. The appellate or revisional authority, if it affirms such an order, need not give separate reasons if the appellate or revisional authority agrees with the reasons contained in the order under challenge."

(emphasis supplied)

62. The Supreme Court in the recent time has expanded the horizon of natural justice and reasons have been treated part of the natural justice. It has gone to the extent in holding that reasons are heart and soul of the order. The absence of reasons renders an order indefensible/ unsustainable particularly when it is subject to appeal/ revision. Reference may be made to the judgments of the Supreme Court in the cases of **Ravi Yashwant Bhoir v. District Collector, Raigad and others**⁶, **Sant Lal Gupta and others v. Modern Cooperative Group Housing Society Limited and others**⁷; **Kranti Associates Private Limited and another v. Masood Ahmed Khan and others**⁸; **Abdul Ghaffar and another v. State of Bihar**⁹; **Ram Phal v. State of Haryana and others**¹⁰.

63. The position of law that emerges from the decisions, mentioned above, is that assignment of reasons is imperative in nature. The judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

64. It is a trite law that even if a Statute is silent and it does not provide the principles of natural justice or are not embodied in rule, if by an order a statutory authority affects a citizen with civil or evil consequences, it must meet the test of reasonableness. Civil consequences cover everything that affects a citizen's civil life. Reference may be made to the judgment of the Supreme Court in the case of **Mohinder Singh Gill and others Vs. The Chief Election Commissioner, New Delhi and others**¹¹.

65. In view of the above, I do not find substance in the submissions of learned Standing Counsel that the Rules, 2008 do not require recording any reason, while rejecting a candidate on medical ground.

66. It is worth-mentioning that learned Standing Counsel has produced the original record, which indicates that even brief reasons have not been recorded and only in casual way deficiencies have been mentioned.

67. In medical matter the possibility of divergent opinions of doctors is common. Moreover in this profession, skills differ from doctor to doctor. There is always possibility of error of judgment while forming an opinion. It is trite that in realm of diagnosis and treatment there is a scope for genuine difference of opinion. Hence a brief description of deficiency with a brief reason is necessary to eschew the arbitrariness.

68. The record also indicates that in all the cases candidates' appeals have been rejected in mechanical manner. In fact, the order of the Appellate Medical Board appears to be rubber stamp decision, which does not inspire confidence.

69. In the present case, the Rule, 2008 provides only an appeal, and there is no provision of revision or review. Hence, in absence of reason the appeal in the present case is illusory inasmuch as the candidate does not know the ground on which he has been rejected.

70. Insofar as the submission of learned Standing Counsel that the opinion of the Medical Board and the Appellate Medical Board is based on expert opinion hence it would not be appropriate for this Court to interfere under the jurisdiction of Article 226 of the Constitution. I do not agree with the said submission. The Supreme Court in the case of **Veer Pal Singh v. Secretary, Ministry of Defence**¹² has considered the same issue. The Court has held that it is true that the opinion of the expert should be respected but it should not be worshiped. Relevant part of the judgement reads as under:

"10. Although, the courts are extremely loath to interfere with the opinion of the experts, there is nothing like exclusion of judicial review of the decision taken on the basis of such

opinion. What needs to be emphasized is that the opinion of the experts deserves respect and not worship and the courts and other judicial / quasi-judicial forums entrusted with the task of deciding the disputes relating to premature release/ discharge from the army cannot, in each and every case, refuse to examine the record of the Medical Board for determining whether or not the conclusion reached by it is legally sustainable."

71. The Supreme Court in recent cases has emphasized the need to record reason by the Medical Board. In the case of **Union of India and others v. Manjeet Singh**¹³ has observed as under:

"27. ...The requirement of recording reasons is not contingent on the duration of the Army service of the member thereof and is instead of peremptory nature, failing which the decision to board him out would be vitiated by an inexcusable infraction of the relevant statutory provisions."

72. The next question that arises for consideration is whether amended Appendix-5(3) (d) to Rule-15 of the Rules, 2008 is irrational, unreasonable and arbitrary. The object of the Rule is to provide a remedy by way of an appeal. The Rules, 2008 is a subordinate legislation. It is a trite law that the subordinate legislation may also be questioned on any of the grounds on which vires of a legislation is challenged. Although the subordinate legislation does not carry the same degree of immunity which is enjoyed by the Statute passed by the competent legislature.

73. The question whether a subordinate legislation can be questioned on the ground of unreasonableness and arbitrariness, was considered by Prof. Alan Wharam in one of his article "Judicial Control of Delegated Legislation: The Test of Reasonableness". His views were quoted with approval by the Supreme Court in the case of **Indian Express Newspapers (Bombay) Private Ltd. and others v. Union of India and others**¹⁴. The Supreme Court held that the law in India about the arbitrariness comes within the sweep of Article 14 of the Constitution, hence a judicial review can also be made where a subordinate legislation is arbitrary and it offends Article 14 of the Constitution. In India, the Court may require the Government to exercise a power in a reasonable way in conformity with the spirit of the Constitution. The relevant paragraphs of the judgment in **Indian Express newspapers (supra)** are quoted as under:

"76. Prof. Alan Wharam in his Article entitled "Judicial Control of Delegated Legislation: The Test of Resonableness" in 36 Modern Law Review 611 at pages 622-23 has summarised the present position in England as follows :

(i) It is possible that the courts might invalidate statutory instrument on the grounds of unreasonableness or uncertainty, vagueness or arbitrariness; but the writer's view is that for all practical purposes such instruments must be read as forming part of the parent statute, subject only to the ultra vires test.

(ii) The courts are prepared to invalidate by-laws, or any other form of legislation, emanating from an elected, representative authority, on the grounds of unreasonableness, uncertainty or repugnance to the ordinary law; but they are reluctant to do so and will exercise their power only in clear cases.

(iii) The courts may be readier to invalidate by-laws passed by commercial undertakings under statutory power, although cases reported during the present century suggest that the distinction between elected authorities and commercial undertakings, as explained in *Kruse v. Johnson*, might not now be applied so stringently.

(iv) As far as subordinate legislation of non-statutory origin is concerned, this is virtually obsolete, but it is clear from *In re French Protestant Hospital*¹⁵ that it would be subject to strict control." [See also H.W.R. Wade: *Administrative Law* (Fifth Edn.) pp. 747-748].

77. In India arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. In India any enquiry into the vires of delegated legislation must be confined to the grounds on which plenary legislation may be questioned, to the ground that it is contrary to the statute under which it is made, to the ground that it is contrary to other statutory provisions or that it is so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution.

78. ...On the facts and circumstances of a case, a subordinate legislation be may struck down as arbitrary or contrary to statute if it fails to take into account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or, say, the Constitution. This can only be done on the ground that it does not conform to the statutory or constitutional requirements or that it offends Article 14 or Article 19(1)(a) of the Constitution. It cannot, no doubt, be done merely on the ground that it is not reasonable or that it has not taken into account relevant circumstances which the Court considers relevant."

74. The Supreme Court has applied the same principles in declaring the subordinate legislation arbitrary and ultra-vires. Reference may be made to the judgments in the case of **State of Uttar Pradesh and others v. Hirendra Pal Singh and others**¹⁶, **Air India v. Nargesh Meerza and others**¹⁷, **Indian Council of Legal Aid & Advice and others v. Bar Council of India and another**¹⁸, **C. Chandramohan v. Sengottaiyan and others**¹⁹ and **State of Uttar Pradesh and others v. Ravindra Kumar Sharma and others**²⁰.

75. In the case of **Dev Dutta v. Union of India and others**²¹, the Supreme Court was considering an office memorandum issued by the Ministry / Public Grievance and Pensions of the Union Government dated 10.11.1987, wherein it was provided that only adverse entry is to be communicated to the concerned employee and not the good entry. The Court held that the said communication violates Article 14 of the Constitution and declared all similar Rules/ Government Orders/ Office Memorandum in respect of all services under the State as illegal. The relevant part of the order reads as under:

11. ...It is well settled that no rule or government instruction can violate Article 14 or any other provision of the Constitution, as the Constitution is the highest law of the land. The aforesaid office memorandum, if it is interpreted to mean that only adverse entries are to be communicated to the employee concerned and not other entries, would in our opinion become arbitrary and hence illegal, being violative of Article 14. All similar Rules/Government Orders/Office Memoranda, in respect of all services under the State, whether civil, judicial, police, or other service (except the military), will hence also be illegal and are therefore liable to be ignored."

"12. It has been held in *Maneka Gandhi vs. Union of India & Anr.* AIR 1978 SC 597 that arbitrariness violates Article 14 of the Constitution. In our opinion, the non-communication of an entry in the A.C.R. of a public servant is arbitrary because it deprives the concerned employee from making a representation against it and praying for its up-gradation. ..."

76. What emerges from the abovementioned cases is that manifest arbitrariness, unreasonableness and absurdity can also be a ground to strike down a provision of the subordinate legislation.

77. The next question arises whether a part of provision can be severed from the rest of the provisions, Bennion on Statutory Interpretation (Fifth Edition) at Page 258 states that:

"...Severance Where possible, the court will sever the provision which is ultra vires from the rest of the instrument. If the instrument consists of a collection of separate units, each of which is say a rule, a regulation or a byelaw, severance is likely to be easier. However question of severance does not depend on a 'blue-pencil test'. In accordance with principle, the court will sever the invalid provision from the valid notwithstanding that this cannot be done neatly by textual amendment."

78. Applying those principles in the cases in hand, I find that Appendix 5(3)(d) to Rule-15(f) of the Rules, 2008 is unreasonable and arbitrary as it does not give sufficient time to file an appeal and secondly, in absence of reasoned order any appeal is empty formality, thus, arbitrary and violates Article 14 of the Constitution.

79. I shall now consider the question regarding the fairness of Medical Board.

80. Learned counsel for the petitioners have strenuously urged that there was wide spread corruption and unfairness in the medical examination. The petitioners have brought on the record newspaper clippings and reporting with regard to a large number of serious allegations against the conduct of the Doctors, who were the members of Medical Board at the district level. The Court's attention was also drawn to an FIR against the Doctors. It is stated that at the direction of the District Magistrate a raid was conducted on the members of Medical Board and huge amount of cash was recovered from them.

81. On the basis of those allegations, it was urged that the findings of Medical Boards are tainted and cannot be safely relied upon especially in the case of petitioners, who have qualified all the stages including physical efficiency test, which is most gruelling; a medically unfit person cannot succeed in those tests.

82. In my view, on the basis of abovementioned material on record it is difficult to hold that the entire selection is vitiated on the said ground.

83. However, these materials on the record raise serious question about the credibility of functioning of the Medical Board. In the matter of recruitment of constables the constitution of Medical Board which decides the appeal of the candidates against district level Medical Board, is not provided. The amended Appendix-5(3)(d) to the Rules, 2008 only provides that appeal can be filed on the same day. It further provides that it should be disposed of by the Medical Board constituted for the purpose within one month.

84. Relevant would it be to mention that Rule 15 and its Appendix-5, of the Rules, 2008 are completely silent about the constitution of Appellate Medical Board. In instructions, which is on the record, it is stated that the Appellate Medical Board is constituted in terms of Medical Manual. Paragraphs 176 to 186 of Chapter-V of the Medical Manual deals with the Rules for the grant of medical certificates and the payment of medical fees. Paragraph-182 provides that if in any case the candidate is not satisfied with the decision of Civil Surgeon, he may appeal to the Divisional Medical Board. Paragraphs 182 and 182-A of the U.P. Medical Manual is quoted herein below:

"182. If in any case a candidate is not satisfied with the decision of the Civil Surgeon he may appeal to the Divisional Medical Board through the head of the office or department concerned, and the latter may, at his discretion, accept and forward the appeal or refuse to do so, provided that he shall refuse to forward the appeal in any case in which a member of the Divisional Board had already expressed or recorded an opinion unfavourable to the employment of the candidate. When an appeal is allowed the candidate must appear, at his own expense, at the next meeting of the Board.

182-A. There will be no right of appeal from a Medical Board special or standing; but if State Government are satisfied, on the evidence produced, of the possibility of an error of judgment in the decision of the first Medical Board, it will be open to Government to allow an appeal to a second Medical Board.

Note: Such appeal should be preferred within one month from the date of issue of the communication in which the findings of the medical authority are communicated to the candidate. If the appeal is supported by a medical certificate as a piece of evidence about the possibility of an error of judgment in the decision of the medical authority, such certificate will not be taken into consideration unless it contains a note by the medical practitioner who issues such a certificate to the effect that it has been given in full knowledge the fact that the candidate has already been rejected as unfit."

85. Learned Standing Counsel has stated that at the Divisional Level the Appellate Medical Board is constituted by the Deputy Director, Medical & Health. In the Board there are three doctors.

86. It has to be borne in mind that that the petitioners have qualified all the stages save and except last stage i.e. Medical examination. If a Statute provides the appeal then the grievance of the aggrieved

person must be considered objectively and fairly and the order of the appellate board should not be a rubber stamp order and skeletal.

87. Therefore, in my view, the appellate Medical Board should be constituted comprising experts of subjects and it should fairly re-examine the candidates who have preferred the appeal against their rejection on medical ground.

88. Now the question arises about composition / constitution of appellate Medical Board. In the case of **Arvind Kumar Sonkar v. State of U.P. & others, Special Appeal No. 1573 of 2007** and other connected matters, by the consent order, a Medical Board was directed to be constituted consisting of three doctors, one from a Government Hospital, second from Sanjay Gandhi Post Graduate Institute, Lucknow and the third from the King George Medical College, Lucknow. In the said case also, appellants were the candidates for appointment on the post of constables and their services were dispensed with on the ground that they were medically unfit. But the said judgment has been distinguished by a Division Bench in the case of **Union of India and others v. Parul Punia, 2016(2) ADJ 14 (DB)** on the ground that **Arvind Kumar Sonkar (Supra)** was an order based on consent. The Division Bench in **Parul Punia (supra)** held that the recruitment process can be derailed if such requests of candidates, who are not found to be medically fit, for reassessment on the basis of procedures other than that provided in the statute, are allowed. This would ordinarily be impermissible. However, the Court directed that a review Medical Board shall reassess the case of the candidates who were rejected on medical ground. Paragraph-11 of the said order reads as under:

"11. We, accordingly, allow the special appeal and set aside the judgment and order of the learned Single Judge dated 26 November 2015. Instead and in place of the direction issued by the learned Single, we direct, that a review medical Board shall reassess the case of the respondent and shall upon a fresh medical examination determine whether the respondent meets the medical parameters for recruitment. This exercise shall be carried out no later than within a period of one month of the receipt of a certified copy of this order. Based on the report of the review medical Board, further action as may be warranted in law shall thereafter be taken by the authorities for considering the candidature of the respondent based on the assessment."

89. My attention has been drawn to a recent order of this Court in a batch of writ petition led by **Ravi Shankar Dubey v. U.P. State Road Transport Corporation and others, Writ-A No. 38185 of 2015**, wherein the Court has directed the U.P. State Road Transport Corporation to re-constitute State Medical Board comprising three members in the following manner.

"1. Out of the three members while one member shall be the Director General of Medical Health, the other two members should belong to the particular field of medicine relating to the employee before it;

2. One member shall be of the rank of Head of Department of the particular field of medicine relating to the employee before it.

3. The third member should not be below the rank of Professor of the particular field of medicine relating to the employee before it."

90. In the said case the facts were slightly different It was in the context of unfitness of the existing employees, however, in that case also the employees have doubted the credibility of medical reports.

91. In view of the above facts, in my view, it would be appropriate that in the existing Appellate Medical Board at the Divisional level one doctor shall be of the rank of Professor of a Medical College nominated by the Principal of the concerned College. The said direction is necessary to maintain transparency and credibility of the Medical Board.

92. Insofar as the submission of learned Standing Counsel that physical fitness is one of the essential requirements for the post in question is concerned, it goes without saying that in Civil Police, Armed Police and other branches of Police Force, physical fitness is one of the basic requirements which cannot be diluted. Any compromise with the fitness will adversely affect the efficiency of the Police Force.

93. After careful consideration of submissions of learned counsel for the parties and the material on record, for the reasons stated above, I hold that the provision for filing appeal on the same day as contained in Appendix-5(3)(d) to Rule-15(f) of the Uttar Pradesh Police Constables and Head Constables Service Rules, 2008, is unconstitutional and arbitrary being violative of Article 14 of the Constitution.

94. In view of the above, following orders are passed:

(i) The provision of Appendix-5(3)(d) to Rule-15 of the Rules, 2008, "**on the day of the examination itself. No appeal with respect to the medical examination shall be entertained if the Candidate fails to appeal on the day of his medical examination and announcement of the result of the same**" is struck down as arbitrary and ultra vires.

(ii) A fresh Appellate Medical Board shall be constituted within two months, as directed above. A candidate, who is aggrieved by the order of the Medical Board, may file an appeal to the Appellate Medical Board within two weeks. The freshly constituted Appellate Medical Board shall continue in future recruitments also until appropriate amendment is made in the Rules, 2008;

(iii) In the existing Appellate Medical Board at the Divisional level one doctor shall be of the rank of Professor of a Medical College nominated by the Principal of the concerned College.

(iv) The petitioners' appeals shall be considered by the newly constituted Appellate Medical Board.

95. The writ petitions are, accordingly, partly allowed.

96. Parties will bear their own costs.

Writ C No.- 18121 Of 2016

...Respondents

C.S.C., Ashish Gupta, J.K. Tiwari, R.S. Gupta, S.K. Rai

1. P.K. Jha vs. State of Jharkhand, 2006 (9) SCC 458
2. R.K. Agrawal vs. State of U.P., 2015 (1) SCC 642

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. This writ petition has been filed with the following prayer:-

"(i) a writ, order or direction in the nature of certiorari to quash the illegal proceedings initiated after conclusion of proceedings by passing the final order/judgment and direct the respondents to restraint from proceeding further in Case Nos.74/2014-15, 76/2014-15 and 77/2014-15, vide order dated 2.4.2016."

2. Petitioner Yogesh Kumar has approached this Court with the assertion that proceedings of arbitration got initiated in respect of a dispute between the members and 509 Army Base Workshop Workers Cooperative Society, in which Sri Subhash Chandra, Joint Commissioner-cum-Joint Registrar Co-operative was appointed the arbitrator. It is stated that the proceedings continued before the arbitrator, and judgment was reserved in the matter on 19th March, 2015. According to the petitioner on 23rd March, 2015, awards were delivered in Case Nos.74 of 2014-15, 76 of 2014-15 and 77 of 2014-15. These awards have been brought on record of the writ petition as Annexure-2. It is stated in the writ petition that the awards have attained finality, and have not been challenged any further. Petitioner asserts that thereafter notices have been issued by the arbitrator calling upon petitioner to appear in proceedings of Arbitration Case Nos.74 of 2014-15, 76 of 2014-15 and 77 of 2014-15, vide notice dated 2nd April, 2016. Date has been fixed for appearance in the matter on 27th April, 2016. It is at this stage that petitioner felt aggrieved, and has filed this petition.

3. The writ petition was entertained, and following orders were passed in the matter on 3rd May, 2016:-

"The challenge in this petition is to the proceedings in respect of Misc. Case No.74 of 2014-15, 76 of 2014-15 and 77 of 2014-15 before the Dy. Commissioner/Dy. Registrar Co-operative Societies, Meerut Division, Meerut.

Sri Sujeet Kumar Rai, has put in appearance on behalf of respondent No.4.

He submits that for the same cause of action the petitioner has filed another writ petition which is pending before the Division Bench and is likely to come up on 9th May, 2016. He has produced the copy of the aforesaid writ petition.

I have perused the same and find in the said writ petition the cause of action arises out of Misc. Case No.73 of 2014-15, 75 of 2014-15 and 78 of 2014-15.

In view of above, the aforesaid petition is in respect of different proceedings and not those in relation to Case No.74 of 2014-15, 76 of 2014-15 and 77 of 2014-15.

The argument of learned counsel for the petitioner is that all the above three cases have already been decided by the award dated 23.03.2015 passed by the Joint Commissioner/Joint Registrar, Co-operative Societies, Meerut.

Therefore, the issuance of notices dated 2nd April, 2016 requiring the petitioner to appear and the participate in the said proceedings is wholly without jurisdiction.

Sri R.S. Gupta, learned counsel appearing for respondent No.5 submits that the awards dated 23.03.2015 which have been annexed with the petition are totally fake documents and are not part of the record of the proceedings and as such it is misconceived to allege that the above referred matters have decided.

Learned Standing Counsel appearing for respondents No.1 and 2 is directed to obtain the record of the above proceedings from the office of the Joint Commissioner/Joint Registrar, Co-operative Societies, Meerut and to produce the same before the court in a sealed cover on 10th May, 2016.

Put up on 10th May, 2016."

4. It further transpires that original records, pursuant to the directions issued on the previous occasion, were produced before the Court, and following orders were passed in the matter on 10th May, 2016:-

"In pursuance of the order dated 3.5.2016 the learned standing counsel has produced the original record of the three cases.

The order sheets reveals that the matter was heard by the Arbitrator on 19.3.2015 on merit and the order was reserved. Thereafter, on 29.4.2015 in presence of the representative of the society, on his application the case was adjourned. There is no order of 25.3.2015 on the order sheet, not even an order that the award had been pronounced. The copy of the award is also not part of the record.

Sri Umesh Chandra Yadav, learned counsel for the petitioner submits that the award was pronounced on 23.3.2015 in the presence of the parties and a copy thereof bearing the signatures of the Arbitrator was supplied to the petitioner, a photocopy of which has been enclosed with the writ petition. He undertakes to produce the original copy supplied to him on the next date.

In view of the facts and circumstances of the case as referred to above and disclosed in the order dated 3.5.2016, it has to be ascertained, if any award, was pronounced by Mr. Subhash Kumar as Arbitrator on 23.3.2015 in the above three cases and if so, why it is not reflected in the order sheet and is not available on record.

Even though Mr. Subhash Kumar, who was Arbitrator, is retired from the post of the Joint Commissioner-cum-Joint Registrar, Co-operative Societies, U.P. Lucknow he is directed to appear before the court to explain his conduct in this regard.

The learned standing counsel is directed to inform Mr. Subhash Kumar about this order and to remain present before the court on the next date.

List on 26.5.2016, on which date he shall remain present.

The original record is returned to the learned standing counsel for keeping it in safe custody and to retain it till the next date of listing."

5. It may be noticed that the awards are stated to have been delivered by one Sri Subhash Chandra, in his capacity as an arbitrator, who has not been impleaded as a party to the writ petition. Respondent no.4 is the present arbitrator in the proceedings, which are under challenge. Pursuant to the directions issued by this Court, Mr. Subhash Chandra, who was the arbitrator, appeared before this Court, and is also present today. An affidavit has been filed in the matter by him through his counsel Sri J.K. Tiwari, Advocate. The arbitrator, who is stated to have delivered the awards, has stated that proceedings were pending before him, after he was named as an arbitrator by the Additional Registrar on 17.11.2014 for deciding the three cases in question. The arbitrator has following to state in support of the petitioner's contention that awards in fact had been delivered. Paragraphs 6 to 10 of the affidavit of compliance filed by Sri Subhash Chandra are reproduced:-

"6. That vide orders dated 17.11.2014 issued by Addl. Commissioner Evam Addl. Registrar (Law) Cooperatives, U.P., Lucknow, deponent above named was appointed as an Arbitrator for deciding Arbitration Cases concerned i.e. Arbitration Cases Nos.74/2014-15, 76/2014-15 and 77/2014-15 and deponent was further directed to give his award by 15.02.2015, which may be verified from the record of the department.

7. That the awards dated 23.03.2015 (Annexure No.2 of the Writ Petition) was delivered by the deponent on 23.03.2015 at about 5:45 P.M. and copy of which were received by respondents concerned who were present before the deponent on 23.03.2015.

8. That at the initial stage of preparation of order sheet pertaining to aforesaid awards in question suddenly deponent felt uneasiness and unwell due to increase of high blood pressure and he left the office immediately on 23.03.2015 at about 6:00 P.M. with intention to get order sheet prepared on 24.03.2015 after recovery from sudden illness.

9. That vide order dated 24.03.2015 issued by Addl. Commissioner Evam Addl. Registrar (Law) Cooperatives, U.P., Lucknow the matter pertaining to aforesaid Arbitration Cases No.74/2014-15, 76/2014-15 and 77/2014-15 were withdrawn from the deponent and for disposal of same Sri S.K. Dixit, Joint Commissioner Evam Joint Registrar Cooperative, Lucknow was appointed Arbitrator and he was directed to give award by 20.06.2015, which may be verified from the record of the department.

10. That in view of the issuance of the aforesaid order dated 24.03.2015 (Annexure No.A-2) issued by the Addl. Commissioner Evam Addl. Registrar (Law) Cooperatives, U.P., Lucknow the

deponent above named could not completed preparation of order-sheet pertaining to award in question as he had become functus officio."

6. A counter affidavit has been filed in the matter on behalf of respondent no.5. So far as the making of the awards by the arbitrator, as alleged in the writ petition, is concerned, it is stated by the said respondent that in fact proceedings in arbitration were concluded on 19th March, 2015. However, no date was fixed in the matter, and the respondents were not informed at any stage that any award has been made. Delivery of awards on 23rd March, 2015 and serving its copies upon respondent no.5 is denied. It is also brought on record before this Court that serious allegations were levelled against the then arbitrator Sri Subhash Chandra and prayer was made to change the arbitrator. It is stated that pursuant to such request made, an order dated 24th March, 2015 was passed, noticing the apprehension expressed by the parties that they are not likely to get justice at the hands of the then arbitrator, and consequently, the proceedings have been transferred. The proceedings from Sri Subhash Chandra were withdrawn and transferred to Sri S.K. Dixit, Joint Commissioner-cum-Joint Registrar. This order withdrawing the proceedings from Sri Subhash Chandra bears the date of 24th March, 2015. Similar orders have been passed in respect of all three case. It is stated by the respondents that no award till then had surfaced. It is also stated that the parties remained under the belief that proceedings of arbitration are pending, and that is why subsequent letters for change of arbitrator were made by other parties. Reliance has been placed upon a letter sent by Mrs. Asha Yadav dated 14.7.2015, in which request has been made to change the arbitrator. It is stated that Smt. Asha Yadav is one of the defendants in arbitration proceedings. Respondents have further brought on record a letter dated 5th October, 2015, which is signed by 05 persons, including present petitioner, which refers to the proceedings of the arbitration being continued before one Sri Rajeev Yadav. The letter of petitioner, which has been enclosed as Annexure-13 to the counter affidavit at page-65, reads as under:-

"सेवा में,

आयुक्त एवं निबन्धक, सहकारी समितियों उ०प्र०

लखनऊ

विषय मध्यस्थ वाद संख्या-72. 72. 74. 75. 76. 77 एवं 78 की सुनवाई की राजीव यादव संयुक्त आयुक्त एवं संयुक्त निबन्धक / एम०डी० पैक फैड अथवा मुख्यालय के किसी अन्य अधिकारी के यहां स्थानान्तरित किए जाने हेतु।

महोदय.

कृपया अपने कार्यालय पत्रांक संख्या-211-15, 206-10, 200-05, 195-99, 189-94, 183-88, 177-82/विधि-3ए/आर्बी वाद दिनांक 29 अप्रैल 2015 का सन्दर्भ ग्रहण करने की कृपा करें जो कि उपरोक्त मध्यस्थ वादों में मध्यस्थ नियुक्ति विषयक है।

आपके उपरोक्त सन्दर्भित पत्रांको द्वारा उक्त मध्यस्थ वादों की सुनवाई हेतु श्रीमान संयुक्त आयुक्त एवं संयुक्त निबन्धक सहकारिता मेरठ मण्डल, मेरठ श्री राजीव यादव जी को मध्यस्थ नियुक्त किया गया था। उनके द्वारा उक्त मध्यस्थ वादों की सुनवाई लगभग पूर्ण हो चुकी थी। सुनवाई में वादी प्रतिनिधि एवं प्रतिवादीगण उपस्थित हुए तथा वादोत्तर भी प्रस्तुत किया गया। वादी के गवाहानों को उपस्थित होने हेतु अन्तिम तिथि दिनांक 18.06.2015 नियत की गयी थी परन्तु मध्यस्थ महोदय का स्थानान्तरण हो जाने के कारण उपरोक्त मध्यस्थ वादों की सुनवाई स्थगित हो गयी है। इसके अतिरिक्त यहां यह भी उल्लेखनीय है कि सहकारिता विभाग मेरठ मण्डल, मेरठ में अब संयुक्त आयुक्त एवं संयुक्त निबन्धक सहकारिता के पद स्तर का कोई अधिकारी नहीं है। तथा न ही आगरा मण्डल का क्षेत्राधिकार मेरठ मण्डल में आता है।

अतएवं ऐसी स्थिति में उक्त मध्यस्थवादों की सहकारिता विभाग मेरठ में सुनवाई किया जाना उचित नहीं है तथा पूर्व मध्यस्थ महोदय द्वारा वादों की सुनवाई भी लगभग पूर्ण की जा चुकी थी।

उपरोक्त के कम में आपसे निवेदन है कि उपरोक्त सन्दर्भित मध्यस्थवादों को सुनवाई हेतु श्री राजीव यादव, संयुक्त आयुक्त एवं संयुक्त निबन्धक सहकारिता / मैनेजिंग डायरेक्टर पैकफेड अथवा मुख्यालय लखनऊ के किसी अन्य अधिकारी के यहां स्थानान्तरित करने की कृपा करें।

आपके इस सहयोग के लिए प्रार्थिगण सदैव आमारी रहेंगे।

दिनांक 05.10.2015

प्रार्थिगण-

ह० अपठनीय
(अनिल प्रकाश दुबे)

ह० अपठनीय
(योगेश कुमार) 154, सिलवर टाउन आगरा।

ह० अपठनीय
(भोलाराम)

ह० अपठनीय
(सत्येन्द्र सिंह) 14/1, शक्तिनगर, आगरा।

ह० अपठनीय
(लेकपाल सिंह)"

7. The respondents have contended that in fact no award was made and the alleged awards, which have been relied upon by the petitioner, are manufactured documents, which have been brought to their notice much after the proceedings stood withdrawn from the arbitrator Sri Subhash Chandra, who is subsequently stated to have retired on 30th April, 2015. Reliance has also been placed upon the provisions contained under Section 71 of the U.P. Co-operative Societies Act, 1965, as well as Rules 244 to 246 framed under the U.P. Co-operative Societies Rules, 1968, which provide for the conduct of arbitration proceedings. Rules 244 to 246 of the U.P. Co-operative Societies Rules, 1968, which are relevant for the present purposes, reads as under:-

"244. The award shall contain the reasons on which the decision is based and shall also contain an order as to costs, if any, and interest including future interest, if any, and shall also mention the number of the reference, the names and description of the parties and particulars of the dispute.

245. A copy of the award shall be given to each party, certified and sealed, in such manner as the Registrar may direct by general or special order.

246. (a) Any award made by an arbitrator or board of arbitrators shall be sent by him or by the president of the board of arbitrators, as the case may be, with all the papers and proceedings of the dispute to the Registrar (who appointed the arbitrator or the president of the board of arbitrators in the case), within 15 days from the date on which the award is made.

(b) Any document or record tendered by a party may, on application, be returned to the party after-

(i) the disposal of appeal, if any, or

(ii) the period of filing appeal has expired and no appeal has been filed."

8. The counter affidavit filed by the respondent no.5 has not been responded to by filing any rejoinder affidavit. Instead petitioner has filed a supplementary affidavit today, entertainment whereof has been seriously objected to by the respondents. In the supplementary affidavit filed by the petitioner, various allegations have been made against respondent no.5, and various mala fides have been alleged against him in the matter of conduct of affairs of the society. It has also been stated that proceedings have been drawn against respondent no.5, who was acting contrary to the interest of the society. Learned counsel for the petitioner, during the course of submissions, has contended that the proceedings were sought to be influenced at the instance of the Chief Secretary, and a letter dated 16th June, 2015 has been brought on record at page-49 of the supplementary affidavit. It is suggested by the counsel for the petitioner that it was on account of interest exercised by the Chief Secretary that proceedings were being manipulated.

9. I have heard Sri Colonel Sanjay Sitanshu, learned counsel for the petitioner, learned Standing Counsel for the respondent nos.1 & 2, Sri R.S. Gupta and Sri Ashish Gupta for the respondent no.5, Sri J.K. Tiwari has appeared for the arbitrator, who is stated to have passed the awards although he is not a party to the proceedings, and Sri Sujeet Kumar Rai, learned counsel appearing for the respondent no.4.

10. Issue that requires consideration in the present writ petition is as to whether proceedings of arbitration in Case Nos.74 of 2014-15, 76 of 2014-15 and 77 of 2014-15 stood concluded with delivery of awards by the then arbitrator or not on 23.3.2015, and in case it is found that awards have been delivered then how arbitration proceedings are being continued?

11. Pursuant to the directions issued by this Court, the records of arbitration proceedings have been produced before this Court. The original records have been scanned by the Court, and the observations, which have been made after noticing and examining the records, vide order dated 10th May, 2016, are extracted above. It is undisputed between the parties that on 19th March, 2015, proceedings of arbitration were concluded. It is further admitted between the parties that on that date, no date was fixed for delivery of award. The original records of the arbitration proceedings, which have been produced before the Court, also contain no stipulation about fixation of any date on 23rd March, 2015 for delivery of award. The original records, which have been produced before this Court also does not contain any award of the arbitrator. The copies of the award, however, have been enclosed alongwith the writ petition, genuineness whereof has been disputed by the respondents. The arbitrator in his affidavit has stated that he had delivered the awards on 23rd March, 2015 at 5.45 p.m., and it was received by the respondents concerned, who were present before the Court on 23rd March, 2015. Petitioner states that he was present on 23rd March, 2015, as the arbitrator had indicated in the open court on 19th March, 2015 that awards will be delivered on 23rd March, 2015. This stand of the petitioner as well as of the arbitrator appears to be contrary to the materials, which exists on record. The proceedings admittedly concluded on 19th March, 2015, and in the order-sheet, there is no endorsement of any date being fixed for delivery of the award. The arbitrator herein was conducting quasi-judicial proceedings and proceedings were required to have been duly reflected in the records. The stand taken by the arbitrator before this Court that awards were delivered

on 23rd March, 2015, does not find support from the proceedings of the arbitration, which have been produced in original before this Court.

12. In order to further examine the stand of the arbitrator and the petitioner, it would be relevant to take note of the statutory scheme, which regulates the conduct of arbitration proceedings itself. Rule 244 states that the award shall contain the reasons on which the decision is based and shall also contain an order as to costs. Rule 245 thereafter provides that a copy of the award shall be given to each party, certified and sealed, in such manner as the Registrar may direct by general or special order. Rule 246 provides that any award made by an arbitrator or board of arbitrators shall be sent by him or by the president of the board of arbitrators, as the case may be, with all the papers and proceedings of the dispute to the Registrar (who appointed the arbitrator or the president of the board of arbitrators in the case), within 15 days from the date on which the award is made. The statutory scheme makes it clear that as soon as an award is made by the arbitrator, he is enjoined in law to send the award alongwith all papers and proceedings of the dispute to the Registrar within 15 days. Copy of the award has to be given to each party, certified and sealed, in such manner as the Registrar may direct by general or special order. In the facts of the present case, it is to be noticed that in fact the awards delivered by the arbitrator have not even been claimed to have been sent to the Registrar in the manner contemplated alongwith the proceedings. No certified copy has been issued either to the petitioner or to the respondents. Unless the award is delivered in the manner contemplated in law, its delivery cannot be conceived in law.

13. In the facts of the present case, this Court finds that awards as well as proceedings have neither been sent to the Registrar nor its certified copies have been issued to the parties. This is a material aspect, which has to be borne in mind. The arbitrator in his affidavit has stated that after he delivered the awards, he felt uneasiness and he left his office at about 6.00 p.m. with intention to get the order-sheet prepared on 24th March, 2015. It is also stated by him that the proceedings were thereafter withdrawn from his office on 24th March, 2015 itself, and were transferred to another arbitrator, on account of which he could not make any endorsement regarding delivery of awards in the order-sheet.

14. This Court, on the basis of materials adduced, finds that not only the records of arbitration proceedings do not speak about delivery of any award but even the parties including the petitioner were under a belief that arbitration proceedings are still pending. Reference has been made by the respondents to a letter sent by one of the persons, who is stated to be a party to the arbitration seeking transfer of the proceedings, vide letter dated 29th April, 2015. It is further to be noticed that petitioner himself has sent a letter on 5th October, 2015 objecting to the transfer of proceedings, on the ground that the arbitrator had fixed a date on 18th June, 2015, and proceedings had to be concluded on that date. Petitioner does not refer to making of any award by the arbitrator on 23rd March, 2015 in his letter. Contents of the letter signed by petitioner dated 5.10.2015 have already been extracted above. From the perusal of the letter sent by the petitioner himself, it is clear that petitioner was not aware about making of any award by the arbitrator, and he continued to appear in arbitration proceedings thereafter on subsequent dates, and reference has been made to the last proceedings on 18th June, 2015.

15. A counter affidavit has been filed and served upon the petitioner, but neither any reply has been filed, nor the letter annexed by the petitioner dated 5.10.2015 has been explained. The petitioner has

filed subsequent affidavits including a supplementary affidavit, but his act of not filing a rejoinder affidavit clearly indicates that petitioner has nothing to state in opposition to the materials, which have been brought on record of the counter affidavit, particularly when the letter stated to have been sent by him on 5th October, 2015. This Court, therefore, is inclined to draw an inference that petitioner was not aware about making of any award by the arbitrator till 5th October, 2015. It seems that proceedings of arbitration have subsequently been transferred to respondent no.4, and at such subsequent stage, the petitioner in collusion with the then arbitrator has prepared awards, which have been annexed alongwith the writ petition to make out a case, as is being pleaded before this Court. The facts, which have been noticed, clearly go to show that neither the original records of the proceedings contain reference of awards, nor the awards have been sent to the Registrar, as was required under the Rules, and even certified copies have not been issued to the parties. The plea taken by the then arbitrator that he fell suddenly ill, does not merit any consideration, inasmuch as no supporting material has been brought on record to substantiate such plea of illness. Even otherwise, once the arbitrator was conducting the proceedings, and the awards were delivered on 23rd March, 2015, it was his duty to have maintained the proceedings accordingly, and his stand of delivery of awards having not been noticed in the order-sheet, due to his illness, lacks bona fide and is, therefore, not liable to be accepted.

16. In the facts and circumstances, as have been noticed above, this Court is inclined to hold that the alleged awards have not been delivered in the manner as is contemplated in law, and therefore, cannot be treated to be awards in the eyes of law. In the absence of proceedings being concluded with delivery of awards, the proceedings before the arbitrator are liable to be continued.

17. At this stage, it may also be noticed that though learned counsel for the petitioner has tried to make allegations of mala fide against the Chief Secretary, but such allegation need to be examined by this Court in absence of the person concerned having been impleaded as a party to the proceedings. Law in this regard has been settled by the Apex Court in P.K. Jha Vs. State of Jharkhand 2006(9) SCC 458 and in R.K. Agrawal Vs. State of U.P. 2015 (1) SCC 642, and unless a person is made a party, allegation of mala fide cannot be looked into. Although the conduct of the then arbitrator warrants making of observations against him in the matter, but as he has already retired, I refrain from making any further comment.

18. In view of the discussions made, it is held that no award in the eyes of law has been delivered on 23rd March, 2015, and the copy of the awards, which have been enclosed alongwith the writ petition as Annexure-2 are no award in the eyes of law. In the absence of there being any award delivered by the arbitrator, the proceedings before the arbitrator cannot be objected to. Writ petition, consequently, fails and is dismissed.

19. Since the proceedings before this Court are found to be an abuse of the process of law, the costs are reduced to Rs.1,000/- upon the prayer made by the counsel for the petitioner, though with a heavy heart. The original records shall be returned to the office concerned.

(2016) 8 ILRA 935
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.08.2016

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ C No.- 25467 Of 2013
&
Connected With Other Cases

Nagar Palika Parishad

...Petitioner

Versus

Presiding Officer, Labour Court & Anr.

...Respondents

Counsel for Petitioner:

Sahab Tiwari, Saurabh Tiwari

Counsel for Respondent:

A.K. Dixit, Jamal Khan, S.C., Sunil Kumar Tripathi

U.P. Industrial Disputes Act, 1947 – Section 6-N – Illegal Termination – Daily Wage Employee – Non-Existent Post

— Workman engaged as Tax Collector on daily wages, terminated without payment of retrenchment compensation — Labour Court held termination violative of Section 6-N and awarded reinstatement with continuity of service and 50% back wages — Employer, a local authority and 'State' under Article 12, specifically pleaded before Labour Court that engagement was never against any sanctioned or vacant post and that constitutionally mandated recruitment procedure was never followed — Held: Where employer is 'State' or instrumentality of State, existence of sanctioned post, manner of recruitment and compliance with Articles 14 and 16 remain relevant considerations even in industrial adjudication. (Para 1)

Relief of Reinstatement – Not Automatic – Compensation in Lieu Thereof — Held: Reinstatement with full back wages consequent upon finding of violation of Section 6-N/Section 25-F is not an automatic relief, particularly where workman engaged on daily wages for short duration — Monetary compensation in lieu of reinstatement better subserves ends of justice in such cases, subject to exceptions such as unfair labour practice or mala fide termination, none of which established here. (Para 2)

Reinstatement Against Non-Existent Post – Violative of Articles 14 and 16 — Held: Since no evidence led by workman to show engagement was against any sanctioned vacant post following due procedure, and specific plea of employer in this regard remaining un rebutted, direction of reinstatement against non-existent post, or conferring status of permanency through back-door engagement, would itself offend Articles 14 and 16 of the Constitution. (Para 3)

Quantification of Compensation – Amount Already Realised in Execution — Held: Considering workman had worked little over two years more than a decade ago, monetary compensation of Rs. 2,00,000/- held appropriate in lieu of reinstatement — Since amount exceeding this sum already realised by workman in execution proceedings, no further amount held payable and no recovery directed from workman, amount already paid treated as full and final settlement of claim under Section 6-N. (Para 4)

Connected Proceedings Under Section 33-C(2) – Consequential Setting Aside — Held: Order passed under Section 33-C(2) of the Industrial Disputes Act granting regular pay-scale to workman, being founded on same erroneous premise of subsisting post and valid recruitment, cannot be sustained and is liable to be set

aside — No direction for payment of salary could accordingly be issued in workman's connected writ petition. (Para 5)

Writ Petition No. 25467 of 2013 Allowed In Part — Award of Labour Court modified to extent that workman held entitled to monetary compensation of Rs. 2,00,000/- alone in lieu of reinstatement, treated as satisfied by amount already paid, no further recovery or payment directed — Connected Writ Petition No. 48995 of 2015 Allowed, order under Section 33-C(2) set aside — Connected Writ Petition No. 31497 of 2016 Dismissed — Parties to bear their own costs.

Case Law Discussed

1. State of U.P. vs. Charan Singh, 2015 (8) SCC 150
2. Bhuvanesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd., 2014 (142) FLR 20
3. K.V.S. Ram vs. Bangalore Metropolitan Transport Corporation, 2015 (144) FLR 994
4. Harjinder Singh vs. Punjab State Warehousing Corporation, 2010 (3) SCC 192
5. Krishan Singh vs. Executive Engineer, 2010 (125) FLR 187
6. Bharat Sanchar Nigam Limited vs. Bhurumal, 2014 (7) SCC 177
7. BSNL vs. Man Singh, (2012) 1 SCC 558
8. Incharge Officer & Anr. vs. Shankar Shetty, (2010) 9 SCC 126
9. Jagbir Singh vs. Haryana State Agriculture Mktg. Board (and connected decisions)
10. Telecom District Manager vs. Keshab Deb
11. A. Umarani vs. Registrar, Coop. Societies
12. Secy., State of Karnataka vs. Umadevi (3), (2006) 4 SCC 1
13. Coal India Ltd. vs. Ananta Saha
14. Metropolitan Transport Corporation vs. V. Venkatesan
15. Bhavnagar Municipal Corporation vs. Jadeja Govubha Chhanubha, AIR 2015 SC 609
16. Rajasthan State Agricultural Marketing Board vs. Mohan Lal, 2013 (14) SCC 543
17. Hari Nandan Prasad and another vs. Employer I/R to Management of Food Corporation of India and another, 2014 (7) SCC 190
18. U.P. Power Corporation vs. workmen (referred)
19. Maharashtra State Road Transport Corporation vs. Karamchari Union (referred)
20. State of U.P. and another vs. Hind Majdoor Sabha and others, 2011 (5) ALJ 249
21. Raj Kumar vs. Jalgaon Municipal Corporation, 2013 (2) SCC 751

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Dispute between Nagar Palika Parishad, Firozabad and its workman Kamal Kumar has given rise to filing of these three writ petitions. These petitions have been heard together and are being disposed of by this common judgment.

2. Writ Petition No. 25467 of 2013 has been filed by Nagar Palika Parishad, Firozabad, challenging an award passed by Presiding Officer, Labour Court, U.P. Firozabad, dated 15.4.2013 in Adjudication Case No.35 of 2009. By the award, reference has been answered in favour of the workman, holding that his termination from service w.e.f. 22.7.2004 without complying with the requirement of Section 6-N of the U.P. Industrial Disputes Act, 1947 is bad in law, and relief of reinstatement alongwith continuity of service together with 50% back wages has been awarded. A sum of Rs.1500/- towards cost of litigation has also been awarded to the worker.

While entertaining the writ petition, following interim order was passed on 7.5.2013:-

"Sri A.K. Dixit, the learned counsel for the respondent no.2 will file a counter affidavit within three weeks.

List for admission thereafter.

In the meanwhile, the effect and operation of the award passed by the Labour Court shall remain stayed provided the petitioner reinstates the workman within three weeks from today and file an affidavit to that effect."

Parties are at issue regarding compliance of the aforesaid order.

3. Writ Petition No.48995 of 2015 is also filed by the Nagar Palika Parishad, Firozabad, challenging an order passed in Misc. Case No.16 of 2014, under Section 33-C(2) of the Industrial Disputes Act, awarding a sum of Rs.92,320/- towards salary payable from 1.6.2014 to 30th November, 2014 alongwith cost of litigation amounting to Rs.1,000/-. In this petition, an interim protection has been granted on 12.10.2015, staying the order upon the condition of deposit of 50% of the amount payable, which was permitted to be withdrawn by the workman.

4. Writ Petition No.31497 of 2016 has been filed by the worker Kamal Kumar for a direction upon Nagar Palika Parishad, Firozabad, to pay salary to him from month to month, and for deciding his application. Upon this writ petition, an order has been passed on 20th July, 2016 for the earlier writ petition to be connected, and that is how the matters have been placed before this Court.

5. The main writ petition for the present purposes is the Writ Petition No.25467 of 2013, wherein the award itself is under challenge, and the subsequent two writ petitions to a great extent are dependent upon the outcome of the first petition. In such circumstances, the Writ Petition No.25467 of 2013 is taken up first.

6. It transpires from the record that a writ petition no.41096 of 2004 was filed by the workman alongwith another person, seeking relief of regularization in the employment of Nagar Palika Parishad, Firozabad. This petition was disposed of on 8th February, 2007. Operative portion of the order dated 8.2.2007 is reproduced:-

"Considering the facts and circumstances of the case the petitioners may file a fresh representation before respondent no.2 and that will be considered in accordance with law within a period of two months from the date of production of certified copy of this order.

It is made clear that this order will not come in the way of the petitioner if the respondents are interested to take work any further.

With these observations, this petition is disposed of."

7. In compliance of the directions so issued on 8.2.2007, workman's representation was rejected vide order dated 27.4.2007, holding that respondent workman was never appointed, nor had worked as a regular employee. The order records that the workman was engaged on daily wage basis to collect house and water tax as a contract employee, and he failed to furnish account. Upon expiry of term, his engagement automatically came to an end. It is, therefore, stated that since workman was never appointed, question of his termination does not arise, nor regularization of his services is permissible. This order dated 27.4.2007 then came to be challenged before this Court by filing Writ Petition No.50561 of 2007, which was dismissed on the ground of alternative remedy. A special appeal no.1547 of 2007 filed thereafter also was dismissed on 12.1.2009. It is thereafter that conciliation proceedings were initiated in the matter, which failed, resulting in making of reference of dispute to the Labour Court under Section 4-K of the U.P. Industrial Disputes Act. Written statements were filed by the workman and the employer. Evidence in the form of statement of the parties/their witnesses and other documentary evidence were also adduced. Labour Court has ultimately returned a finding that workman remained in continuous employment of Nagar Palika Parishad from 6.11.2001 to 22.7.2004, on daily wages, as Tax Collector, and his services were illegally terminated w.e.f. 23.7.2004. Relief of reinstatement alongwith continuity of service with 50% back wages has been allowed.

8. I have heard Sri Sahab Tiwari, learned counsel for the Nagar Palika Parishad, Firozabad, and Sri S.N. Dubey, learned counsel appearing for the workman Kamal Kumar, and have perused the materials available on record.

9. The workman in his written statement has stated that he was engaged w.e.f. 6.11.2001 by the executive officer, pursuant to an order of Chairman. In the Municipalities Act, 1916, power exists for appointing permanent or temporary workman, but as per the workman, the order in his case contained no stipulation that appointment is temporary. As per the workman, work of tax collector is permanent in nature, and as such his appointment was permanent from the very beginning. Reference is also made in his statement to various work performed and the persons with whom he worked. It is then stated that although his work was permanent, but he was not given any permanent post, due to which he filed writ petitions. Continuous working from 6.11.2001 to 22.7.2004 is also claimed.

10. Petitioner employer, on the other hand disputed the claim by asserting that Chairman had no authority to appoint any person without advertising the post and obtaining approval of State. Appointment on the post of Tax Collector has been denied, and it is asserted that no appointment order was issued. As per employer, the workman was engaged through contractor for some time on daily wages, without there being any vacant post in existence, purely due to exigency of work. A specific plea is taken that ever since workman claims his appointment, no post remained vacant, and that is why workman approached the Writ Court. In the absence of post, claim of reinstatement has been denied. Petitioner asserts that Nagar Palika Parishad, Firozabad, is a local authority constituted under the Act of 1916, and is a 'State' within the meaning of Article 12 of the Constitution of India. It is stated that engagement of employee is regulated by statutory provisions. Appointment could be made only after due publication of vacancy, by the authority competent,

against a post duly sanctioned by the State. It is stated that there was no vacant post of Tax Collector, nor any appointment order was ever issued to the respondent workman. In the written statement also, it was pleaded that no vacancy existed or was advertised, nor any appointment letter was issued to the workman, and that engagement of the workman was through a Contractor, and he was paid at the daily rate basis, and no employee employer relationship came into being, but all such objections have not been considered. Continuance of workman for three years is specifically denied, and it is alleged that no termination could be said to have been effected in the absence of any appointment itself.

11. On behalf of workman, it is stated that workman had been appointed by the Chairman, but admittedly no order of appointment has been brought on record. Reference has been made to engagement of workman by the Executive Officer w.e.f. 6.11.2001 on the basis of directions issued by the Chairman but such order is also not on record. However, it is stated that there was no complaint with regard to working of respondent workman.

12. Labour Court, on the basis of evidence brought before it, has disbelieved the case of employer about engagement of workman on contract basis, and it has been held that working of respondent from 6.11.2001 to 22.7.2004 was continuous. Labour Court, however, has not examined the question as to whether the engagement of workman was against any sanctioned vacant post, nor it has been considered as to whether the procedure for a valid recruitment by State agency had been followed or not. Although a specific issue was raised by the petitioner employer regarding appointment being bad due to non-following of procedure as well as non-availability of vacant post in the written statement but the workman failed to demonstrate that any valid appointment against a vacant post was made and the award is absolutely silent on such crucial aspects. A perusal of the award goes to show that Labour Court found engagement of respondent workman to be purely on daily wage basis. Labour Court has confined its award only to the aspect relating to non-payment of retrenchment compensation and consequent violation of Section 6-N of the U.P. Industrial Disputes Act.

13. It is undisputed that Nagar Palika Parishad, Firozabad is a local authority, and in matters relating to engagement of its employees, the statutory provisions as well as dictum of Article 16 of the Constitution of India was applicable. It is nowhere claimed that any recruitment proceeding in consonance with Article 16 of the Constitution of India was undertaken before engaging the respondent workman. No evidence has been led on behalf of the worker on this aspect, despite a specific objection taken in this regard before the Labour Court. On the aspect of existence of vacant post also no evidence was led by the workman. The engagement of respondent workman, therefore, was purely to meet exigency of work, on daily wage, and was apparently not against any post.

14. So far as challenge made by the employer to the award is concerned, it is to be noticed that though a case was set up by the employer about engagement being made on contract basis, but no evidence to support such a plea has been adduced before the Labour Court. The finding returned by the Labour Court about continuous working of workman is based upon appreciation of materials

brought on record, which has not been shown to be erroneous or perverse. From the stand taken by the employer, engagement of workman on daily wage basis is not in dispute. It is further not in dispute that no retrenchment compensation was paid. In view of the finding returned by the Labour Court that the workman had continued for more than 240 days in a calendar year, and had not been paid any retrenchment compensation before terminating his services, the finding returned by the Labour Court about violation of Section 6-N of the U.P. Industrial Disputes Act is clearly made out and requires no interference.

15. Once it is held that termination of respondent workman was in teeth of Section 6-N of the U.P. Industrial Disputes Act, it follows that termination is bad in law. The question which then arises is as to what is the relief, to which workman was entitled in law?

Sri S.N. Dubey has urged that once termination is held to be illegal, due to non-payment of retrenchment compensation, workman is entitled to reinstatement alongwith back wages, and the Labour Court is not required to go into other aspects like availability of post, manner of engagement etc. For such purposes, reliance has been placed upon decisions of the Apex Court in *State of U.P. Vs. Charan Singh* [2015 (8) SCC 150], *Bhuvanesh Kumar Dwivedi Vs. M/s Hindalco Industries Ltd.* [2014 (142) FLR 20], and *K.V.S. Ram Vs. Bangalore Metropolitan Transport Corporation* [2015 (144) FLR 994] to contend that payment of compensation in place of reinstatement has been disapproved. It is also urged that unless award is found to be illegal on account of some error of law, relief of reinstatement cannot be substituted with lump sum compensation. Reliance has also been placed upon a judgment of the Apex Court in *Harjinder Singh Vs. Punjab State Warehousing Corporation*, reported in 2010 (3) SCC 192. Consideration of initial illegality in making of appointment was disapproved in the matter, as no such plea was taken before the Labour Court. *Krishan Singh Vs. Executive Engineer*, reported in 2010 (125) FLR 187, is also to similar effect. These two judgments apparently have no applicability in the facts of the present case, as the employer had taken a specific ground about non-existence of post as well as non-observance of procedure contemplated for a valid appointment in its written statement.

16. On the other hand, judgments are relied upon, to contend that where employer is a 'State' or 'Agency or instrumentality of State' issues regarding existence of post, manner of recruitment, length of service etc. are relevant considerations. Learned counsel for the petitioner employer has relied upon a recent decision of the Apex Court reported in **2014 (7) SCC 177 (Bharat Sanchar Nigam Limited Vs. Bhurumal)**. Para 29 to 35 of the said decision dealt with a similar exigency, where a worker engaged on daily wage had been terminated without complying with the provisions of Section 25-F of the Industrial Disputes Act. Following proposition has been laid down by the Hon'ble Supreme Court in Paras 29 to 35, which is reproduced:-

"29. The learned counsel for the appellant referred to two judgments wherein this Court granted compensation instead of reinstatement. In the case of BSNL vs. Man Singh [(2012) 1 SCC 558], this Court has held that when the termination is set aside because of violation of Section 25-F of the Industrial Disputes Act, it is not necessary that relief of reinstatement be also given as a matter of right. In the case of Incharge Officer & Anr. vs. Shankar Shetty [(2010) 9 SCC 126], it

was held that those cases where the workman had worked on daily wage basis, and worked merely for a period of 240 days or 2- 3 years and where the termination had taken place many years ago, the recent trend was to grant compensation in lieu of reinstatement.

30. In this judgment of Shankar Shetty (supra), this trend was reiterated by referring to various judgments, as is clear from the following discussion: (SCC pp 127-28, paras 2-4)

"2. Should an order of reinstatement automatically follow in a case where the engagement of a daily wager has been brought to end in violation of Section 25-F of the Industrial Disputes Act, 1947 (for short "the ID Act")? The course of the decisions of this Court in recent years has been uniform on the above question.

3. In Jagbir Singh v. Haryana State Agriculture Mktg. Board⁵, delivering the judgment of this Court, one of us (R.M. Lodha,J.) noticed some of the recent decisions of this Court, namely, U.P. State Brassware Corpn. Ltd. V. Uday Narain Pandey⁶, Uttarakhand Forest Development Corpn. V. M.C. Joshi⁷, State of M.P. v. Lalit Kumar Verma⁸, M.P. Admn v. Tribhuban⁹, Sita Ram v. Moti Lal Nehru Farmers Training Institute¹⁰, Jaipur Development Authority v. Ramsahai¹¹, GDA v. Ashok Kumar¹² and Mahboob Deepak v. Nagar Panchyat, Gajraula¹³ and stated as follows: (Jagbir Singh case⁵, SCC pp.330 & 335 paras 7 & 14)

'7. It is true that the earlier view of this Court articulated in many decision reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in a long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention of the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice.

* * *

14. It would be, thus, seen that by a catena of decisions in recent time, this Court has clearly laid down that an order of retrenchment passed in violation of Section 25-F although may be set aside but an award of reinstatement should not, however, automatically passed. The award of reinstatement with full back wages in a case where the workman has completed 240 days of work in a year preceding the date of termination, particularly, daily wagers has not been found to be proper by this Court and instead compensation has been awarded. This Court has distinguished between a daily wager who does not hold a post and a permanent employee.'

4. Jagbir Singh⁵ has been applied very recently in Telegraph Deptt. V. Santosh Kumar Seal¹⁴, wherein this Court stated: (SCC p.777, para 11)

'11. In view of the aforesaid legal position and the fact that the workmen were engaged as daily wagers about 25 years back and they worked hardly for 2 or 3 years, relief of reinstatement and back wages to them cannot be said to be justified and instead monetary compensation would subserve the ends of justice.'"

31. In the case of *Telecom District Manager v. Keshab Deb*¹⁵ the Court emphasized that automatic direction for reinstatement of the workman with full back wages is not contemplated. He was at best entitled to one months' pay in lieu of one month's notice and wages of 15 days of each completed year of service as envisaged under Section 25-F of the Industrial Disputes Act. He could not have been directed to be regularized in service or granted /given a temporary status. Such a scheme has been held to be unconstitutional by this Court in *A.Umarani v. Registrar, Coop.Societies*¹⁶ and *Secy., State of Karnataka v. Umadevi*⁽³⁾¹⁷.

32. It was further submitted by the learned counsel for the appellant that likewise, even when reinstatement was ordered, it does not automatically follow full back wages should be directed to be paid to the workman. He drew our attention of this Court in the case of *Coal India Ltd. Vs. Ananta Saha*¹⁸ and *Metropolitan Transport Corporation v. V. Venkatesan*¹⁹.

33. It is clear from the reading of the aforesaid judgments that the ordinary principle of grant of reinstatement with full back wages, when the termination is found to be illegal is not applied mechanically in all cases. While that may be a position where services of a regular/permanent workman are terminated illegally and/or malafide and/or by way of victimization, unfair labour practice etc. However, when it comes to the case of termination of a daily wage worker and where the termination is found illegal because of procedural defect, namely in violation of Section 25-F of the Industrial Disputes Act, this Court is consistent in taking the view in such cases reinstatement with back wages is not automatic and instead the workman should be given monetary compensation which will meet the ends of justice. Rationale for shifting in this direction is obvious.

34. The reasons for denying the relief of reinstatement in such cases are obvious. It is trite law that when the termination is found to be illegal because of non-payment of retrenchment compensation and notice pay as mandatorily required under Section 25-F of the Industrial Disputes Act, even after reinstatement, it is always open to the management to terminate the services of that employee by paying him the retrenchment compensation. Since such a workman was working on daily wage basis and even after he is reinstated, he has no right to seek regularization [See: *State of Karnataka vs. Uma Devi*⁽³⁾¹⁷]. Thus when he cannot claim regularization and he has no right to continue even as a daily wage worker, no useful purpose is going to be served in reinstating such a workman and he can be given monetary compensation by the Court itself inasmuch as if he is terminated again after reinstatement, he would receive monetary compensation only in the form of retrenchment compensation and notice pay. In such a situation, giving the relief of reinstatement, that too after a long gap, would not serve any purpose.

35. We would, however, like to add a caveat here. There may be cases where termination of a daily wage worker is found to be illegal on the ground it was resorted to as unfair labour practice or in violation of the principle of last come first go viz. while retrenching such a worker daily wage juniors to him were retained. There may also be a situation that persons junior to him were regularized under some policy but the concerned workman terminated. In such circumstances, the terminated worker should not be denied reinstatement unless there are some other weighty reasons for adopting the course of grant of compensation instead of reinstatement. In such cases, reinstatement should be the rule and only in exceptional cases for the reasons stated to be in writing, such a relief can be denied."

Similar views are expressed by the Apex Court in Bhavnagar Municipal Corporation Vs. Jadeja Govubha Chhanubha AIR 2015 SC 609; Rajasthan State Agricultural Marketing Board Vs. Mohan Lal 2013 (14) SCC 543 and 2014 (16) SCC 440. Judgment in BSNL Vs. Bhurumal (supra) has been reiterated in Hari Nandan Prasad and another Vs. Employer I/R to Management of Food Corporation of India and another, 2014 (7) SCC 190. The question as to what relief is to be granted to a workman employed by State Authorities when termination is found to be bad on account of non-payment of retrenchment compensation has been dealt with extensively. Paragraphs 23 to 40 of the judgment is apposite and thus reproduced:-

"23. Before we advert to this question, it would be necessary to examine as to whether the Constitution Bench judgment in Uma Devi case have applicability in the matters concerning industrial adjudication. We have already pointed out above the contention of the counsel for the appellants in this behalf, relying upon Maharashtra State Road Transport case that the decision in Uma Devi would be binding the Industrial or Labour Courts. On the other hand, counsel for the FCI has referred to the judgment in U.P. Power Corporation for the submission that law laid down in Uma Devi equally applies to Industrial Tribunals/Labour Courts. It, thus, becomes imperative to examine the aforesaid two judgments at this juncture.

24. A perusal of the judgment in U.P. Power Corporation would demonstrate that quite a few disputes were raised and referred to the industrial tribunal qua the alleged termination of respondent Nos.2 and 3 in that case. Without giving the details of those cases, it would be sufficient to mention that in one of the cases the tribunal held that after three years of their joining in service both respondents 2 and 3 were deemed to have been regularized. The appellants filed the Writ Petition which was also dismissed. Challenging the order of the High Court, the appellants had approached this Court. It was argued that there could not have been any regularization order passed by the Industrial Court in view of the decision in Uma Devi. Counsel for the workmen had taken a specific plea that the powers of the industrial adjudicator were not under consideration in Uma Devi's case and that there was a difference between a claim raised in a civil suit or a Writ Petition on the one hand and one adjudicated by the industrial adjudicator. It was also argued that the labour court can create terms existing in the contract to maintain industrial peace and therefore it had the power to vary the terms of the contract.

25. While accepting the submission of the appellant therein viz. U.P. Power Corporation, the Court gave the following reasons: (U.P. Power Corpn. case, SCC pp.758, para 6-8)

"6. It is true as contended by learned counsel for the respondent that the question as regards the effect of the industrial adjudicators' powers was not directly in issue in Umadevi case. But the foundation logic in Umadevi case is based on Article 14 of the Constitution of India. Though the industrial adjudicator can vary the terms of the contract of the employment, it cannot do something which is violative of Article 14. If the case is one which is covered by the concept of regularization, the same cannot be viewed differently.

7. The plea of learned counsel for the respondent that at the time the High Court decided the matter, decision in Umadevi case was not rendered is really of no consequence. There cannot be a case of regularization without there being employee-employer relationship. As noted above the concept of regularization is clearly linked with Article 14 of the Constitution. However, if in a case the fact situation is covered by what is stated in para 45 of Umadevi case the industrial adjudicator can modify the relief, but that does not dilute the observations made by this Court in Umadevi case about the regularization.

8. On facts, it is submitted by learned counsel for the appellants that Respondent No.2 himself admitted that he never worked as a pump operator, but was engaged as daily wage basis. He also did not possess the requisite qualification. Looked at from any angle, the direction for regularization, as given, could not have been given in view of what has been stated in Umadevi case."

It is clear from the above that the Court emphasized the underline message contained in Umadevi's case to the effect that regularization of a daily wager, which has not been appointed after undergoing the proper selection procedure etc. is impermissible as it was violative of Art.14 of the Constitution of India and this principle predicated on Art.14 would apply to the industrial tribunal as well inasmuch as there cannot be any direction to regularize the services of a workman in violation of Art.14 of the Constitution. As we would explain hereinafter, this would mean that the industrial court would not issue a direction for regularizing the service of a daily wage worker in those cases where such regularization would tantamount to infringing the provisions of Art.14 of the Constitution. But for that, it would not deter the Industrial Tribunals/Labour Courts from issuing such direction, which the industrial adjudicators otherwise possess, having regard to the provisions of Industrial Disputes Act specifically conferring such powers. This is recognized by the Court even in the aforesaid judgment.

26. For a detailed discussion on this aspect, we proceed to discuss the ratio in the case of Maharashtra State Road Transport Corporation (*supra*). In that case the respondent Karamchari Union had filed two complaints before the Industrial Court, Bombay alleging that the appellant-Corporation had indulged in unfair labour practice qua certain employees who were engaged by the appellant as casual labourers for cleaning the buses between the years 1980-1985.

It was stated in the complaints that these employees were made to work every day at least for 8 hours at the depot concerned of the Corporation; the work done by them was of permanent nature but they were being paid a paltry amount; and even when the post of sweepers/cleaners were available in the Corporation, these employees had been kept on casual and temporary basis for years together denying them the benefit of permanency:

26.1. After adjudication, the Industrial Court held that the Corporation had committed unfair labour practice under items 5 and 9 of Schedule IV to the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practice Act, 1971 (MRTU and PULP Act). As a consequence, it directed the Corporation to pay equal wages to the employees concerned which was being paid to Swachhaks and also pay arrears of wages to them.

26.2. In the second complaint, the Industrial Court returned the finding that the Corporation was indulging in unfair labour practice under Item 6 of Schedule IV, by continuing these employees on temporary/casual/daily wage basis for years together and thereby depriving them the benefits of permanency. The direction in this complaint was to cease and desist from the unfair labour practice by giving them the status, wages and all other benefits of permanency applicable to the post of cleaners, w.e.f. 3.8.1982.

27. The Corporation challenged these two orders of the Industrial Court before the High Court of Judicature at Bombay in five separate Writ Petitions. These were disposed of by the learned Single Judge vide common judgment dated 2.8.2001 holding that complaints were maintainable and the finding of the Industrial Court that the Corporation had indulged in unfair labour practice was also correct.

28. The Corporation challenged the decision of the learned Single Judge by filing LPAs which were dismissed by the Division Bench on 6.5.2005. This is how the matter came before the Supreme Court. One of the contentions raised by the appellants before this Court was that there could not have been a direction by the Industrial Court to give these employees status, wages and other benefits of permanency applicable to the post of cleaners as this direction was contrary to the ratio laid down by the Constitution Bench of this Court in Umadevi (supra). The Court while considering this argument went into the scheme of the MRTU and PULP Act. It was, inter-alia, noticed that complaints relating to unfair labour practice could be filed before the Industrial Court. The Court noted that Section 28 of that Act provides for the procedure for dealing with such complaints and Section 30 enumerates the powers given to the Industrial and Labour Courts to decide the matters before it including those relating to unfair labour practice. On the reading of this section, the Court held that it gives specific power to the Industrial/Labour Courts to declare that an unfair labour practice has been engaged and to direct those persons not only to cease and desist from such unfair labour practice but also to take affirmative action. Section 30(1) conferring such powers is reproduced below:

"30. Powers of Industrial and Labour Courts.- (1)Where a court decides that any person named in the complaint has engaged in, or is engaging in, any unfair labour practice, it may in its order-

(a)declare that an unfair labour practice has been engaged in or is being engaged in by that person, and specify any other person who has engaged in, or is engaging in the unfair labour practice;

(b) direct all such persons to cease and desist from such unfair labour practice, and take such affirmative action (including payment of reasonable compensation to the employee or employees affected by the unfair labour practice, or reinstatement of the employee or employees with or without back wages, or the payment of reasonable compensation), as may in the opinion of the Court be necessary to effectuate the policy of the Act;

(c) where a recognized union has engaged in or is engaging in, any unfair labour practice, direct that its recognition shall be cancelled or that all or any of its rights under sub-section(1) of Section 20 or its right under Section 23 shall be suspended."

29. It was further noticed that Section 32 of the Act provides that the Court shall have the power to decide all connected matters arising out of any application or a complaint referred to it for decision under any of the provisions of this Act. The Court then extensively quoted from the judgment in *Uma Devi* in order to demonstrate the exact ratio laid down in the said judgment and thereafter proceeded to formulate the following question and answer thereto:

"The question that arises for consideration is: have the provisions of the MRTU and PULP Act been denuded of the statutory status by the Constitution Bench decision in *Umadevi*? In our judgment, it is not."

30. Detailed reasons are given in support of the conclusion stating that the MRTU and PULP Act provides for and empowers the Industrial/Labour Courts to decide about the unfair labour practice committed/being committed by any person and to declare a particular practice to be unfair labour practice if it so found and also to direct such person ceased and desist from unfair labour practice. The provisions contained in Section 30 giving such a power to the Industrial and Labour Courts vis-à-vis the ratio of *Uma Devi* are explained by the Court in the following terms: (*Maharashtra SRTC case*, SCC pp. 573-74, paras 32-33 & 36)

"32. The power given to the Industrial and Labour Courts under Section 30 is very wide and the affirmative action mentioned therein is inclusive and not exhaustive. Employing badlis, casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent employees is an unfair labour practice on the part of the employer under Item 6 of Schedule IV. Once such unfair labour practice on the part of the employer is established in the complaint, the Industrial and Labour Courts are empowered to issue preventive as well as positive direction to an erring employer.

33. *The provisions of the MRTU and PULP Act and the powers of the Industrial and Labour Courts provided therein were not at all under consideration in Umadevi. As a matter of fact, the issue like the present one pertaining to unfair labour practice was not at all referred to, considered or decided in Umadevi. Unfair labour practice on the part of the employer in engaging employees as badlis, casuals or temporaries and to continue them as such for years with the object of depriving them of the status and privileges of permanent employees as provided in Item 6 of Schedule IV and the power of the Industrial and Labour Courts under Section 30 of the Act did not fall for adjudication or consideration before the Constitution Bench.*

* * *

36. *Umadevi does not denude the Industrial and Labour Courts of their statutory power under Section 30 read with Section 32 of the MRTU and PULP Act to order permanency of the workers who have been victims of unfair labour practice on the part of the employer under Item 6 of Schedule IV where the posts on which they have been working exist. Umadevi cannot be held to have overridden the powers of the Industrial and Labour Courts in passing appropriate order under Section 30 of the MRTU and PULP Act, once unfair labour practice on the part of the employer under Item 6 of Schedule IV is established."*

(emphasis in original)

31. *The Court also accepted the legal proposition that Courts cannot direct creation of posts, as held in Mahatma Phule Agricultural University vs. Nasik Zilla Sheth Kamgar Union (2001) 7 SCC 346. Referring to this judgment, the Court made it clear that inaction on the part of the State Government to create posts would not mean an unfair labour practice had been committed by the employer (University in that case) and as there were no posts, the direction of the High Court to accord the status of permanency was set aside. The Court also noticed that this legal position had been affirmed in State of Maharashtra vs. R.S.Bhonde (2005) 6 SCC 751. The Court also reiterated that creation and abolition of post and regularization are purely Executive functions, as held in number of judgments and it was not for the Court to arrogate the power of the Executive or the Legislature by directing creation of post and absorbing the workers or continue them in service or pay salary of regular employees. This legal position is summed up in para 41 which reads as under: (Maharashtra SRTC case, SCC p.576)*

"41. Thus, there is no doubt that creation of posts is not within the domain of judicial functions which obviously pertains to the executive. It is also true that the status of permanency cannot be granted by the Court where no such posts exist and that executive functions and powers with regard to the creation of posts cannot be arrogated by the courts."

32. *However, the Court found that factual position was different in the case before it. Here the post of cleaners in the establishment were in existence. Further, there was a finding of fact recorded that the Corporation had indulged in unfair labour practice by engaging these workers on temporary/causal/daily wage basis and paying them paltry amount even when they*

were discharging duties of eight hours a day and performing the same duties as that of regular employees.

33. In this backdrop, the Court was of the opinion that direction of the Industrial Court to accord permanency to these employees against the posts which were available, was clearly permissible and with the powers, statutorily conferred upon the Industrial/Labour Courts under Section 30 (1)(b) of the said Act which enables the Industrial adjudicator to take affirmative action against the erring employees and as those powers are of wide amplitude abrogating within its fold a direction to accord permanency.

34. A close scrutiny of the two cases, thus, would reveal that the law laid down in those cases is not contradictory to each other. In *U.P. Power Corporation*, this Court has recognized the powers of the Labour Court and at the same time emphasized that the Labour Court is to keep in mind that there should not be any direction of regularization if this offends the provisions of Art.14 of the Constitution, on which judgment in *Umadevi* is primarily founded. On the other hand, in *Bhonde* case, the Court has recognized the principle that having regard to statutory powers conferred upon the Labour Court/Industrial Court to grant certain reliefs to the workmen, which includes the relief of giving the status of permanency to the contract employees, such statutory power does not get denuded by the judgment in *Umadevi's* case. It is clear from the reading of this judgment that such a power is to be exercised when the employer has indulged in unfair labour practice by not filling up the permanent post even when available and continuing to workers on temporary/daily wage basis and taking the same work from them and making them some purpose which were performed by the regular workers but paying them much less wages. It is only when a particular practice is found to be unfair labour practice as enumerated in Schedule IV of MRTTP and PULP Act and it necessitates giving direction under Section 30 of the said Act, that the Court would give such a direction.

35. We are conscious of the fact that the aforesaid judgment is rendered under MRTTP and PULP Act and the specific provisions of that Act were considered to ascertain the powers conferred upon the Industrial Tribunal/Labour Court by the said Act. At the same time, it also hardly needs to be emphasized the powers of the industrial adjudicator under the Industrial Disputes Act are equally wide. The Act deals with industrial disputes, provides for conciliation, adjudication and settlements, and regulates the rights of the parties and the enforcement of the awards and settlements. Thus, by empowering the adjudicator authorities under the Act, to give reliefs such as a reinstatement of wrongfully dismissed or discharged workmen, which may not be permissible in common law or justified under the terms of the contract between the employer and such workmen, the legislature has attempted to frustrate the unfair labour practices and secure the policy of collective bargaining as a road to industrial peace.

36. In the language of Krishna Iyer, J:

"22. The Industrial Disputes Act is a benign measure, which seeks to pre-empt industrial tensions, provide for the mechanics of dispute- resolutions and set up the necessary

infrastructure, so that the energies of the partners in production may not be dissipated in counter-productive battles and the assurance of industrial justice may create a climate of goodwill." (Life Insurance Corpn. Of India v. D.J.Bahadur 1980 Lab IC 1218, 1226(SC), per Krishna Iyer,J.).

In order to achieve the aforesaid objectives, the Labour Courts/Industrial Tribunals are given wide powers not only to enforce the rights but even to create new rights, with the underlying objective to achieve social justice. Way back in the year 1950 i.e. immediately after the enactment of Industrial Disputes Act, in one of its first and celebrated judgment in the case of Bharat Bank Ltd. V. Employees of Bharat Bank Ltd. [1950] LLJ 921,948-49 (SC) this aspect was highlighted by the Court observing as under: (Bharat Bank case, AIR p.209, para 61)

"61. In settling the disputes between the employers and the workmen, the function of the tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace."

37. At the same time, the aforesaid sweeping power conferred upon the Tribunal is not unbridled and is circumscribed by this Court in the case of New Maneckchowk Spinning & Weaving Co.Ltd.v. Textile Labour Association [1961] 1 LLJ 521,526 (SC) in the following words: (AIR p.870, para 6)

"6. This, however, does not mean that an industrial court can do anything and everything when dealing with an industrial dispute. This power is conditioned by the subject matter with which it is dealing and also by the existing industrial law and it would not be open to it while dealing with a particular matter before it to overlook the industrial law relating to the matter as laid down by the legislature or by this Court."

38. It is, thus, this fine balancing which is required to be achieved while adjudicating a particular dispute, keeping in mind that the industrial disputes are settled by industrial adjudication on principle of fair play and justice.

39. On harmonious reading of the two judgments discussed in detail above, we are of the opinion that when there are posts available, in the absence of any unfair labour practice the Labour Court would not give direction for regularization only because a worker has continued as daily wage worker/adhoc/temporary worker for number of years. Further, if there are no posts available, such a direction for regularization would be impermissible. In the aforesaid circumstances giving of direction to regularize such a person, only on the basis of number of years put in by such a worker as daily wager etc. may amount to backdoor entry into the service which is an anathema to Art.14 of the Constitution. Further, such a direction would not be given when the concerned worker does not meet the eligibility requirement of the post in question as per the Recruitment Rules. However, wherever it is found that similarly situated workmen are regularized

by the employer itself under some scheme or otherwise and the workmen in question who have approached Industrial/Labour Court are at par with them, direction of regularization in such cases may be legally justified, otherwise, non-regularization of the left over workers itself would amount to invidious discrimination qua them in such cases and would be violative of Art.14 of the Constitution. Thus, the Industrial adjudicator would be achieving the equality by upholding Art. 14, rather than violating this constitutional provision.

40. The aforesaid examples are only illustrated. It would depend on the facts of each case as to whether order of regularization is necessitated to advance justice or it has to be denied if giving of such a direction infringes upon the employer's rights."

17. Learned counsel for the petitioner Nagar Palika Parishad has also relied upon the decision of this Court reported in 2011 (5) ALJ 249 (*State of U.P. And another Vs. Hind Majdoor Sabha and others*), and also decision of the Apex Court reported in 2013 (2) SCC 751 (*Raj Kumar Vs. Jalagaon Municipal Corporation*), 2010 (6) SCC 773 (*Senior Superintendent Telegraph (Traffic), Bhopal Vs. Santosh Kumar Seal and others*), 2005(107) FLR 122 (*M/s Kesarwani Zarda Bhandar Vs. Additional Labour Commissioner, Allahabad and others*), and AIR 2006 SC 2427 (*Haryana State Electronics Development Corporation Ltd. Vs. Mamni*).

18. Having considered the aforesaid submission, this Court finds that law for guidance of the courts with regard to grant of relief, in such circumstances, has been clearly laid down by the Apex Court. Relief of reinstatement and back wages, in a case of violation of Section 6-N or Section 25-F, is the normal rule. Industrial jurisprudence and service jurisprudence operated in distinct fields. However, after the exhaustive definition assigned to industry in Bangalore Water Supply case, this distinction has got blurred. Many of governmental activities upon which provisions of Articles 14 and 16 apply have come within the definition of industry. Applicability of constitutional provisions, which regulates governmental activity, cannot be excluded from consideration merely because it is an industry. In view of the law laid down by the Apex Court in Hari Nandan Prasad (supra), considerations like existence of post, manner of recruitment, length of working, entitlement of regularization in case of daily wager etc. are relevant in case of a State instrumentality notwithstanding it being an industry. Grant of relief of reinstatement to a daily wager is not automatic, when no post itself is available. The nature of engagement is relevant, inasmuch as if it is found that initial engagement was contrary to Article 16 of the Constitution of India, the Court may not be justified in granting relief of reinstatement, as it may not subserve the larger cause sought to be addressed by Article 16 of the Constitution of India. Although, as a result of non-compliance of Section 6-N, workman is entitled to be reinstated, but in the absence of existence of any vacant post of Tax Collector, it would not be possible to award relief of reinstatement against a non-existent post. This is particularly so as the employer herein is a State Authority and in the matter of recruitment thereunder is governed by the statutory service regulations, and dictum of Articles 14 and 16 would clearly be attracted.

19. Even otherwise, reinstatement is permissible on the same status as was held by the workman at the time of his termination. The Labour Court has held that workman was engaged on

daily wage basis, and his reinstatement would have to be as a daily wage earner. The workman's plea of regularization has not been granted. No such relief can otherwise be granted in the matter of employment by State/Agency of State, against a non-existent post without following the procedure for recruitment. In the facts of the present case, engagement of respondent was apparently a back-door entry, courtesy the then Chairman, without any advertisement or existence of post. Despite a specific plea taken in the written statement, the workman has not adduced any evidence to show that he was appointed against a vacant post, after procedure was followed. Relief of non-compliance of the provisions of Section 6-N of the U.P. Industrial Disputes Act can not be granted, which has the effect of violating mandate laid under Articles 14 and 16 of the Constitution of India. Consequence flowing from the non-compliance of Section 6-N, therefore, has to be restricted in a manner such that constitutional protection guaranteed under Article 14 and 16 of the Constitution of India itself is not violated.

20. Labour Court has not found the case of workman to be covered under the Rules for regularization. Regularization can otherwise be granted only in accordance with the Rules framed for the purpose (See: Secretary, State of Karnataka vs. Uma Devi & Ors. (2006) 4 SCC 1). In case reinstatement is allowed as a daily wager, the continuance of worker would be dependent upon exigency of work, and it would be open for the employer to terminate the employee upon payment of retrenchment compensation. The judgment relied upon on behalf of the respondents in State of U.P. Vs. Charan Singh, reported in 2015 (8) SCC 150 also will have no applicability, inasmuch as the Labour Court in the said case had returned a finding on the basis of evidence that work of tube-well operator were taken over by other workman, some of whom were junior. Finding was returned that post of tube-well operator was not abolished, but was merely changed. The judgment in Bhuvnesh Kumar Dwivedi (supra) since related to a private company, as such, considerations mandated by Articles 14 and 16 of the Constitution of India did not arise for consideration.

21. In the opinion of the Court, it was not proper for the Labour Court to have allowed relief of reinstatement when there existed no post and procedure for appointment was not followed. On this aspect, award suffers from a serious error of law, which is liable to be corrected by this Court, exercising its jurisdiction under Article 226 of the Constitution of India. In such circumstances, workman was at best entitled to a definite sum towards compensation instead of relief of reinstatement.

22. Considering the facts and circumstances that respondent had worked for a little over two years more than a decade back, and his engagement was on daily wage basis against a non-existent post without following any procedure for recruitment contemplated in law, it would have been appropriate that a sum of Rs.2 lacs was quantified and awarded, as monetary compensation to the worker on account of non-payment of retrenchment compensation, under Section 6-N of the Act. However, admittedly, a sum of Rs.3,00,000/- and odd has already been realized in execution proceedings, and paid to the respondent workman. This amount was disbursed to the workman in the year 2015. It would be harsh on part of this Court to direct any recovery now from the respondent workman. In order to balance equity, it would be appropriate to hold that no further amount would be payable to the workman concerned, and no recovery would be made from the

respondent workman of the amount, which had already been paid. The amount already paid would be treated to be the settlement amount, which would take care of all claims of the respondent workman concerned on account of disobedience of Section 6-N of the U.P. Industrial Disputes Act.

23. In view of the conclusions drawn in Writ Petition No.25467 of 2013, the order passed by the Labour Court under Section 33-C(2) granting regular scale of pay for the post of Tax Collector, without there being any post and valid recruitment cannot be sustained. Since it has already been held that the grant of relief vide award is illegal, for the reasons already stated above, the order passed by the Labour Court in Misc. Case No.16 of 2014 cannot be sustained and is set aside, and Writ Petition No.48995 of 2015 is allowed. No direction for payment of salary can thus be issued, as prayed for in the Writ Petition No.31497 of 2016. The Writ Petition No.31497 of 2016 is, accordingly, dismissed.

24. Accordingly, Writ Petition Nos.25467 of 2013 succeeds and is allowed in part, and the award of the Labour Court dated 22.3.2013 in Adjudication Case No.35 of 2009 is modified to the extent that respondent workman is held entitled to monetary compensation of Rs.2,00,000/- alone. However, in view of the facts narrated above, it is provided that no further amount is held payable under the award to the workman Kamal Kumar, nor any recovery is to be made by the employer from the workman concerned.

25. Parties shall bear their own cost.

**(2016) 8 ILRA 953
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.08.2016**

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ C No.- 35868 Of 2016

United Bank Of India & Anr. ...Petitioners
State Of U.P. & Ors. ...Respondents
Versus

Counsel for Petitioners:
Krishna Mohan Asthana

Counsel for Respondents:
C.S.C., Ashok Pandey

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 – Sections 17 and 18 – Successive Appeals Against Successive Auction Notices – Jurisdiction — Borrower's securitisation appeal under Section 17(1) against first auction notice dismissed by DRT — Appeal under Section 18 against such dismissal remained pending before Appellate Tribunal without compliance of mandatory pre-deposit or grant of interim relief — Fresh e-auction notice issued during pendency, challenged by borrower through fresh appeal under Section 17(1), in which Tribunal declined interim relief by reasoned order that attained finality — Borrower thereafter revived stay application in earlier pending Section 18 appeal to challenge fresh auction notice — Held: Having elected to challenge fresh auction notice by separate appeal under Section 17(1) and having failed therein, borrower could not revert to earlier pending Section 18 appeal, confined in scope to previous superseded auction notice, to assail the fresh notice. (Para 1)

Jurisdiction of Appellate Tribunal – Fresh Cause of Action Cannot Be Agitated in Pending Appeal –
 – Held: Appellate Tribunal had no jurisdiction to entertain, in pending Section 18 appeal, a challenge to fresh auction notice which was never subject-matter of that appeal, more so when borrower's separate challenge under Section 17 to the fresh notice was not pursued further. (Para 2)

Interim Protection – Requirement of Reasons – SARFAESI Proceedings — Appellate Tribunal stayed e-auction and allowed waiver of 75% of mandatory pre-deposit without recording any reasons — Held: Reasons must be assigned even while granting interim or interlocutory protection — Order staying e-auction without recording reasons is unsustainable. (Para 3)

Recovery Proceedings – Caution in Grant of Stay – Impact on Financial Institutions — Held: Courts and Tribunals must exercise circumspection while granting stay in matters concerning recovery of dues of banks and financial institutions, since such stay orders have serious adverse impact on financial health of such institutions and, ultimately, on the economy. (Para 4)

Section 18(1), Provisos – Mandatory Pre-Deposit – Waiver – Reduction Only With Reasons Recorded in Writing — Second proviso to Section 18(1) mandates pre-deposit of 50% of amount due; third

proviso permits Appellate Tribunal to reduce it to not less than 25%, for reasons recorded in writing — Held: Grant of interim protection before compliance with requirement of pre-deposit under Section 18(1) was impermissible in facts of the case. (Para 5)

Writ Petition Allowed — Order of Debt Recovery Appellate Tribunal dated 26.06.2016, staying e-auction of secured asset and allowing waiver of pre-deposit, set aside — Parties left to pursue remedies available to them in law — Costs made easy.

Case Law Discussed

1. Narayan Chandra Ghosh vs. UCO Bank & Ors. (referred)
2. Siemens Engineering & Manufacturing Co. of India Ltd. vs. Union of India, AIR 1976 SC 1785
3. G. Vallikumari vs. Andhra Education Society and others, (2010) 2 SCC 497
4. Kranti Associates (P) Ltd. vs. Masood Ahmed Khan, (2010) 9 SCC 496
5. United Bank of India vs. Satyawati Tondon, 2010 AIR SCW 5267

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Petitioner United Bank of India has approached this Court challenging an order passed by the Debt Recovery Appellate Tribunal, Allahabad (hereinafter referred to as the "Appellate tribunal") dated 26.6.2016, staying e-auction of property in question, scheduled for 21.6.2016. Application for waiver has been allowed simultaneously, permitting the defaulters to deposit 25% amount till the date of auction, after adjusting the amount deposited after issuance of notice under Section 13(2) of the SARFAESI Act, 2002.

2. Facts in brief are that commercial loan was availed under the Prime Minister's Employment Generation Scheme by respondent firm on 19th February, 2010. Overall credit limit of Rs.23,75,000/- for Ice and Ice-cream Unit was sanctioned. It consisted of a term loan of Rs. 16,15,000/-, repayable in 84 monthly installments of Rs. 19,226/- per month, beginning from February, 2010 besides interest as given in schedule to the sanction letter. Working capital amounting to Rs. 7,16,000/- was also sanctioned and had to be paid in 84 monthly installments of Rs. 9,048/- along with interest. Terms of loan were duly accepted and a bidding agreement came into being. Respondent no. 3 is the proprietor of the respondent no. 2 firm and respondent no. 4 is the guarantor. Respondent no. 4 admittedly executed a equitable mortgage of house no. 260/129/2, Himmatganj, Allahabad, which is the subject matter of e-auction.

3. Default in payment of loan amount in terms of loan agreement is not disputed. A notice under Section 13(2) of the SARFAESI Act was issued on 31st August, 2013, showing a liability of Rs.27,53,563/- along with future interest. Recovery notices were also issued from time to time and respondent firm requested for grant of further time to repay the amount, but to no avail. Possession notice under Section 13(4) was issued on 10th April 2014. Ultimately bank proceeded with auction of mortgaged property vide notice dated 28.8.2014, fixing 8th October 2014 as the date of auction.

Respondent nos. 2 and 3, at this stage filed a securitization appeal no. 364 of 2014 on 30th September, 2014. This appeal came to be dismissed by the Debts Recovery Tribunal (hereinafter referred to as "Tribunal") on 28th August 2015.

4. Aggrieved by the rejection of this appeal vide order dated 28.8.2015, respondent no. 2 and 3 then preferred an appeal before the Appellate Tribunal which was registered as securitization appeal no. 256 of 2015. Along with appeal, an application for waiver from pre deposit was also filed along with stay application. An objection was also came to be filed by the petitioner in the matter.

5. It transpires that while securitization appeal of petitioner remained pending before the appellate tribunal, a fresh date for auction was fixed on 21.6.2016 vide notice dated 10.5.2016. Aggrieved by this notice respondent nos. 2 and 3 preferred a fresh appeal under Section 17(1) of SARFAESI Act, 2002 on 21st May 2016. An objection to such appeal was filed by the petitioner on 6th June, 2016. The Tribunal disposed of stay application while refusing to interfere with e-auction fixed for 21st June. The order of Tribunal dated 7th June 2016 is reproduced :-

" Ld. Counsel Sri Ashok Pandey is present on behalf of the applicant.

Ld. Counsel Sri. K.M. Asthana is present on behalf of the respondent bank.

Counsel for the bank filed written objection.

Copy reserved.

While arguing on stay application, counsel for the applicant submitted that he has no objection if bank may auction the property under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 but bank is under obligation to disclose the arbitration proceedings pending before the Hon'ble High Court to the intending purchasers. He further submitted that he has no other grouse at this stage as far as disposal of stay application is concerned.

Whereas counsel for the bank submitted that bank has every right to auction the property and is not under obligation to disclose anything to the intending purchaser regarding alleged arbitration proceedings. He further submitted that the said property is not subject matter of arbitration proceedings.

In rebuttal counsel for the applicant submitted that as one arbitration dispute is pending regarding partnership firm before Hon'ble High Court as such bank is under obligation to disclose such fact to all the bidders to avoid multiplicity of litigation.

I have heard the counsel for the parties and gone through the record. In fact applicants have referred partition deed dated 18.3.1977 annexed at page 126 of S.A. and partnership

deed dt. 25.3.1977 annexed at page 150 of the S.A. In which the mortgagor of the bank is not party, so I am of the considered opinion that if at all some dispute is pending before Hon'ble High Court regarding said documents, the bank is not under obligation to convey any litigation between third persons to the purchasers under securitization process. The stay application is accordingly disposed of.

The applicant is directed to file rejoinder within 15 days.

Post the matter on 12.7.2016 for final hearing."

6. The order of Tribunal dated 7th June 2016, has been allowed to become final. No appeal under Section 18, has been filed against it. Respondent nos. 2 and 3, however, appear to have moved an application on 14.6.2016 for stay in their appeal pending before the Appellate Tribunal being S.A. 256 of 2015. An objection was filed by the petitioner raising various grounds. The Appellate Tribunal by the order impugned has allowed the waiver application to the extent of 75% and respondent nos. 2 and 3 have been permitted to deposit 25% pre deposit till the date of e-auction. Paragraphs 12 to 15 of the appellate order reads as under:-

" 12. It is to be pointed out at this juncture that as per the second proviso of sub-section (1) of Section 18 of the SARFAESI Act, 2002 no appeal shall be entertained unless the borrower/guarantor has deposited with the Appellate Tribunal 50% of the amount due from him as claimed by the secured creditor or determined by the Debts Recovery Tribunal. As per the third proviso of Sub-section (1) of Section 18, the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than 25% of debt referred to in the second proviso.

13. The language used in Section 18(1) of the SARFAESI Act, 2002 is very plain and clear that the Appellate Tribunal is not versted with any discretion, except to the pre-deposit amount to the extent of 25% of the debt due from the appellant for reasons to be recorded in writing.

14. In view of the law laid down by the Hon'ble Supreme Court in Narayan Chandra Ghosh Vs. UCO Bank & Ors. (Supra) and in the facts of the present case, I deem it just and proper to direct the appellants to deposit 25% of the demand amounting to Rs. 27,53,563/- raised by the respondent-Bank as per notice under section 13(2) of the SARFAESI Act, 2002, which is to be reduced by a sum of Rs. 2,47,541/- which has already been paid by the appellants after the demand notice. This amount is to be paid before the auction sale of the property in question scheduled to be held on 21.6.2016 in the form of Demand Draft in the name of the Registrar of the Appellate Tribunal, Allahabad, who shall keep the sasme in FDR for a period of six months n the Nationalized Bank in auto renewal scheme.

15. The waiver application is accordingly decided.

7. Tribunal at the same time has proceeded to stay the auction/sale of the property in question fixed for 21st June, 2016. Aggrieved by the order of the Appellate Tribunal, petitioner bank has filed the present writ petition. A counter affidavit has been filed in the matter on behalf of respondent nos. 2 to 4 which is taken on record.

8. I have heard Sri K.M. Asthana for the petitioners, learned Standing Counsel appearing for respondent nos. 1 and 5 and Sri Ashok Pandey, counsel for respondent nos. 2 to 4. With the consent of the counsel for the parties, writ petition is disposed of finally at the admission stage itself.

9. Learned counsel for the petitioner has challenged the appellate order on the following grounds:-

(i) The grant of interim protection is unsustainable since no reasons have been assigned in the order.

(ii) No relief could be granted in respect of the e-auction fixed for 21st June 2016, in the appeal filed under Section 18 as it was against a previous notice, and had lost its efficacy, especially as a subsequent appeal was filed under Section 17(1) against fresh notice.

(iii) The order dated 7.6.2016 rejecting stay application had attained finality and without any challenge laid to it, no stay could be granted.

(iv) It is also contended that Appellate Tribunal could not entertain and grant relief on the interim application as condition of pre deposit of 25% was not met by then.

10. Sri. Ashok Pandey, Advocate, on the other hand has submitted that the Appellate Tribunal has validly passed interim order for the reasons recorded therein, which requires no interference.

11. From the facts already noticed above, it is undisputed that a commercial loan was availed of by respondent nos. 2 and 3 and the borrower failed to repay the loan amount in terms of the agreement. Proceedings under Section 13(2) were initiated vide notice dated 31.8.2013 and thereafter, possession notice under Section 13(4) dated 10th April, 2014 was also issued. Auction notice of mortgaged property was issued on 28.8.2014 fixing 8th October, 2014 as the date of auction. The proceedings were challenged by filing appeal under Section 17(1) of the Act, 2002 being securitization appeal no. 364 of 2014. This appeal of respondent nos. 2 and 3 has been rejected on 28.8.2015. In appeal filed against it under Section 18 No. 256 of 2015 neither the requirement of pre deposit in terms of Section 18 was met nor any interim protection was granted.

12. The date for auction fixed on 8.10.2014 had expired. A fresh auction notice was published on 10.5.2016 fixing 21st June 2016 as the date for holding of e-auction. Respondents opted to challenge the fresh e-auction notice by instituting a fresh appeal under Section 17(1) of the

SARFAESI Act of 21st May 2016. The filing of fresh appeal by respondent nos. 2 and 3, in law, would mean that respondents opted not to pursue their grievance in pending appeal before under Section 18 of the Act. This appears to have been done as a fresh cause had arisen and for pursuing the appeal under Section 18, the respondents had to comply with the requirement of pre deposit in terms of Section 18(1), where as, no such requirement existed if a fresh appeal under Section 17 was filed. It was however open in law for the respondents to have filed a fresh appeal under Section 17 which they opted.

13. However having opted to choose such course and having failed to get any interim relief from the Tribunal, respondents gave up their challenge in the fresh appeal under Section 17 and reverted back to the appeal pending under Section 18. The order of Tribunal dated 7.6.2016, already extracted, is not even challenged. No appeal under Section 18 was filed against it. Instead a fresh application for stay was preferred in their pending appeal before Appellate Tribunal being S.A. No. 256 of 2015.

14. The Appeal before appellate Tribunal was pending on the date of issuance of fresh auction notice dated 10th May 2016, and in case respondent nos. 2 and 3 intended to question the fresh auction notice in their pending appeal under Section 18, there was no necessity of having filed a fresh securitization appeal under Section 17. However, after having elected not to challenge the fresh auction notice in pending appeal under Section 18, and filing a fresh appeal under Section 17 against it, the respondent nos. 2 to 4 could not thereafter give up their appeal against fresh auction notice and straightaway challenge the auction notice in appeal arising out of the previous auction notice. This Court finds substance in the argument of the petitioner that respondent nos. 2 and 3 having given up their challenge in the fresh auction notice in the appeal filed against it, could not have pressed their pending appeal under Section 18 for challenging the fresh auction notice. Admittedly, the scope of appeal under Section 18 was restricted to the order passed by the Tribunal rejecting challenge to the previous auction notice. The fresh auction notice was not the subject matter of challenge in previous appeal filed under Section 17 or the orders passed thereafter. A fresh cause, therefore could not have been brought before the appellate forum in the pending appeal. The Appellate forum, therefore, had no jurisdiction to entertain a challenge to the fresh auction notice in the pending appeal arising out of previous e-auction notice. Particularly, as the challenge made to the fresh auction notice by invoking Section 17 was not pursued.

15. Even otherwise, this Court finds that absolutely no reasons have been assigned for grant of interim protection to respondent nos. 2 and 3. Apparently, the default in repayment of loan was established and the only ground pressed was the pendency of some arbitration, which the respondents wanted to be made known to the intending purchaser. It was not open for the Appellate Tribunal to have stayed the e-auction without specifying reasons for grant of such interim protection. Law is settled that reasons must be assigned even for grant of interim protection. (See: Siemens Engineering & Manufacturing Co. of India Ltd. Vs. Union of India and other: AIR 1976 SC 1785, G.Vallikumari vs. Andhra Education Society and others: (2010) 2 SCC 497 and Kranti Associates (P) Ltd. vs. Masood Ahmed Khan: (2010) 9 SCC 496).

16. This is particularly so as proceedings under SARFAESI Act have been undertaken. Apex Court in **United Bank of India Vs. Satyawati Tondon 2010 AIR SCW 5267** has been pleased to observe that in cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by High Court would have serious adverse impact on the financial health of such bodies/institutions, which would ultimately be detrimental to the economy. The observation of the apex court applies equally to the proceedings of Appellate Tribunal when it proceeds to grant interim protection to a defaulter. Cogent reasons have to be assigned before the Tribunal assumes jurisdiction in the matter to grant interim protection. In the absence of reasons assigned for grant of relief by the Tribunal, the order itself is rendered bad. This Court also finds that interim relief has been granted by the Tribunal, even before requirement of pre deposit was met, which was impermissible.

17. In the facts and circumstances, as have been noticed above, this Court finds that the order of the Tribunal impugned in this petition suffers from lack of jurisdiction and is, otherwise, in teeth of settled principles of law, which cannot be sustained.

18. Writ petition, consequently, stands allowed. Order of the Tribunal dated 20th June 2016 is set aside. Parties are left to pursue their remedy as are available to them in law.

19. Costs made easy.

(2016) 8 ILRA 960
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.08.2016

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.

Writ C No.- 40249 Of 2008

Ram Briksh	...Petitioner
	Versus
State Of U.P. & Ors.	...Respondents

Counsel for Petitioner:

Gyanendra Kumar Singh, S.P. Pandey, S. Shahi, Satyawar Shahi

Counsel for Respondents:

C.S.C., Anoop Trivedi, O.P. Shukla, P.N. Tripathi, V.K. Singh

Fair Price Shop Licence — Cancellation — Substitution of Legal Heir — Locus Standi — Petitioner, licence holder, died during pendency of writ petition — Substitution application filed by his son on ground that cancellation orders were illegal and he, being legal heir, has right to be heard — Respondent objected that petition became infructuous on death of licence holder and son has no right to defend father's action or inaction — Son of deceased licence holder has a right for consideration for allotment of fair price shop if father was carrying good reputation in distribution of essential commodities — If cancellation orders are allowed to stand unconsidered on merits, they would come in the way of son's preferential right — Writ petition cannot be rendered infructuous — Substitution application allowed. (Para 1)

Government Order dated 17.08.2002 — Clause 10(jha) — Preferential Right of Legal Heir — Clause 10(jha) provides that on death of a shopkeeper of good reputation, the shop may be allotted to his dependent, meaning wife, son, or unmarried daughter — Reliance placed on Subash Vs. State of U.P., 2015 (1) ADJ 113 — Division Bench therein held that allotment is to be made only after resolution in open meeting of Gaon Sabha, and legal heir of a licensee who earned goodwill has a preferential right for consideration on compassionate ground — Son of licence holder has preferential right for consideration, subject to villagers' opinion on father's reputation being obtained in open Gram Sabha meeting. (Para 2)

Cancellation of Licence — Non-Distribution of Essential Commodities — Absence of Concerned Officer — Distribution scheduled for 11.10.2007 could not take place as the concerned officer/observer did not turn up — Licence holder promptly informed District Supply Officer, who fixed 18.10.2007 for distribution and nominated another officer to supervise — Distribution duly carried out on 18.10.2007 — Suspension order passed on 30.10.2007, i.e., twelve days after distribution, acting on an earlier complaint. Distribution was not withheld but only postponed for reasons beyond licence holder's control — First charge in suspension order not proved — Licensing and Appellate Authorities failed to consider that distribution had in fact taken place on rescheduled date. (Para 3)

Cancellation of Licence — Non-Deposit of Money for November 2007 — Gram Pradhan's Inaction — Licence holder pleaded that money for November 2007 could not be deposited as the distribution certificate for October 2007 was not issued by Gram Pradhan, and further that shop stood suspended from 30.10.2007 itself, leaving no occasion to deposit money for the subsequent month — Neither Licensing Authority nor Appellate Authority examined this aspect or recorded any finding that the certificate had in fact been furnished — Second charge also not established — Cancellation on this count equally unsustainable. (Para 4)

Appellate Order — Non-Application of Independent Mind — Appellate Authority rejected appeal on the very same grounds as the Licensing Authority without independent reasoning — Such mechanical affirmance vitiates the appellate order. (Para 5)

Relief — Cancellation Orders Set Aside — Compassionate Allotment — Cancellation orders passed by Licensing Authority and Appellate Authority set aside on both counts — Son of deceased licence holder permitted to apply for allotment of the fair price shop, which fell vacant on his father's death, on compassionate ground — Sub-Divisional Officer directed to convene open Gram Panchayat meeting within six weeks of presentation of application, taking villagers' opinion on reputation of deceased licence holder — Candidature of impleaded respondent (subsequent allottee) also to be considered in the same meeting — Decision to be taken preferably within four weeks of the meeting — Writ petition allowed with directions. (Para 6)

Case Law Discussed

1. Subash Vs. State of U.P. and others, 2015 (1) ADJ 113

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.)

1. Heard Sri Satyawan Shahi, learned counsel for the petitioner and Sri Anoop Trivedi, learned counsel for the respondent no.6

2. The relevant facts of the case are that:-

3. The present petition has been allowed by this Court vide judgement and order dated 16.02.2012 whereby the orders passed by the licensing authority and the appellate authority in cancelling the fair price shop licence of the petitioner have been quashed. It appears that an impleadment application was filed by Smt. Sumitra Devi with the assertion that the shop in question was allotted in her favour after cancellation of the licence of the petitioner. She was, therefore, necessary party in the writ petition. It appears that no order could be passed on the impleadment application and it remained pending. The applicant Smt. Sumitra Devi therefore, filed a review application alongwith the delay condonation application which was rejected by this Court vide order dated 06.09.2012.

4. Aggrieved Smt. Sumitra Devi, approached the Apex Court in Civil appeal nos.9363-9364 of 2014, against the order dated 16.02.2012 passed in writ petition and the order dated 06.09.2012 passed on the review application.

5. The Apex Court has set aside both the orders on 08.10.2014 on the ground that the High Court should have given opportunity to the appellant Smt. Sumitra Devi before restoring the licence of the petitioner (respondent no.6 before the Apex Court). However, it was directed by the Apex Court that till a final order is passed by this Court the licence of respondent no.6 namely the petitioner herein shall continue and he can operate the fair price shop.

6. It appears that during pendency of the present writ petition the petitioner died on 02.04.2015 and a substitution application, therefore, has been filed by his son namely Ram Pravesh on the ground that the authorities had illegally passed the cancellation orders and he being the legal heir of the deceased (licence holder) has a right to be heard.

7. On 25.04.2016 when the matter was heard, the impleadment application filed by Smt. Sumitra Devi was allowed and she was directed to be impleaded as respondent no.6 in the array of party. Sri Anoop Trivedi, learned counsel appearing for Smt. Sumitra Devi (respondent No.06 herein) has been heard at length.

8. Learned counsel for the respondent at the very outset submits that the writ petition has become infructuous on account of the death of the licence holder. The applicant in the substitution application namely Ram Pravesh allegedly son of the licence holder has no right to be substituted in his place as he cannot defend the action or inaction of his father. The shop has become vacant on account of the death of the licence holder and has to be allotted in an open meeting of the Gram Panchayat. This Court is not required to look into the correctness of the cancellation orders passed by the licensing authority as also the appellate authority at the instance of the applicant in the substitution application.

9. In the rejoinder, learned counsel for the applicant, however, submits that he has a preferential right to be considered for allotment of the fair price shop being the legal heir of the licence holder. Reliance is placed upon Clause 10(jha) of the Government Order dated 17.08.2002 to submit that in case, he succeeded in proving that his father was innocent and was carrying a good will and the cancellation orders are bad, the authorities cannot refuse to consider his application, if any, for allotment of the fair price shop on preferential basis.

10. Considering the submissions of learned counsel for the parties and having perused the record, this Court does not find force in the submission of Sri Anoop Trivedi learned counsel for the respondent that the petition has become infructuous. The impact of clause 10 (jha) of the Government order dated 17.08.2002 is admitted to the learned counsel for the parties. The relevant clause 10(jha) of the said Government order is as follows:-.

"यदि दुकानदार अच्छी ख्याति का हो तो उसकी मृत्यु के उपरांत दुकान का आवंटन उसके आश्रित को करने पर विचार किया जा सकता है. आश्रित का तात्पर्य पत्नी, पुत्र तथा अविवाहित पुत्री से है."

11. This Government order came up for consideration before a division bench of this Court in **Subash Vs. State of U.P. And others**, 2015 (1) ADJ 113. It has held therein that the allotment of the fair price shop licence is to be done only after resolution is passed in the open meeting of the Gaon Sabha, and no exception to the said procedure can be carved out. However, a legal heir of the licensee who had earned a good will has a preferential right for consideration for the settlement of the fair price shop on compassionate ground.

12. In the said case, the agenda for settlement of the fair price shop placed in the meeting of Gram Panchayat did not suggest as to whether the reputation of the petitioner therein was good or not and the opinion of villagers was not taken on the said issue in the open meeting of the Gaon Sabha and, therefore, the resolution was held to be not in consonance with clause 10(jha) of the Government order dated 17.08.2002 and was therefore, set aside.

13. Considering the relevant clause 10(jha) of the Government order dated 17.08.2002 and the observations of the Division Bench of this Court in the above noted case, this Court is of the opinion that the son of the licence holder who has filed the substitution application has a right for consideration for allotment of the fair price shop in case, it is found that his father was carrying good reputation in the matter of distribution of essential commodities in the village. However, in case, the cancellation order are allowed to remain as such without consideration on merits, they will come in the way of consideration of the right of the son of the licence holder who can be non-suited on this ground alone. For this reason, the writ petition cannot be rendered infructuous and it is held that the applicant in the substitution application has a right to confront the orders passed by the licensing authorities in canceling the fair price shop licence of his father.

14. The substitution application is, therefore, allowed. Sri Ram Pravesh is substituted in place of the petitioner in the present petition.

15. Coming on the merits of the orders of cancellation, it is found from the record that a suspension order dated 30.10.2007 was passed suspending the fair price shop licence of the petitioner's father Ram Briksh (licence holder) on the ground that he did not distribute the essential commodities to the villagers on 11.10.2007 and Gram Pradhan had filed a complaint in that regard vide letter dated 16.10.2007. Another charge against the licence holder was that he did not tender money for lifting the food grains and sugar for distribution for the month of November, 2007.

16. The petitioner gave a reply on 01.12.2007 with the relevant documents to the effect that the distribution on 11.10.2007 was to be done in the presence of the concerned officer/observer who did not turn up. Information in this regard was given to the District Supply Officer who in-turn fixed 18.10.2007 for distribution of essential commodities. The licence holder distributed the essential commodities on the said date. He also pleaded that the

Gram Pradhan was carrying grudges against him and had filed the complaint in a malafide manner.

17. The cancellation order dated 18.01.2008 was passed by the licensing authority rejecting the explanation of the licence holder recording a finding that he intentionally did not distribute the essential commodities and had thus violated the rights of the villagers to get ration at the subsidised rates. The appeal was also rejected on the same ground as has been taken by the licensing authority. No independent reasoning has been given by the Appellate Authority to reject the appeal.

18. It is further found that a letter dated 15.10.2007 written by the District Supply Officer, Gorakhpur to Bal Vikas Pariyojna Adhikari, Pipraich, Gorakhpur has been brought on record as Annexure no.1 to the writ petition. A perusal of the said letter indicates that 18.10.2007 was fixed for distribution of the essential commodities and one Virendra Yadav, Gram Vikas Adhikari was nominated to remain present to ensure fair distribution. It was also directed that a report be submitted regarding absence of Lekhpal on 11.10.2007 in the village to ensure distribution. This letter was written on the information given by the petitioner to the District Supply Officer, Gorakhpur regarding non-distribution of essential commodities on 11.10.2007.

19. It is evident from the record that both the Licensing Authority and the Appellate Authority did not consider that the distribution was not withheld by the licence holder rather it was postponed on account of absence of the concerned officer in whose presence the distribution was required to be done. Further the licence holder was prompt in giving information to the District Supply Officer who while acting upon his report had fixed another date and deputed another officer to supervise the distribution.

20. The essential commodities were distributed on 18.10.2007 i.e. on the date fixed by the District Supply Officer. The suspension order itself was passed on 30.10.2007 i.e. after 12 days of the distribution acting on an earlier complaint of the Gram Pradhan. Therefore, the first charge against the licence holder mentioned in the suspension order is not proved.

21. So far as the second charge namely non deposit of the requisite money for the month of November, 2007 is concerned, the licence holder has submitted in his explanation that the money could not be deposited because of the inaction of the Gram Pradhan. It is specific case of the licence holder that the money for November, 2007 could not be deposited by him for the reason that the certificate of distribution for the month of October, 2007 was not given by the Gram Pradhan. In absence of the said certificate, it was not possible for him to deposit the money. Moreover, the shop was suspended on 30.10.2007 on account of malafide act of the Gram Pradhan and the licensing authority so he could not get the chance to make the deposits.

22. In the cancellation order, both the licensing as well as Appellate authority did not consider this aspect of the matter. There is no finding that certificate of distribution for the month of October was given to the licence holder but he did not deposit the money for November month. Even otherwise, the licence was suspended only on 30.10.2007 and, therefore, there was no occasion before the licensee holder to persuade the authorities to provide him distribution certificate so as to deposit the money for the month of November 2007.

23. In view of the above, on both the counts, the cancellation order passed by the Licensing Authority as also the Appellate Authority cannot be sustained. Both the above noted orders are hereby set aside.

24. It is, however, left open for the petitioner Ram Pravesh to apply for allotment of fair price shop which became vacant on account of the death of his father on compassionate ground. In case, such an application is moved, an open meeting of the Gram Panchayat be held for considering the agenda to allot the fair price shop on compassionate ground after taking opinion of the villagers on the issue as to whether the reputation of the erstwhile licensee namely (Ram Briksh) the father of the petitioner herein was good or not. Such meeting shall be called by the Sub-Divisional Officer within a period of six weeks from the date of presentation of the application by Ram Pravesh alongwith the certified copy of this order and a decision be taken regarding allotment of the fair price shop on the basis of resolution of the Gram Panchayat. The respondent no.6 Smt. Sumitra, if moves an application for allotment of the fair price shop, her candidature shall also be considered in the aforesaid meeting of the Gaon Sabha to ensure the fair distribution of the essential commodities to the villagers. An early decision be taken by the Sub Divisional Officer preferably within a period of four weeks after holding the meeting of the Gram Panchayat for allotment of the fair price shop in accordance with law.

25. With the above observations and directions, the writ petition is allowed.

(2016) 8 ILRA 966
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.08.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Writ Tax No.- 1238 Of 2010
&
Connected With Other Cases

Bulbul Banerjee

...Petitioner

Versus

State Of U.P. & Ors.

...Respondents

Counsel for Petitioner:

Govind Krishna, Ashok Kumar Pandey, Purusottam Upadhyay, Vipin Kumar, T.S. Dabas, N.S. Chahar, Durga Prasad Singh, Rajendra Tiwari, Sanjay Singh Sengar, Haridwar Singh (for respective petitioners)

Counsel for Respondents:

C.S.C.

U.P. Entertainment and Betting Tax Act, 1979 — Section 3 — Entertainment Tax (Amendment) Act, 2009 — Explanation (2) — Scope of Challenge — Though validity of Section 3 as amended was challenged in the writ petitions, dispute during argument was found confined to Explanation (2) inserted at the end of Section 3 — Question was whether Explanation (2) contemplates computation of entertainment tax on the amount of entertainment tax already computed under Section 3(1), or is merely clarificatory — Explanation (2) defines 'aggregate payment' to include entertainment tax and other amounts payable under the Act, but this definition operates only for the purpose of levying tax on 'aggregate payment required for admission' under Section 3(1) — It cannot be read to permit double computation, i.e., tax upon tax already computed. (Para 1)

Explanation to Statute — Nature and Limits — An explanation to a statutory provision is ordinarily clarificatory in nature, meant to remove ambiguity — What is not contemplated by the principal charging section cannot be supplied or expanded through an explanation — Entertainment tax once computed under Section 3(1) does not attract further entertainment tax on the tax so computed. (Para 2)

Section 3-A — Extra Charges for Maintenance and Air-Conditioning — Effect of Amendment Act, 2009 — Prior to amendment, extra charges collected for maintenance of cinema premises and for air-cooling/air-conditioning facilities stood excluded from being treated as payment for admission and were thus not exigible to entertainment tax — Post-amendment, Section 3-A(1) requires the proprietor to utilise a notified portion of the ticket value itself for such maintenance and facilities, without a separate exclusion — The earlier exemption stands validly withdrawn by the new provision — A principal legislative enactment altering an earlier benefit cannot be struck down merely because it takes away what an earlier provision conferred, absent violation of constitutional provision or legislative competence. (Para 3)

Definition of 'Payment for Admission' — Amendment — Gross Payment Deemed Aggregate Payment — Insertion of clauses (vi), (vii) and (viii) in Section 2(l) by the Amendment Act, 2009, including the deeming provision that gross payment on admission shall be treated as aggregate payment, is consistent with the scheme requiring cinema owners to value tickets inclusive of maintenance and air-conditioning charges, all of which now form part of aggregate payment for admission. (Para 4)

Impugned Circulars of Commissioner (Entertainment Tax) — Validity — Circulars directed that extra charges for maintenance and air-conditioning could no longer be levied separately post-amendment, and amounts so collected be refunded — Circulars are only for guidance of field authorities and do not permit levy of entertainment tax on entertainment tax already computed — Circulars are consistent with the statute as amended and are not ultra vires; direction for refund of separately charged maintenance/air-conditioning amounts upheld. (Para 5)

Disposal — All writ petitions disposed of with the clarification that entertainment tax cannot be computed twice on the same component, and that Section 3-A as amended is not ultra vires. (Para 6)

(Delivered by Hon'ble Sudhir Agarwal, J.

&

Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Govind Krishna, Sri Vipin Kumar and Sri N.S. Chahar, Advocates for petitioners in all the writ petitions and learned Standing Counsel for respondents.

2. Though validity of Section 3 of U.P. Entertainment and Betting Tax Act, 1979 (hereinafter referred to as the "Act, 1979") as amended by U.P. Entertainment and Betting Tax (Amendment) Act, 2009 (Act No. 25 of 2009) (hereinafter referred to as the "Amendment Act, 2009") has been challenged in all these writ petitions but during course of argument we find that as a matter of fact dispute relates to Explanation (2) inserted by Amendment Act, 2009 at the end of Section 3 only and not entire Section 3 as amended by Amendment Act, 2009. We further find during course of argument that dispute was confined to interpretation of meaning of Explanation (2), whether it contemplates computation and demand of entertainment tax on the amount of entertainment tax already computed under Section 3(1) or is only clarificatory in nature.

3. Section 3 as it stood prior to Amendment Act, 2009 and after said amendment are reproduced as under:

Before Amendment Act, 2009	After Amendment Act, 2009
3. Tax on payment for admission to entertainment- (1) Subject to the provisions of this Act, there shall be levied and paid on all payments for admission to any entertainment, other than an entertainment to which Section 4 or Section 4-A or Section 4-B applies or a	3. Tax on entertainment- (1) Subject to the provisions of this Act, there shall be levied and paid on all aggregate payments required for admission to any entertainment other than an entertainment to which Section 4 or Section 4-A or Section 4-B applies or a compounded payment is made under the

compounded payment is made under the proviso to this sub-section, an entertainment tax at such rate not exceeding one hundred and fifty per cent of each such payment as the State Government may from time to time notify in this behalf, and the tax shall be collected by the proprietor from the person making the payment for admission and paid to the Government in the manner prescribed:

Provided that a proprietor of a cinema of cable operator in a local area having a population not exceeding one lac, may, in lieu of payment under this subsection, pay a compounded payment to the State Government on such conditions and in such manner as may be prescribed and at such rate as the State Government may from time to time notify, and different rates of compounded payments may be notified for different categories of local areas.

proviso to this sub-section, an entertainment tax at such rate not exceeding one hundred and fifty per cent of each such payment as the State Government may from time to time notify in this behalf, and the tax shall be collected by the proprietor from the person making the payment for admission and paid to the Government in the manner prescribed:

Provided that a proprietor of a cinema of cable operator in a local area having a population not exceeding one lac, may, in lieu of payment under this subsection, pay a compounded payment to the State Government on such conditions and in such manner as may be prescribed and at such rate as the State Government may from time to time notify, and different rates of compounded payments may be notified for different categories of local areas.

Provided further that in the case of cable service, the proprietor of the cable service control room/multi system operator shall be liable to pay the tax, irrespective of the fact whether he collect it directly from the person making the payment for admission or indirectly through an associate or franchise cable operator or an agent, who in turn collects it from the person making the payment:

Provided also that a proprietor of a cinema, in lieu of payment under this sub-section, shall make a lump sum payment to the State Government on such conditions and restrictions and in such manner as may be prescribed and at such rate as the State Government may from time to time notify, and different rates of lump sum payments may be notified for different categories of local areas or cinemas or for different payment for admission.

(2) Nothing in sub-section (1) shall preclude the State Government from notifying different rates of entertainment tax for different areas or for different classes of entertainment or for different <u>payments for admission</u> to entertainment. (3) Where the payment for admission to an entertainment, together with the tax, charges for maintenance of cinema premises and extra charge for air cooling or air conditioning facility, is not a multiple of one rupee, then notwithstanding anything contained in sub-section (1) or sub-section (2) or any notification issued thereunder, the tax shall be increased to such extent and be so computed that the aggregate of such payment for admission to entertainment, the tax, charge for maintenance of cinema premises and extra charge for air cooling or air conditioning facility is rounded off to the next higher multiple of one rupee and such increased tax shall also be collected by the proprietor and paid to the Government in the manner prescribed. (4) If in any entertainment, referred to in sub-section (1), to which admission is generally on payment, any person is admitted free of charge or on a concessional rate, the same amount of tax	(2) Nothing in sub-section (1) shall preclude the State Government from notifying different rates of entertainment tax for different areas or for different classes of entertainment or for different <u>aggregate payment required for admission</u> to entertainment. (2-a) <u>It shall be lawful for the State Government to notify lump sum rate of entertainment tax for any entertainment or class of entertainments or for different payment for admission to entertainment or for different area.</u> (3) <u>Where the aggregate payment required for admission to an entertainment together with any other charge leviable under this Act, is not a multiple of one rupee then notwithstanding anything to the contrary contained in sub-section (1) or sub-section (2) or any notification issued thereunder, the tax shall be increased to such extent and be so computed that the aggregate of such aggregate payment and other charges is rounded off to the next higher multiply of one rupee and such increased tax shall also be collected by the proprietor and paid to the State Government in such manner as may be prescribed.</u> (4) If in any entertainment, referred to in sub-section (1), to which admission is generally on payment, any person is admitted free of charge or on a concessional rate, the same amount of tax shall be payable as would have been payable had such person been admitted on full payment. (5) Where the <u>aggregate payment</u>
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shall be payable as would have been payable had such person been admitted on full payment.

(5) Where the payment for admission to an entertainment, referred to in sub-section (1), is made wholly or partly, by means of a lump sum paid as subscription, contribution, donation or otherwise, the tax shall be paid on the amount of such lump sum and on the amount of payment for admission, if any, made otherwise.

(6) Where in a hotel or a restaurant, entertainment by way of cabaret or floor show (by whatever name called, but excluding a mere band in attendance or recorded music) is provided along with any meal or refreshment with a view to attracting customers, whether or not payment for admission is charged distinctly for such entertainment, twenty per cent of the amount payable by the customer for such meal or refreshment or the amount charged distinctly for such entertainment, whichever is higher, shall be deemed to be the payment for admission to such entertainment and the tax shall be levied and paid accordingly.

(7) where in a hotel, entertainment by way of cable service is provided in rooms or other places, the entertainment so provided in each room or other place shall be deemed to be a separate entertainment and the subscription for admission to each such entertainment shall be deemed to be equal to the amount of subscription charged from a subscriber in the vicinity of the hotel by the cable operator providing cable service in the hotel, and the tax

required for admission to an entertainment, referred to in sub-section (1), is made wholly or partly, by means of a lump sum paid as subscription, contribution, donation or otherwise, the tax shall be paid on the amount of such lump sum and on the amount of payment for admission, if any, made otherwise.

(6) Where in a hotel or a restaurant, entertainment by way of cabaret or floor show (by whatever name called, but excluding a mere band in attendance or recorded music) is provided along with any meal or refreshment with a view to attracting customers, whether or not aggregate payment required for admission is charged distinctly for such entertainment, thirty per cent of the amount payable by the customer for such meal or refreshment or the amount charged distinctly for such entertainment, whichever is higher, shall be deemed to be the aggregate payment required for admission to such entertainment and the tax shall be levied and paid accordingly.

(7) where in a hotel, entertainment by way of cable service is provided in rooms or other places, the entertainment so provided in each room or other place shall be deemed to be a separate entertainment and the subscription for admission to each such entertainment shall be deemed to be equal to the amount of subscription charged from a subscriber in the vicinity of the hotel by the cable operator providing cable service in the hotel, and the tax shall be levied and paid on the basis of such subscription:

Provided that where the cable operator himself is the proprietor of the hotel, the subscription for admission to each such entertainment shall be deemed to be equal to

shall he levied and paid on the basis of such subscription: Provided that where the cable operator himself is the proprietor of the hotel, the subscription for admission to each such entertainment shall be deemed to be equal to the amount of subscription charged from a subscriber in the vicinity of the hotel by any other cable operator. Explanation.-- For the purposes of this sub-section and clause (ee) of section 2, 'hotel' includes an accommodational unit wherein rooms are provided to the customers on rent, but does not include the units approved under the 'Paying Guest Scheme' of the Department of Tourism of me State Government."	the amount of subscription charged from a subscriber in the vicinity of the hotel by any other cable operator. Explanation 1.- For the purposes of this sub-section and clause (ee) of section 2, 'hotel' includes an accommodational unit wherein rooms are provided to the customers on rent, but does not include the units approved under the 'Paying Guest Scheme' of the Department of Tourism of me State Government. <u>Explanation (2)-For the purposes of this Act, the expression aggregate payment shall mean a sum paid by a person for admission to the entertainment which shall include entertainment tax and any other amount required to be paid under this Act but does not include any fee or other charges which is not a part of entertainment tax under this Act."</u>
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4. The charging Section 3 contemplates levy of tax on all aggregate payments required for admission to any entertainment at such rate not exceeding 150 per cent of each such payment as the State Government may notify from time to time in this behalf. Aforesaid levy of tax is other than entertainment to which Sections 4, 4-A, 4-B, 4-C apply or to a compounded payment made under provision to Section 3(1). Petitioners before us are not covered by Sections 4, 4-A, 4-B, 4-C, or proviso to Section 3(1). They are thus liable to pay "entertainment tax" at the rate prescribed by Government under Section 3(1).

5. Payment of admission is defined in Section 2(l), which reads as under:

"(l) 'payment for admission' includes--

- (i) any **payment for seats** or other accommodation in any form in a place of entertainment ;*
- (ii) any payment for a programme or synopsis of an entertainment ;*

(iii) **any payment made for the loan or use of any instrument or contrivance which enables a person to get a normal or better view or hearing or enjoyment of the entertainment, which without the aid of such instrument or contrivance such person would not get ;**

(iv) **any payment, by whatever name called for any purpose whatsoever, connected with an entertainment, which a person is required to make in any form as a condition of attending or continuing to attend the entertainment, either in addition to the payment, if any, for admission to the entertainment or without any such payment for admission ;**

(v) **any payment made by a person, who having been admitted to one part of a place of entertainment is subsequently admitted to another part thereof, for admission to which a payment involving tax or more tax is required;**

Explanation.--Any subscription raised or donation collected in connection with an entertainment in any form shall be deemed to be payment for admission ;

(vi) **any payment made by a person by way of contribution or subscription or installation and connection charges or any other charges collected in any manner whatsoever, by whatever name called, for television exhibition through cable television network or any other such network by whatever name called, attached to television set or any other device at a residential or nonresidential place of a connection holder; or**

(vii) **any payment made by person to the proprietor of a Direct-to-Home service or any other service by whatever name called, by way of contribution or subscription or installation and connection charges or any charges collected in any manner by whatever name called either directly or through any agency established for the purpose for Direct-to-Home service with the aid of set top box or any other device of like nature which connects television set or any other device at a residential or non-residential place of a connection holder directly to the satellite without passing through an intermediary such as cable operator:**

Explanation--For the purposes of sub-clauses (vi) and (vii) any expenditure incurred by any co-operative society including a co-operative housing society or by the management of any factory, hotel, lodge, bar, permit room, pub or by a person or group of persons for the purchase of any type of antenna or any other apparatus for securing transmission through cable television network, Direct-to-Home service or any other service by whatever name called, for its member or for workers or customers or for himself or themselves, as the case may be shall be deemed to be the payment made under the sub-clause;

(viii) **Where in any entertainment admission has been allowed on a gross payment, such gross payment shall be deemed to be aggregate payment."** (emphasis added)

6. It is contended that by virtue of Section 3-A(1) the proprietors of Cinema have been authorized to realize from the person making payment to admission to entertainment in such

Cinema, an extra charge which shall be utilized for maintaining Cinema premises and also in case of a centrally air-cooled or centrally air-conditioned Cinema a further extra charge. This extra charge under Section 3-A(1)(a) is not permissible to Cinema owners receiving grant-in-aid from State Government under any scheme. Section 3-A(2) provides that amount charged under sub-section (1) shall not be deemed to be payment to an admission to an entertainment.

7. Section 3-A has also been amended by Amendment Act, 2009 and now it reads as under:

"3-A - Extra charges for maintenance of cinemas and for air-cooled and air-conditioned facility--(1) Notwithstanding anything to the contrary contained in any other provision of this Act, the proprietor of a cinema shall utilize such amount of ticket value excluding entertainment tax and in such manner as may be notified by the State Government from time to time for maintenance of the cinema premises and for air cooling or air conditioning facilities."

(emphasis added)

8. Therefore, exclusion allowed earlier with respect to extra charge under Section 3-A(1) now stand omitted. Petitioners have stated that prior to Amendment Act, 2009, Cinema owners used to collect price of a ticket comprising of following:

- (a) Payment for admission;
- (b) Tax on payment for admission;
- (c) Cinema maintenance charge;
- (d) Air-cooling/air-conditioning charge; and,
- (e) Film development fund.

9. It is argued that in view of Explanation (2) now entertainment tax computed on various other items is again liable to be subjected to entertainment tax and thus such tax would now be computed twice.

10. This has been controverted by learned Standing Counsel stating that there is no duplicacy of entertainment tax inasmuch as tax would be computed only on various components charged by Cinema owners and once various components of admission charge for entertainment tax are computed, there is no question or occasion to calculate entertainment tax again on the amount of entertainment tax. This stand taken by learned Standing Counsel, we find, is consistent with a combined reading of Section 3(1) alongwith Explanation (2) of Amendment Act, 2009.

11. State is authorized to levy tax on all aggregate payments required for admission on any entertainment at a rate not exceeding 150 per cent of each such payments. Meaning thereby,

payment for admission, when comprises of various components, on each such payment or component, an entertainment tax is leviable at a rate not exceeding 150 per cent as prescribed by State Government. Prescription of rate of tax is subsequent to various payments which have been termed as "aggregate payment required for admission" to tax.

12. Section 3(1) further authorizes a proprietor of Cinema to collect tax from the person making payment for admission. It is in this context Explanation (2) has clarified that aggregate payment shall mean a sum paid by a person for admission to entertainment and it shall include "entertainment tax" and other amount required to be paid under this Act but for the purpose of attracting "entertainment tax" under Section 3(1) at the rate prescribed by State Government, the words are qualified that "all aggregate payment requirement for admission to any entertainment". Thus, Explanation (2) cannot be read so as to permit respondents firstly to compute tax on various components of payments made for admission to entertainment and thereafter further compute entertainment tax on entertainment tax so arrived at.

13. Learned Standing Counsel fairly stated that there is no case of such double taxation and impression otherwise gathered by respondents is neither justified, nor correct, nor otherwise so provided in Amendment Act, 2009.

14. Further, the fact that earlier amount charged for maintenance etc. under Section 3-A even if utilized for maintenance etc. but still has been subjected to entertainment tax would not make Section 3-A, as amended by Amendment Act, 2009, bad or ultra vires for the reason that legislature can always frame its policy in the manner it likes and a legislative enactment can be challenged only on the ground of violation of constitutional provisions or legislative competence but not for the reason that a benefit otherwise provided in earlier provision has been taken away by new provision.

15. Impugned circulars issued by Commissioner (Entertainment Tax) is only for guidance of field authorities but we do not find anything therein which permits field authorities to compute and levy "entertainment tax" on the amount of "entertainment tax" computed under Section 3(1) of Act, 1979.

16. Even otherwise an explanation to a provision is normally clarificatory to explain some kind of ambiguity, if there may be any occasion but what is not contemplated under principal charging Section cannot be supplied by way of an explanation. We, therefore, make it clear that by taking recourse to Explanation (2) respondents cannot compute entertainment tax on the amount of entertainment tax computed on various payments authorized for admission for an entertainment. Entertainment tax once computed under Section 3(1) will not attract further computation of entertainment tax on already computed entertainment tax.

17. It is argued that Commissioner (Entertainment Tax) vide circulars impugned in this writ petitions has provided that after amendment of Section 3-A by Amendment Act, 2009 the authority to charge extra charges for maintaining and for air-cooling and air-conditioning facilities has been

stopped and now Cinema owners cannot charge such amount and wherever it has been charged must be refunded.

18. To this extent it is said that direction issued by Commissioner (Entertainment Tax) are contrary to statute inasmuch as Section 3-A, as amended now, provides that amount of ticket value charged by Cinema owners shall be utilized in such manner as may be notified by State Government from time to time for maintenance of Cinema premises and for air-cooling and air-conditioning facilities. This shows that amount of ticket value is not restricted and instead Cinema owners may merge the same in the value of ticket and it would attract entertainment tax also but out of such amount of ticket value some part can be directed by State Government to be utilized for maintenance of Cinema premises and for air-cooling and air-conditioning facilities. The intention is very clear. Earlier a separate provision was made entitling Cinema owners to raise extra charge on these two heads and the same was not subjected to "entertainment tax" when utilized for the purpose the same were charged but now that authority to charge and exemption has gone. A new provision has come in a different way. Cinema owners now may value the amount of their ticket in such manner so as to cover expenses, if any, they may require for maintenance of Cinema premises and for air-cooling and air-conditioning facilities. In fact now it would be a part of payments required for admission to any entertainment. This is also evident from the fact that definition of "payment for admission" has also been amended by Amendment Act, 2009 and Clauses (vi), (vii) and (viii) have been inserted. In Clause (viii) it is said that any entertainment admission if allowed on gross payment such gross payment shall be deemed to be aggregate payment.

19. Cinema owners, therefore, are not justified to continue to charge additional charge/ extra charge by referring to Section 3-A of Act, 1979 after its amendment by substitution and enactment of a different provision in which such authorization of extra charge has been taken away. Circulars, impugned in these writ petitions, therefore, cannot be said to be bad or contrary to statute and Section 3-A as amended by Amendment Act, 2009 also cannot be said to be ultra vires simply because it is a different provision that what it was earlier. A principal legislation cannot be challenged on the ground that it is contrary to what it was earlier. It is within the realm of legislation and unless want of legislative competent or violation of constitutional provision is shown, a principal legislation cannot be challenged as invalid or ultra vires.

20. In the light of clarifications/ observations made above all the writ petitions are disposed of.

(2016) 8 ILRA 976
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.08.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE KAUSHAL JAYENDRA THAKER, J.

Writ Tax No.- 1448 Of 2009
 &
 Connected With Other Cases

M/S Uflex Limited	...Petitioner
	Versus
State Of U.P. & Ors.	...Respondents

Counsel for Petitioner:

Bharat Ji Agrawal (Senior Advocate), Piyush Agrawal, Rahul Agrawal, S.D. Singh (Senior Advocate), Nishant Mishra, Diptiman Singh, Nikhil Agarwal

Counsel for Respondents:

C.B. Tripathi, learned Standing Counsel

U.P. Value Added Tax Act, 2008 — Section 42(4) & (5) — U.P. VAT Rules, 2008 — Rule 70(5) — Vires Challenged — Petitioners, industrial units holding eligibility certificates under Section 4-A of the U.P. Trade Tax Act, 1948 for exemption from tax, challenged Section 42(4) and (5) of the Act, 2008 as substituted by the Amendment Act, 2008, and Rule 70(5) of the Rules, 2008 as substituted by the First Amendment Rules, 2009. Amended scheme requiring deposit of net tax along with return, followed by refund, is neither illegal nor arbitrary nor beyond legislative competence — Section 42(4) and (5) as amended are not ultra vires. (Para 1)

Change of Exemption Scheme — From Upfront Exemption to Deposit-and-Refund — Retrospective Operation — Under the erstwhile scheme, eligible units enjoyed upfront exemption/deferment of tax — By Amendment Ordinance, 2008 and subsequent Amendment Act, 2008, effective from 01.01.2008, the scheme was altered so that units must first deposit net tax with the return and thereafter claim refund — Rule 70(5), framed only on 30.01.2009, prescribed deposit deadlines for tax periods between January 2008 and June 2008, i.e., periods that had already elapsed with returns already filed under the earlier scheme before the new procedure was even notified. Compliance with the amended Rule 70(5) for the already-elapsed period of January 2008 to June 2008 was rendered practically and legally impossible, since the prescribed manner of compliance itself came into existence only on 30.01.2009, after the deadlines it imposed had already expired. (Para 2)

Doctrine of Impossibility — Lex Non Cogit Ad Impossibilia — Applicability — The maxims lex non cogit ad impossibilia and impotentia excusat legem apply — The law does not compel performance of an impossibility; where a statute creates a duty and the party is disabled from performing it without default of his own and has no remedy over it, the law excuses him — Principle affirmed by the Supreme Court. (Para 3)

Rule 70(5) of U.P. VAT Rules, 2008 (as substituted, 2009) — Struck Down — Article 14 — Rule framing authority, despite the amended Section 42(4)(d) requiring compliance 'in the prescribed manner', remained inactive for over five to six months and notified Rule 70(5) only on 30.01.2009, by when the deadlines it prescribed (July 2008 to December 2008 for deposit relating to January-June 2008 tax periods) had already lapsed. Sub-rule (5) of Rule 70, as substituted by the U.P. VAT (First Amendment) Rules, 2009, is irrational, arbitrary, illegal and unreasonable, being violative of Article 14 of the Constitution, and is struck down — Consequently, sub-rules (7) to (11) of Rule 70, insofar as they relate to net tax for January 2008 to June 2008, become inoperative for want of a valid sub-rule (5) to found them, until a valid provision is framed. (Para 4)

Impugned Notices and Orders — Quashed — Interim Directions for Deposit and Refund — Impugned notices and orders demanding interest/penalty for delayed deposit for the period January 2008 to June 2008 quashed — To mitigate further litigation, petitioners permitted to deposit requisite tax along with return within two months, if not already deposited, whereupon such deposit shall be treated as due compliance under Section 42(4)(d) as amended, and refund proceedings to follow under Section 42(5) — Failure to comply within two months renders provisions of Rule 42(7) to (11) operative with due consequences — Writ petitions partly allowed with no order as to costs. (Para 5)

Case Law Discussed

1. Cochin State Power and Light Corporation Ltd. Vs. State of Kerala, AIR 1965 SC 1688
2. Special Reference No. 1 of 1974 (Re: Presidential Poll), 1974 (2) SCC 33
3. State of Rajasthan Vs. Shamsheer Singh, AIR 1985 SC 1082
4. Rajesh D. Darbar Vs. Narsing Rao Krishnaji Kulkarni & Others, (2003) 7 SCC 219
5. Ram Chandra Singh Vs. Sabitri Devi & Others, 2003 (8) SCC 319
6. Industrial Financial Corporation of India Ltd. Vs. Cannanore Spinning & Weaving Mills Ltd., AIR 2002 SC 1841
7. Special Reference No. 1 of 2002, AIR 2003 SC 1987
8. Board of Control for Cricket in India Vs. Netaji Cricket Club, AIR 2005 SC 592
9. HUDA and Another Vs. Dr. Babeswar Kanhar, 2005 (1) SCC 191 : AIR 2005 SC 1491
10. Maharashtra State Board of Secondary Education Vs. Paritosh Bhupesh Kumar Sheth, AIR 1984 SC 1543

(Delivered by Hon'ble Sudhir Agarwal, J.

&

Hon'ble Kaushal Jayendra Thaker, J.)

1. Heard Sri Bharat Ji Agrawal, learned Senior Counsel assisted by Sri Piyush Agrawal and Rahul Agrawal; Sri S.D.Singh, Senior Advocate assisted by Nishant Mishra and Diptiman Singh for the petitioners and Sri C.B. Tripathi, learned Standing Counsel for respondents.

2. Petitioners have filed these writ petitions under Article 226 of Constitution of India challenging vires of Section 42(4) and 42(5) of U.P. Value Added Tax Act, 2008 (hereinafter referred to as the 'Act, 2008') as substituted vide U.P. VAT (Amendment) Ordinance, 2008 which came to be substituted by U.P. VAT (Amendment) Act, 2008 i.e. U.P. Act No. 11 of 2008 (hereinafter referred to as the 'Amendment Act, 2008'). Some of the petitioners have also challenged validity of Rule 70(5) of U.P. Value Added Tax Rules, 2008 (hereinafter referred to as the 'Rules, 2008') as stands substituted by U.P. VAT (First Amendment) Rules, 2009.

3. In writ petition no. 1448 of 2009, writ of certiorari for quashing order dated 05.06.2009 passed by Joint Commissioner, Corporate Circle, Commercial Tax, Noida has also been prayed whereby respondent 3 has found that in view of amended provision, petitioner was supposed to deposit admitted tax of January 2008 to March 2008 by 20th October 2008 but it has been deposited late i.e. on 18.12.2008, 24.12.2008 and 31.12.2008. Hence petitioner is liable to pay interest on the aforesaid delayed payment. Respondent no. 3 has held petitioner liable to pay penalty under Section 54(1)(1) at the rate of 20 per cent of tax paid that is Rs. 10,62,929/- in respect to Provincial Tax and Rs. 19,06,785/- in respect to Central Tax.

4. Petition No. 1449 of 2009 (hereinafter referred to as the 'Second Petition') also deals with a similar order dated 06.06.2009 of penalty under Section 54(1)(1) for alleged delayed payment of due tax for the month of April 2008 which according to respondent 3 was liable to be deposited up to 20.11.2008 but was actually deposited in December 2008, therefore, in respect to Provincial Tax it has demanded penalty of Rs. 25,35,230/- and in respect of Central Tax amount of penalty imposed is Rs. 33,97,959/-.

5. Petition No. 1450 of 2009 (hereinafter referred to as the 'Third Petition') relates to similar order dated 06.06.2009 for alleged delayed payment of due tax for the month of May 2008 which was payable by petitioner up to 20.12.2008 but deposited on 31.12.2008 and in January and February 2009 Penalty for Provincial Tax under Section 54(1)(1) has been imposed at Rs. 23,52,870/- and in respect to Central Tax it is Rs. 43,03,582/-.

6. In Writ Petition No. 870 of 2009 notice dated 25.02.2009 issued by Joint Commissioner has been challenged since it has informed petitioner M/s. ACC Ltd. that it has withheld net tax payable for the period January 2008 to June 2008 whereupon it will have to pay interest under Section 33(2) of Act, 2008.

7. In Writ Petition No. 1680 of 2008 Joint Commissioner has issued notice dated 21.07.2008 which has also been challenged whereupon petitioner M/s. H-One India Pvt. Ltd. has been directed to deposit tax of January 2008 to June 2008 by 25.07.2008.

8. Similar notices requiring payment of tax which was not paid under exemption benefit have been challenged in the remaining three writ petitions for different periods upto June 2008.

9. With the agreement of learned counsel for the parties, for the purpose of pleadings, we have taken writ petition no. 1448 of 2009 as the leading case. The facts in brief giving rise to the dispute in question are stated as under:

10. Petitioner M/S Uflex Limited is a Company incorporated under Companies Act, 1956 (*hereinafter referred to as the 'Act, 1956'*). It established a new unit pursuant to the representation made by State Government in the notification dated 31.03.1995, allowing certain tax exemptions. Petitioner's unit was established for manufacture of printed and unprinted multi layer laminated metal and non metal plastic films etc. It has its unit established at Plot No. A-1, Sector-60 and D-1 to 15, 16 Sector 59, New Okhla Industrial Development Authority (*hereinafter referred to as the 'NOIDA'*). Since petitioner satisfied all the requirements of tax exemption, it was granted eligibility certificate under Section 4-A of U.P. Trade Tax Act, 1948 (*hereinafter referred to as the 'Act, 1948'*) for a period of 15 years or to the extent of Rs. 959,51,76,417/- which ever is earlier. The exemption was granted w.e.f. 16.02.1995.

11. In normal circumstances, petitioner was entitled to avail aforesaid exemption up to 15.02.2010 or till the amount of exemption of tax reaches to the extent of Rs. 959,51,76,417/-, which ever is earlier.

12. The facts in all other writ petitions are similar, inasmuch as, all the petitioners have been granted eligibility certificate entitled for exemption and for the period of dispute i.e. from January 2008 to June 2008 it is admitted by respondents that exemption benefit was available to all the petitioners.

13. It so happened that Act, 1948 was repealed and a new Act i.e. Act, 2008 came to be enacted by Provincial Legislation w.e.f. 01.01.2008. Initially U.P. Value Added Tax Ordinance, 2007 was promulgated on December 20th 2007 and it was made effective from 01.01.2008. Section 42 of Ordinance provided that any industrial unit which was availing tax exemption or reduction in rate of tax under Section 4-A of Act, 1948 on 01.01.2008 and to whom facility of exemption was granted, shall continue to avail tax deferment in accordance with Section 42 of Ordinance. Section 42 of Ordinance is reproduced as under:

"(1) Notwithstanding anything contained in this Ordinance any industrial unit availing tax exemption or reduction in the rate of tax on the date of commencement of this Ordinance or an industrial unit which is granted the facility of exemption or reduction in the rate of tax under the erstwhile Act shall be treated as a unit availing tax deferment.

A unit availing tax deferment under the erstwhile Act on the commencement of this Ordinance or a unit, which is granted benefit of tax deferment under the erstwhile Act, shall continue to avail the said facility subject to such conditions as may be specified.

(2) *The unit availing the tax deferment as specified in sub-section (1) or a unit availing deferment facility under the erstwhile Act shall **be eligible to issue tax invoices and to claim input tax credit subject to provisions of section 13 of this Ordinance.***

(3) *The period of eligibility, the method of debiting eligibility amount, the repayment and any other benefits for all units availing tax deferment shall be in **such manner as may be prescribed.***"

(Emphasis added)

14. In exercise of powers under Section 79 read with Section 74, State Government framed rules i.e. Rules, 2008 and rule 70 thereof provided that a dealer holding eligibility certificate granted before commencement of Ordinance (later Act, 2008) shall be entitled for tax deferment for the extent and period mentioned in eligibility certificate, for balance amount and for the remaining period, as the case may be.

15. Subsequently, State Legislature in its wisdom decided to allow tax exemption to eligible unit by way of refund of tax in the next month after the same is deposited in preceding month along with return. As a consequence thereof U.P. Value Added Tax (Amendment) Ordinance, 2008 (U.P. Ordinance No. 3 of 2008) (hereinafter referred to as the 'Amendment Ordinance, 2008') was enacted vide notification dated 16.07.2008 by which Section 42 was substituted w.e.f. 01.01.2008. Relevant Section 42 (4), (5), (6) and (7) are reproduced as under:

"42-- *Treatment of industrial units availing exemption or reduction in the rate of tax under erstwhile Act -*

.....

(4) *The industrial unit availing benefit of exemption from, or reduction in the rate of, tax on the turnover of sales before the date of commencement of this Act or an industrial unit which is granted the facility of exemption from, or reduction in the rate of, tax on or after such commencement, on the turnover of sales under the erstwhile Act or the Central Sales Tax Act, 1956, **shall be entitled for exemption by way of refund of net tax paid along with the return of tax period in prescribed manner and on fulfilling the conditions that,-***

(a) *the unit shall hold valid registration certificate issued under this Act or under the Central Sales Tax Act, 1956*

(b) *the unit shall have a valid Certificate of Entitlement issued by the Commissioner,*

(c) *the amount of refund shall not be more than an amount equal to net tax paid for relevant tax period,*

(d) the net tax payable has been deposited along with return of tax period in prescribed manner,

(e) the refund shall be subject to the provisions of section 40 except that the amount shall not be adjusted against the admitted tax liability,

(f) the facility of refund shall cease on the day when the amount or the period mentioned in the Certificate of Entitlement, whichever is earlier,

(g) the tax payable on the turnover of sales of goods mentioned in the Certificate of Entitlement and which is manufactured in the industrial unit shall be deducted from the total amount mentioned or described in the Certificate of Entitlement,

(h) the industrial unit has not misused the facility of exemption from or reduction in the rate of tax in any manner.

Explanation : The expression net amount of tax payable means -

(i) the differential amount of tax payable under this Act on the sale of taxable goods other than non-vat goods, manufactured in the unit and input tax credit available to the extent or proportionate to taxable goods other than non-vat goods sold; in case of an industrial unit availing facility of exemption from tax under the erstwhile Act and the Central Sales Tax Act, 1956.

(ii) the partial amount of net tax computed under clause (i) above, in proportion to the rate of tax available for exemption to the rate of tax payable under the erstwhile Act, in case of an industrial unit availing benefit of reduction in the rate of tax

(5) (a) The amount found refundable shall be refunded within a period of 30 days from the last date of the month in which dealer files the return of relevant tax period along with the proof of deposit of net tax payable.

(b) The amount of refund shall be made in such manner as may be prescribed.

(c) The industrial unit failing to deposit the net tax admittedly payable within prescribed time and in prescribed manner or deposits it after due date, the amount of interest leviable and penalty imposed if any, shall be adjusted and only the balance amount shall be refunded.

(6) (a) The total amount of the refund shall be limited to the extent of the differential amount of the total eligible amount available for exemption or reduction in the rate of tax and the amount availed in exemption or reduction in the rate of tax before the commencement of this Act.

(b) The total period of the refund shall not exceed difference of the total period available for exemption or reduction in the rate of tax and the period exhausted before the commencement of this Act.

(7) If any amount is found refundable and is not refunded within the prescribed time, the industrial unit shall be entitled to simple interest at the rate of twelve percent per annum from the last date prescribed for refund. The amount of interest shall be refunded in such manner as may be prescribed."

(Emphasis added)

16. The aforesaid amendment of Section 42 by substitution was given effect from 01.01.2008. Amended Section 42(1) provided that no industrial unit availing benefit of exemption or of reduction in the rate of tax or granted benefit of tax from exemption or reduction in the rate of tax under Act, 1948 and Central Sales Tax Act, 1956 shall be permitted to avail benefit of exemption or reduction in the rate of tax on the turn over of sale and purchase or both, as the case may be, on or after the commencement of Act, 2008. Sub Section (3) however, provided such units availing benefit of exemption etc. to apply Government for issue of a certificate for entitlement in prescribed form and in prescribed manner.

17. Petitioners filed applications for grant of certificate of entitlement as contemplated under Section 42(3) which was granted by Commissioner, Commercial Taxes, U.P. (*hereinafter referred to as the 'CCT'*). The certificate of entitlement was granted to all the petitioners on different dates but for the purpose of record, it may be stated that petitioner M/s. Uflex Ltd. CCT was granted certificate of entitlement dated 07.11.2008 wherein period of entitlement for exemption mentioned is 01.01.2008 to 15.02.2010. Certificate further mention amount of entitlement of refund as Rs. 721,08,88,090.94.

18. For the purpose of availing entitlement for exemption under Act, 2008 as amended by Amendment Ordinance, 2008, a unit would have to deposit net tax payable along with return of tax period in prescribed manner. Sub section (4) of Section 42 provided that thereafter unit would be entitled for exemption by way of refund of net tax paid along with return of tax period.

19. The manner of submission of tax return is contained in Section 24 of Act, 2008 and relevant part of Section 24 reads as under:

"24. Submission of tax returns--(1)Every taxable dealer including a dealer from whom any amount of tax has been deducted at source under section 34, shall, for such tax period and within such time, as may be prescribed, submit tax return of his self assessed turnover and tax, in such form and verified in such manner as may be prescribed, but the assessing authority may in its discretion and for reasons to be recorded, extend the date for submission of the return by any dealer or class of dealers:

Provided that every taxable dealer, including a dealer who claims input tax credit, shall also submit along with tax return a list of-

(i) purchases of goods made from registered dealer in respect of which the dealer has received tax invoices;

(ii) sales of goods made to registered dealers in respect of which the dealer has issued tax invoices; and

(iii) sale made to dealers to whom sale invoices have been issued in the names of such dealers, containing such particulars as may be prescribed:

(2) Before submitting the tax return under sub-section (1), the dealer shall, in the manner prescribed, deposit the net amount of tax payable shown in such tax return along with amount, if any, realized in excess of amount of tax due under this Act from purchasers of goods during the tax period.

(3) Every person or dealer to whom provisions of section 34 apply, shall, in respect of dealers from whom any amount of tax has been deducted, submit such statement within such time as may be prescribed.

(4) Where as a consequence of the date for the submission of return being extended under subsection (1) on the application of the dealer, the deposit of tax under sub-section (2) is deferred, there shall be payable simple interest at the rate of one and quarter percent per men sum on such deposit for the period commencing on the last date prescribed for submission of the tax return and ending with the date of deposit of such amount.

(5) If any dealer discovers any omission or other error in any tax return submitted by him, he may, at any time before the expiry of the time prescribed for submitting the next tax return, submit a revised tax return. If the revised tax return shows a greater amount of tax to be due than was shown in the original return, the dealer shall also deposit separately the difference of tax due and the interest payable under sub-section (4) as if the time for submitting the original tax return had been extended on the application of the dealer to the date of submission of the revised tax return. If, the revised tax return shows lesser amount of tax to be due than was shown in the original tax return the dealer may adjust the excess amount towards the tax due for the subsequent tax periods.

....."

20. Under Rule 45 return has to be filed for each calendar month of assessment year and every month shall be treated as tax period. The relevant part of Rule 45 reads as under :

Rule 45. Submission of returns - (1) In cases of dealers mentioned in the following clauses, tax periods referred to in section 24, shall be as given in each such clause :-

(a) in case of a dealer who becomes liable for payment of tax for the first time in any assessment year, tax periods shall be as under:

(i) first tax period for such assessment year shall commence on the date on which the dealer has become liable for payment of tax and shall end with the last day of the calendar month in which the dealer has become liable for payment of tax;

(ii) after expiry of first tax period, **each calendar month, of the assessment year in which the dealer has become liable for payment of tax, shall be a tax period;**

.....

(2) Except as provided in sub rule (10) of this rule, every dealer liable to pay tax, shall, before expiry of a period of twenty days, commencing on the day following the day on which a tax period has expired, submit to his assessing authority tax return for each tax period in Form XXIV along with detailed information, according to code numbers notified by the State Government from time to time, in respect of each category of goods in which he carries on business:

Provided that a dealer, whose aggregate of turnover, referred to in sub-rule (1), for any assessment year, is likely to exceed twenty-five lakh rupees or whose such aggregate for the assessment year or part of the assessment year, as the case may be, immediately preceding such assessment year, has exceeded twenty-five lakh rupees, shall, before expiry of a period of twenty days after the last day of each calendar month of a quarter referred to in clause (b) of subrule (1), deposit amount of net tax payable by him and Treasury Challan of such deposit shall be submitted to the assessing authority and shall submit to his assessing authority tax return within twenty days after expiry of the quarter along with proof of deposit of net amount of tax payable by him.

(4) **Before submitting the return under sub-rule (2) for a tax period, the dealer shall in the manner laid down in these rules, deposit the net amount of tax payable by him under the Act as disclosed in the return** and shall submit to the assessing authority, along with the return a copy of the treasury challan in Form I:

Provided that where a Government department wants to deposit the tax by book transfer, such department shall, before submitting such return, prepare a bill, in triplicate, for the net amount of tax payable, endorse it to the assessing authority in accordance with the financial rules on the subject and two copies thereof with such return. One of the copies shall be retained by the assessing authority and the other copy shall be sent to the Accountant General, Uttar Pradesh for crediting the amount to the account of the Commercial Tax Department.

Provided further that the net tax payable upto 20th March for the tax period ending on 31st March of an assessment year, shall be deposited and Treasury Challan of such deposit shall be submitted to the assessing authority upto 25th March of that year.

(5) The amount deducted under sub-section (1) or sub-section (7) of section 34 , shall be deposited into the Government Treasury by the person making such deduction before the expiry of period of twenty days commencing on the day following the last day of the month in which deduction is made.

(6) Every person, responsible for making tax deduction under any provision of section 34, shall, for each quarter ending with thirtieth June, thirtieth September, thirty-first December and thirty-first of March of each assessment year, submit the statement in Form XXV containing following particulars:

.....

(8) Dealers having more than one place of business shall include the turnover of all branches of his business in Uttar Pradesh in the return submitted for the principal place of business and shall send intimation thereof to each Assessing Authority concerned.

*(9) **Upon expiry of the assessment year**, every person liable to deduct amount of tax at source under provisions of section 34, **shall submit to the Assessing Authority having jurisdiction over the principal place** of business of such person, **a statement in Form XXVII on or before October 31, for the preceding assessment year**,*

Provided that the assessing authority may, on request of the person concerned and for adequate reasons to be recorded in writing, extend the time for filing such statement for a period not exceeding ninety days.

.....

21. Thus, even after grant of certificate of entitlement, an industry availing benefit of tax exemption would have got benefit only when first it has to deposit net tax along with return and thereafter such deposited tax shall be refunded.

22. Amendment Ordinance, 2008 came to be substituted by U.P. Act No. 19 of 2008 published on 29.08.2008 and came into force w.e.f. 01.01.2008.

23. So far as section 42 is concerned, it is in this backdrop, dispute which has arisen relates to the period of January 2008 to June 2008 for which time to file return and deposit of tax had already expired and it was not practically feasible to comply with the requirements of Section 42 as amended.

24. Thereafter, Rule 70 was also amended by Amendment Rules, 2009 vide notification dated 30.01.2009 which came into force from the date of publication in gazette. Rule 70 as it existed earlier and stood after amendment by notification dated 30.01.2009 is reproduced as under:

Column-I Existing rule	Column-II Rule as hereby substituted
(1) Subject to other provisions of this rule, dealers holding eligibility certificate, granted before, on or after the date of commencement of the Act, shall be eligible for tax deferment, referred to in section 42 to the extent and for the period, whichever expires earlier, as under: (a)(i) In case of an industrial unit referred to in first paragraph of sub-section (1), to the extent of the difference of the amount of exemption from tax mentioned in the eligibility certificate and the aggregate of amounts of exemption from payment of tax that has been availed, either under the Uttar Pradesh Trade Tax Act, 1948 or under the Central Sales Tax Act, 1956, before the date of the commencement of the Act; and (ii) In case of an industrial unit referred to in second paragraph of sub-section (1) of section 42 of the Act, to the extent of balance amount as on the date of commencement of the Act liable for deferment. (b) For the remaining period of exemption from tax as on the date of the commencement of this Act, out of the maximum period mentioned in the eligibility certificate. (2) Facility of deferment shall be available in respect of net amount of tax payable under the Act.	(1) Industrial unit availing or granted the facility of exemption or reduction in the rate of tax under erstwhile Act, may apply to the Commissioner for issue of certificate of entitlement duly filled and signed by the person authorized under sub-rule (6) of rule 32, in form XLV up to 31st August 2008 or within thirty days from the date of publication of this rule whichever is later. (2) A copy of the application along with enclosures, if any, shall be served to the assessing authority and certified copy of such receipt shall be annexed to the application. (3) The assessing authority shall, after examining relevant record and after giving the dealer a reasonable opportunity of being heard if necessary, send to the Commissioner a report in form XLVI within a period of thirty days from the date of receipt of the application. (4) If the Commissioner is satisfied that information furnished is correct and complete and report of the assessing authority confirms the particulars of the application, he shall issue the certificate of entitlement in form XLVII within sixty days of the receipt of the application. (5) If the net tax payable for tax periods commencing on January 2008 and ending with 30th June 2008, has not been deposited along with return of the tax period the same shall be deposited in following time schedule:-

Explanation: Net amount of tax payable means- (a) In case of an industrial unit availing facility of exemption under the Uttar Pradesh Trade Tax Act, 1948 and Central Sales Tax Act, 1956 shall be the differential amount of tax payable under the Act on the sale of taxable goods other than non-vat goods, manufactured in the unit and input tax credit available to the extent or proportionate to taxable goods other than non-vat goods sold. (b) In case of an industrial unit availing reduction in the rate of tax, the net tax payable will be the partial amount of net tax computed as described in sub-clause (a) of this explanation in proportion to the rate of tax available for exemption to the rate of tax payable under the Uttar Pradesh Trade Tax Act, 1948 as if the Uttar Pradesh Trade Tax Act, 1948 had not been repealed. (3) Facility of tax deferment shall be available under the Uttar Pradesh Value Added Tax Act, 2008 and the Central Sales Tax Act, 1956. (4) Aggregate of amounts of tax, payment of which is deferred for each assessment year under the Uttar Pradesh Value Added Tax Act, 2008 and the Central Sales Tax Act, 1956, shall be debited against the differential amount referred to in sub-clause (i) or sub-clause (ii) of clause(a) of sub-rule (1), as may be applicable. (5) Payment of tax, for which facility of	S.N.	Tax period ending on	Date up to which net tax has to be deposited
	1	31.03.2008	20.08.2008
	2	29.02.2008	20.09.2008
	3	31.03.2008	20.10.2008
	4	30.04.2008	20.11.2008
	5	31.05.2008	20.12.2008
	6	30.06.2008	31.07.2008
	(6) The net tax payable for the tax period after the tax period ending on 30th June 2008 shall be deposited along with return of the relevant tax period. (7) If an industrial unit fails to deposit the net tax payable for the period and within the time prescribed under sub-rule (5) of this rule, the unit shall be liable to pay the interest provided under subsection (2) of section 33 of the Act and penalty, if any, in accordance with the provisions of section 54 of the Act (8) The amount of refund or interest if any, under section 42 of the Act shall be made in accordance with the provisions of the rules 50 and 51. (9) Aggregate of amounts of tax payable under the Act and the Central Sales Tax Act, 1956, shall be debited from the amount mentioned in the certificate of entitlement. (10) Payment of tax, for which facility of deferment is available, for any assessment year, shall be deferred for a period of five years and such period of five years shall		

deferment is available, for any assessment year, shall be deferred for a period of five years and such period of five years shall commence on the date immediately following the last date prescribed for submission of tax return of the last tax period of such assessment year. (6) The dealer availing the facility of deferment of net tax payable under the Act shall file statement of computation of net tax payable, total amount of eligibility, amount availed up to last month, amount availed in the month and balance at the end of the month, along with the return of the tax period.	commence on the date immediately following the last date prescribed for submission of tax return of the last tax period of such assessment year. (11) The dealer availing the facility of deferment or refund of net tax payable under the Act shall file statement of computation of net tax payable, total amount of eligibility, amount availed up to last month, amount availed in the month and balance at the end of the month, along with the return of the tax period in form XLVIII
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(Emphasis added)

25. This substituted Rule 70(5) though came into force on 30.01.2009 but requires industrial units availing exemption/ concession to deposit tax payable during the period of January 2008 to May 2008 by 20.08.2008 to 20.12.2008, but for the period of June 2008 by 31st July 2008. Sub Rule 7 further provides, if an industrial unit failed to pay tax as prescribed under sub Rule (5), unit shall be liable to pay interest under Section 33(2) and penalty under Section 54.

26. The short and crucial issue raised in these writ petitions is that compliance of deposit of net tax to which petitioners were entitled for exemption with regard to period of January 2008 to June 2008 was practically impossible for the reason that Section 42 for the first time making such different procedure came to be enacted on 16.07.2008 and relevant rule came to be enacted on 30.01.2009 by which date time for deposit of tax along with return had already elapsed. The submission is that petitioners and other similarly placed industries could have never imagined or dreamt that in future legislature will change scheme for entitlement of tax benefit for remaining period/ amount in a totally different manner i.e. first amount of tax along with return would be deposited and thereafter refund would be claimed. Before enactment of Ordinance of 16.07.2008, petitioners had strictly and honestly followed requirement of statute as it was. Even the requirement of amended provision is not objectionable to petitioners but impossibility in the manner of compliance required by legislature renders the said provisions illogical, irrational and arbitrary. It is also contended that in case the provisions are not irrational or arbitrary yet for observance and compliance a reasonable opportunity has to be given to concerned industries like petitioners and therefore, the aforesaid provisions need to be read down in a manner so that intention of legislature become practicable and is capable of compliance. A provision has to be read as to make entire

things workable and functional, compliance for the period, already expired before actual amendment is just improbable and impossible.

27. The learned Standing Counsel when confronted with the situation could not dispute that with respect to period of January 2008 to June 2008 apparently an industry could not have complied with provisions since returns had already been filed and time to file return and deposit tax as per amended statute has already expired. He also could not dispute that even time frame mentioned in sub Rule (5) of Rule 70 having already expired, no one could have complied the same and necessarily all the industries availing tax exemption would attract a liability of interest and penalty under Rule 70(6) and (7) though have not committed anything wrong or illegal. He however, submitted that provision by itself is not irrational and arbitrary but can always be read in a manner so as to render it functional, practicable and compliant.

28. We have heard learned counsel for the parties, perused the authorities and relevant statutes.

29. The amended scheme of deposit of net amount of tax to which petitioners industries were entitled for exemption alongwith return per-se is neither illegal nor arbitrary nor violates any constitutional provision nor the legislature lacks competence in changing its policy and amending statute. Therefore, Section 42(4) and (5) as enacted by amendment Act, 2008 cannot be said to be ultra-vires. We find no force in the submission that Section 42(4) and (5) as amended by Amendment Act, 2008 are bad for any reason whatsoever, and have no hesitation in us holding the same. However, the question is whether compliance of Section 42(4)(d) of Act, 2008 as amended by Amendment Act, 2008 read with Rule 70(5) as amended by U.P. VAT (First Amendment) Rules, 2009 requires petitioners or any person similarly situated, to do something which is practicably possible. A provision compliance whereof is improbable, irrational, in that view of the matter is Rule 70(5) of U.P. VAT (First Amendment) Rules, 2009 is invalid, irrational and unreasonable.

30. Section 42(4)(d) as amended by Amendment Act, 2008 seeks compliance in the "prescribed manner". Under existing Act, 2008, and Rules 2008, there was no provision with regard to deposit of tax, by industrial units having certificate of entitlement for exemption of tax along with return, therefore, no procedure or scheme was prescribed till Rule 70 was amended by U.P. VAT (First Amendment) Rules, 2009. The amended Rule 70 provides the manner in which net tax payable along with return shall be paid and thus for the first time requirement of Section 42(4)(d) as amended by Amendment Act, 2008 satisfied 'prescribed manner' only on 30.01.2009 and not before that.

31. Now, rule framing authority in its wisdom requires deposit of tax and filing of return for January 2008 by September 2008, March 2008 by October 2008, April 2008 by November 2008, May 2008 by December 2008 and for the month of June 2008 since amendment by Ordinance was made by notification dated 16.07.2008, therefore, time was prescribed upto 31.07.2008. Unfortunately, rule framing authority completely missed and erred in failing to

appreciate that the period by which compliance under amended Rule 70(5) was required, has long expired before actual framing of Rule 70(5) vide U.P. Value Added Tax (First Amendment) Rules, 2009 which came to be published by notification dated 30.01.2009.

32. Even, learned Standing Counsel for respondents could not explain any logic or rational for mentioning such period for compliance under amended Rule 70(5) which has already expired. There is a well accepted principle in law that law does not require anyone to perform something which is impossible or improbable or cannot be performed by any person of ordinary prudence in the given facts and circumstances and situation. The Principal Legislature require compliance of deposit of tax by amended Section 42 of Act, 2008 vide amendment Act, 2008 in the manner prescribed. Delegated legislation acted and complied the requirement of "prescribed manner" by framing Rules laying down as to how and when tax shall be deposited and return shall be filed as required by the amended Section 42(4)(d). Rule framing authorities, however, sit tight and idle for more than 5-6 months and only on 30.01.2009 framed Rules providing time schedule. But this prescribed period has already expired long back.

33. Can such a provision be held rational and valid? Our obvious emphatic answer is 'No'. Since neither such provision is capable of read down in such a manner so as to render it rational such a provision which require compliance just impossible, valid law. There is a well known maxim, "Lex Non Cogit ad impossibilia" The law does not compel a man to do that which he cannot possibly perform. The other similarly recognized legal maxims are "Impotentia Excusat Legim" and "neon tenatur ad impossibilia." Where the law creates a duty, and the party is disable to perform it without any default in him and has no remedy over there, the law will excuse him.

34. The aforesaid doctrines have been accepted, approved and applied by Courts, in India also, in Cochin State Power and Light Corporation Ltd. Vs. State of Kerala AIR 1965 SC 1688, Court followed the aforesaid maxims and held:

"The performance of this impossible duty must be excused in accordance with the maxim, lex non cogit ad impossibilia (the law does not compel the doing of impossibilities), and sub-s. (4) of S. 6 must be construed as not being applicable to a case where compliance with it is impossible". (para 8)

35. A Constitution Bench of seven Hon'ble Judges in Re: Presential Pool 1974 (2) SCC 33: (AIR 1974 SC 1682) held as under:

"The maxim of law impotentia excusat legam is intimately connected with another maxim of law lex non cogit ad impossibilia. Impotentia excusat legam is that when there is a necessary or invincible disability to perform the mandatory part of the law that impotentia excuses. The law does not compel one to do that which one cannot possibly perform. "Where that law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him." Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by

circumstances over which the persons interested had no control, like the act of God, the circumstances will be taken as a valid excuse. Where the act of God prevents the compliance of the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God. (See Broom's Legal Maxim 10th Edition at PP. 162-163 and Craies on Statute Law 6th Ed. At p. 268)" (para 15)

36. In State of Rajasthan versus Shamsher Singh AIR 1985 SC 1082, Court, while considering a case under Notional Security Act, applied the aforesaid doctrine and held as under:

"Mr. Jethmalani placed before us a passage from broom's Legal Maxims (p. 162), 10th Edn. Where the doctrine of impossibility of performance (lex non cogitat impossibilia) has been discussed. It has been indicated therein that however mandatory the provision may be where it is impossible of compliance that would be a sufficient excuse for non-compliance, particularly when it is a question of the time factor, keeping the attendant circumstances of this case in view, we find it difficult to hold that the time taken by the State Government can amount to withholding of the representation which resulted in non-compliance of S. 10 of the Act so as to vitiate the detention." (para 10)

37. Rajesh D. Darbar versus Narsing Rao Krishnaji Kulkarni & others (2003) 7 SCC 219, it was held:

"The other maxim is, lex non cogit an impossibilia i.e. law does not compel a man to do that what he cannot possibly perform. The applicability of the abovesaid maxim has been approved by this Court in Raj Kumar Dey v. Tarapada Dey : AIR 1987 SC 2195 Gursharan Singh V. New Delhi Municipal Committee : AIR 1996 SC 1175 and Mohd. Gazi Vs. State of M.P. : AIR 2000 SC 1806 (para 6)

38. This was followed again in Ram Chandra Singh versus Sabitri Devi & Others 2003 (8) SCC 319 (para 41). In the case of Industrial Financial Corporation of India Ltd. versus Cannanore Spinning & Waving Mills Ltd. AIR 2002 Supreme Court 1841, Court held:

"The Latin Maxim referred to in the English judgment "lex non cogit ad impossibilia" also expressed as "impotentia excusat legem" in common English acceptation means, the law does not compel a man to do that which he cannot possibly perform. There ought always thus to be an invincible disability to perform the obligation and the same is akin to the Roman Maxim. "nemo tenetur ad impossibilia". (para 30)

39. A Constitutional Bench of Five Hon'ble Judges also considered the aforesaid maxim in Special Reference No. 1 of 2002 reported in AIR 2003 Supreme Court 1987 and held:

"The maxim of law impotentia excusat legem is intimately connected with another maxim of law lex non cogit ad impossibilia. Impotentia excusat legem is that when there is a necessary or invincible disability to perform the mandatory party of the law that impotentia

excuses. The law does not compel one to do that which one cannot possibly perform. "Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him". Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God, the circumstances will be taken as a valid excuse. Where the act of God prevents the compliance of the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God. (See Broom's Legal Maxims 10th Edition at pp. 1962-63 and Craies on Statute Law 6th Ed. p. 268.) These aspects were highlighted by this Court in Special Reference 1 of 1974 (1975 (1) SCR 504). Situations may be created by interested persons to see that elections do not take place and the caretaker government continue in office. This certainly would be against the scheme of the Constitution and the basic structure to that extent shall be corroded." (para 154)

40. In Board of Control of Cricket in India Vs. Netaji Cricket Club AIR 2005 SC 592, Court has again followed and approved the aforesaid maxim by referring to its earlier judgment in Rajesh D. Darbar, and said:

"The other maxim is, lex non cogit ad impossibilia, i.e. the law does not compel a man to do that what he cannot possibly perform....." (para 107)

41. In another judgment of Apex Court in HUDA and another Vs. Dr. Babeswar Kanhar 2005 (1) SCC 191 : AIR 2005 SC 1491 referring to certain English decisions, Court observed:

"Apart from the said section and various provisions in various other Acts, there is the general principle that party prevented from doing an act by some circumstances beyond his control, can do so at the first subsequent opportunity (see Sambasiva Chari Vs. Ramasami Reddi). The underlying object of the principle is to enable a person to do what he could have done on a holiday, on the next working day. Where, therefore, a period is prescribed for the performance of an act in a court or office, and that period expires on a holiday, then the act should be considered to have been done within that period if it is done on the next day on which the court or office is open. The reason is that law does not compel the performance of an impossibility (see Hossein Ally V. Donezelle 2.) Every consideration of Justice and expediency would require that the accepted principle which underlies Section 10 of the General Clauses Act should be applied in cases where it does not otherwise in terms apply. The principles underlying are lex non cogit ad impossibilia (the law does not compel a man to do the impossible) and actus curiae neminem gravabit (the act of court shall prejudice no man)" (para 5)

42. In Maharashtra State Board of Secondary Education Vs. Paritosh Bhupesh Kumar Seth AIR 1984 SC 1543, Court, in para 29 of judgment, observed as under:-

"It will be wholly wrong for the court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and gaoss root problems

involved in the workign of the system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded. It is equally important that the court should also, as far as possible, avoid any decision or interpretation of a statutory provision, rule or by law which would bring about the result of rendering the system uunworkable in practice".

43. We may add that the aforesaid principle has been followed by Division Bench of this Court in Inter College, Kasmali 2006 (2) ALJ 601.

44. When issues of a statute is challenged, Court presumes constitutionality unless shown otherwise but presumption cannot go to uphold a provision whereof compliance is impossible by any person and still that statute hold one guilty and further liable of penalty and other dues for non compliance.

45. In Maharashtra State Board of Secondary and Higher Education (supra) Court in para 21, 22 and 28 said:

"21. If of instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say parliament never intended to given authority to make such rules; they are unreasonable and ultra vires.

22. A law has to be adjudged for its constitutionality by the generality of cases it covers not by the freaks and exceptions it martyre.

28. The test of reasonableness is not applied in vaccum but in the context of life's realities."

(Emphasis added)

46. The above doctrine and also exposition of law that a statute cannot require performance of something which is impossible and places a burden upon a person for no fault of him has also been considered in ***M/s. D.C.M. Ltd. and others Vs. State of U.P. And others Writ C No. 9513 of 1989.***

47. In view of above exposition of law, when we look into the amended Rule 70(5) of Rule, 2008 as substituted by U.P. VAT (First Amendment) Rules, 2009, we find that rule framing authority, while framing a rule and enforcing the same on 30.01.2009, has required concerned units to deposit tax and submit return between July 2008 to December 2008 which is ex-facie irrational, unreasonable and improbable. When information by way of framing Rules is being given on 30.01.2009, no one can be expected to comply in retrospect i.e. during July 2008 to December 2008. In our view, Sub-rule (5) of Rule 70 as substituted by U.P. VAT (First Amendment) Rules,

2009 in Rules, 2008 is apparently irrational, arbitrary, illegal and unreasonable, hence violative of Article 14 of the Constitution. We have no hesitation in striking down the same, being wholly illegal, absurd, unfair and unreasonable, thus, violative of Article 14 of the Constitution.

48. Consequently, sub-rules (7) to (11) of Rule 70 in respect of net tax of January 2008 to June 2008 would render inoperative for the reason that they would come into operation only when a valid sub-Rule (5) is in existence but when we strike down sub-rule (5), consequences provided under sub-rule (7) and of Rule 70 also cannot be complied. Therefore, the same would become inoperative till a valid provision providing a rational procedure for compliance under Section 42(4)(d) is made by competent rule framing authority.

49. In view of above discussion, impugned notices and orders in all these writ petitions, issued by taxing authorities, are also hereby quashed.

50. Since dispute relates to deposit of tax from January 2008 to June 2008 and sufficient period had already elapsed since then, in order to mitigate and avoid any further scope of litigation and in the interest of both the parties, we provide and permit petitioners to deposit requisite amount of tax along with return within two months from today, if not already deposited, and if the said direction is complied with, respondent tax authorities shall treat said deposit and submission of return as due compliance of requirement of Section 42(4)(d) of Act, 2008 as amended by Amendment Act, 2008 and proceed accordingly for the purpose of refund of tax as provided under amended Section 42(5). If deposit has already been made, the same shall be treated as a deposit of tax in time then respondents shall proceed accordingly.

51. In case the direction as above, are not complied, with after two months from today, petitioners shall be deemed guilty of non compliance of deposit of tax and filing of return under Section 42(4) and then on all the relevant provisions including Rule 42(7) to (11) shall become operative with due consequences.

52. All writ petitions are partly allowed in the manner aforesaid. However, there shall be no order as to cost.

(2016) 8 ILRA 995
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.08.2016

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.

S.C.C. Revision Defective No.- 128 Of 2016

Jetendra Pandey

...Revisionist

Versus

Narain Jotwani

...Opposite party

Counsel for the Revisionist:

Anand Dubey

Counsel for the Opposite party:

Ashish Saxena, Brijesh Kumar Saxena

This revision has been filed against the order dated 20.5.2016 whereby the application filed under Order VI Rule 17 read with Section 151 CPC in SCC Suit No. 000187 of 2014 has been rejected on the ground that the revisionist has not shown due diligence in bringing on record the plea sought to be raised in the application, and it was found that allowing such a plea to be incorporated in the written statement at a stage when the suit proceedings had progressed to the stage of evidence which was about to close would defeat the expediency of proceedings.

I have given my anxious thought to the rival submissions made before this Court and it is found that an arbitration clause would not oust the jurisdiction of the civil court under Section-9 CPC or the remedy available under the Small Causes Court Act unless the parties invoke the arbitration clause at the threshold of dispute. Once the civil remedy is subscribed to by an aggrieved person by filing first statement, the course of arbitration shall stand obstructed due to the operation of Section 8 of the Arbitration Act. Moreover, once there is a failure on the part of the revisionist to take advantage of Section 8 of the Arbitration Act and from his conduct it is clear that the jurisdiction of the judicial authority has been subscribed to, for him waking up at a later stage to invoke the provision of Order VI Rule 17 for seeking an amendment which otherwise is not permissible under law, would defeat the very object of expediency of trial.

The civil revision is accordingly dismissed with no order as to cost.

Held: Para-

Case Law discussed : 2016 (34) LCD 177 (Ishaq @ Gama Ahmad v. Smt. Champa Devi); 2005 (23) LCD 658 (Murari Lal v. 5th Additional District Judge, Bulandshahr and others); 2008 All.

C.J. 2333 (Chander Kanta Bansal v. Rajinder Singh Anand); and (2001) 2 SCC 472 (Ragu Thilak D. John v. S. Rayappan and others).

Magma Leasing & Finance Ltd. V. Potluri Madhavilata, (2009)10 SCC 103, Santlal v. Ramkewal and others, 2014 (6) All. L.J. 602

(Delivered by Hon'ble Attau Rahman Masoodi, J.)

1. Heard Sri Anand Dubey, learned counsel for the revisionist and Sri B. K. Saxena, learned counsel for opposite party.

2. Delay in moving the revision is condoned.

3. This revision has been filed against the order dated 20.5.2016 whereby the application filed under Order VI Rule 17 read with Section 151 CPC in SCC Suit No. 000187 of 2014 has been rejected on the ground that the revisionist has not shown due diligence in bringing on record the plea sought to be raised in the application, and it was found that allowing such a plea to be incorporated in the written statement at a stage when the suit proceedings had progressed to the stage of evidence which was about to close would defeat the expediency of proceedings.

4. Before entering into other grounds of challenge against the impugned order passed on the application filed under Order VI Rule 17 CPC, it is desirable to answer whether such a plea in the teeth of Section-8 of the Arbitration Act, 1996 was at all open to be raised. A question to this effect has cropped up. The reason being that the lease deed postulates an arbitration clause and the plea of arbitration clause being available was not taken before filing of the written statement in order to stop suit proceedings to progress before the court below under the provisions of Provincial Small Causes Court Act, 1887. Now at an advanced stage when proceedings have reached the stage of evidence, it is questionable whether raising of such a plea is permissible under law.

5. Briefly stated, facts of the case are that the revisionist entered into a lease agreement with the opposite party in respect of the premises in question rented out to him on a monthly rent of Rs. 30,000/-for a period of five years, subject to other terms and conditions stipulated in the lease dated 27.12.2013. The monthly rent was payable in advance on the first day of every calendar month and various bills/taxes levied by the government and municipality and other local body/authority were liable to be paid by the lessee i.e. the revisionist. The revisionist-lessee as per the allegations made in the plaint was alleged to have breached not only the stipulation of payment of rent but also the dues payable to the local bodies, particularly electricity dues as such, occasion to terminate the tenancy by a written notice arose and tenancy was terminated on 19.7.2014. The tenant-lessee, however, is said to have not responded to the notice of termination of tenancy and continued to remain in arrears of rent as well as the dues towards other heads in terms of the lease deed. The failure to act in response to the notice of termination of tenancy, led to the institution of suit for eviction by the opposite party. The suit was filed in the month of August, 2014 wherein written statement was filed by the revisionist-respondent on 9.3.2015. The suit proceedings progressed further and have reached the stage of evidence with due participation of the parties. However, as aforesaid, an application under Order VI Rule 17 read with Section 151 CPC was filed by the revisionist whereby the stipulation of arbitration clause was sought to be pleaded through amendment in the written statement.

6. The application filed by the revisionist was opposed by the opposite party, namely, the plaintiff. The objections filed by the plaintiff clearly stated that a copy of the lease deed being available to the revisionist and its subject matter being known to him, such a defence was open but at this stage, through an amendment, taking the plea would be impermissible. The amendment was also opposed on the strength of the provisions underlying the Order VI Rule 17. The court below, having regard to the facts and circumstances of the case, has rejected the application by means of the impugned order, giving rise to the present revision.

7. It is argued by learned counsel for the revisionist that the court below without delving into the subject matter of the application on the touchstone of Section 8 of the Act, has only dealt with the application within the purview of Order VI Rule 17. The submission proceeds that unless the application was allowed, the issue that arbitration clause bars the suit would be decided at a later stage. In other words, the stage of appreciating the grievance in the light of Section 8 of the Arbitration Act would arise only after allowing the application. Failure on the part of revisionist to act diligently is attributed to the negligence on the part of counsel who was previously conducting the case.

8. Learned counsel for the revisionist essentially argued that the application for amendment ought to have been allowed and legality of the objections was open to be considered later but the court below having failed to do so, has committed a manifest error of law warranting interference under Section 115 CPC.

9. Learned counsel for the revisionist placed reliance upon the decisions reported in **2016 (34) LCD 177 (Ishaq @ Gama Ahmad v. Smt. Champa Devi)**; **2005 (23) LCD 658 (Murari Lal v. 5th Additional District Judge, Bulandshahr and others)**; **2008 All. C.J. 2333 (Chander Kanta Bansal v. Rajinder Singh Anand)**; and **(2001) 2 SCC 472 (Ragu Thilak D. John v. S. Rayappan and others)**. Relying upon the aforesaid, it is submitted that the plea giving rise to a legal question, was open to be taken at any stage of the proceedings and precluding the revisionist to advance such a plea amounts to miscarriage of justice.

10. Per contra, learned counsel for the respondent, while defending the impugned order, argued that the court below while passing the impugned order has not committed any error of law, rather, the very application filed by the revisionist for seeking an amendment in the written statement is in the teeth of Section 8 of the Arbitration Act, which permits the plea of arbitration to be raised before the stage of filing written statement. It is argued that once stage of filing an application under Section 8 is allowed to lapse, the revisionist having waived the right available to him, cannot turn around for taking shelter of such a plea after filing the written statement. In fact, inclusion of such a plea in the written statement itself amounts to waiver of right, therefore, the application filed by the revisionist erodes the foundation of his own case.

11. Section 8 of the Arbitration Act being relevant for the present controversy is extracted below:

"8. Power to refer parties to arbitration where there is an arbitration agreement:-

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

12. From a plain reading of the aforesaid provision, it is clear that it is always open to a party to raise objection on the strength of an arbitration clause before subscribing to the jurisdiction of a judicial authority which in the present case is the Judge, Small Causes Court. Once the written statement was filed before the court below, the stage of filing an application under Section 8 of the Arbitration Act was allowed to lapse by the revisionist consciously. To turn the clock back for availing the benefit as was open to the revisionist at the time of instituting the suit proceedings seems to be too late. This Court finds that the revisionist had shown no inclination to protest on the strength of arbitration clause against the notice issued to him nor any protest was put up by filing an application before the court below under Section 8 of the Act so as to avoid suit proceedings in terms of clause-26 read with clause 29 of the agreement. The revisionist also failed to file an application raising the plea with regard to the arbitration clause before filing the written statement. In such a situation, inviting attention of this Court to the decision rendered by apex court rendered in **Branch Manager, Magma Leasing & Finance Ltd. v. Potluri Madhavilata, (2009)10 SCC 103** and by this Court in **Santlal v. Ramkewal and others, 2014 (6) All. L.J. 602**, it is demonstrated that the course adopted by the revisionist by filing an application under Order VI Rule 17 being not open in law and the scope of principles embodied thereunder being also against the revisionist, has rightly been construed by the court below while passing the impugned order.

13. I have given my anxious thought to the rival submissions made before this Court and it is found that an arbitration clause would not oust the jurisdiction of the civil court under Section-9 CPC or the remedy available under the Small Causes Court Act unless the parties invoke the arbitration clause at the threshold of dispute. Once the civil remedy is subscribed to by an aggrieved person by filing first statement, the course of arbitration shall stand obstructed due to the operation of Section 8 of the Arbitration Act. Moreover, once there is a failure on the part of the revisionist to take advantage of Section 8 of the Arbitration Act and from his conduct it is clear that the jurisdiction of the judicial authority has been subscribed to, for him waking up at a later stage to invoke the provision of Order VI Rule 17 for seeking an amendment which otherwise is not permissible under law, would defeat the very object of expediency of trial.

14. The order passed by the court below in the facts and circumstances of the present case does not suffer from any illegality so as to call for interference by this Court. The civil revision is accordingly dismissed with no order as to cost.

(2016) 8 ILRA 999
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.08.2016

BEFORE

THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE DR. VIJAY LAXMI, J.

Special Appeal No.- 175 Of 2016

Sudhir Kumar Mishra

...Appellant
Versus

State Of U.P. & Ors.

...Respondents

Counsel for the Appellant:

Anuj Kumar Garg, Ram Mohan Mishra

Counsel for the Respondents:

C.S.C.

This special appeal has been filed against the judgment and order dated 20.01.2016 passed by learned Single Judge in Writ Petition No.7501 (SS) of 2005, Sudhir Kumar Mishra vs. The State of Uttar Pradesh and others whereby the order dated 28.09.2006 of the state government rejecting the representation of the petitioner for compassionate appointment was confirmed and Writ Petition was dismissed.

The father of the appellant, Shri Rama Shanker Mishra, while working as Collection Amin at Tehsil Bighapur, District Unnao, died on 01.10.1996 leaving behind his widow, three daughters and the petitioner. The mother of the petitioner, Smt. Vijaya Devi, did not claim compassionate appointment but moved an application on 28.08.2000 before the District Magistrate, Unnao, making submissions that she did not claim compassionate appointment since she was neither qualified nor was able to take up employment due to her continued illness. Her three daughters were of marriageable age and were not inclined to take up any employment. Her only son, the petitioner, who was studying in Class-X, was not eligible for appointment as he was minor and was to attain majority in year 2004. In this situation, it was, thus, prayed that in view of amended provisions of Section 5 of the Uttar Pradesh Recruitment of Dependents of Government Servant Dying in Harness Rules, 1974 (in short referred to as "1974 Rules") period of 5 years may be relaxed in respect of her son who may be considered for employment and a post be kept reserved for employment of her son under the Rules.

On the basis of objective considerations founded on the disclosures made by the petitioner in this case for compassionate appointment and having considered the reasons for the delay, we are of the opinion that undue hardship within the meaning of the first proviso to Rule 5 of the Rules would be caused to the petitioner and his family by the application of the time limit of five years. The expression 'undue hardship' has not been defined in the Rules. Undue hardship would necessarily postulate a consideration of relevant facts and circumstances of the case. In view the income of the family, its financial condition, the extent of dependency and marital status of its members, its liabilities, the terminal benefits received by the family; the age, together with the nugatory income from any other sources in this case, we are of the view that the family continues to suffer financial distress and hardship occasioned by the death of the bread winner. Considering the penurious condition of the family, it appears to be one of the rarest of rare cases where due to exceptional

circumstances the family needs the extraordinary remedy to elate the condition of family. It would be appropriate to deal with the case of the petitioner in a just and equitable manner.
Appeal Allowed.

Held: Para-

Case Law discussed:

Shiv Kumar Dubey and Ors. Vs.State of U.P. and Ors. MANU/UP/0189/2014, 2014 (2)ADJ 312.

Shiv Kumar Dubey and Ors. Vs. State of U.P. and Ors.

Subhash Yadav vs. State of U.P. through Secretary Education Department (Basic) and Ors. MANU/UP/2289/2010, Umesh Kumar Nagpal v. State of Haryana and others, MANU/SC/0701/1994⊗1994) 4 SCC 138, Sushma Gosain and others v. Union of India and others, MANU/SC/0519/1989 : (1989) 4 SCC 468, Director of Education (Secondary) and another v. Pushpendra Kumar and others, MANU/SC/0373/1998 ⊗1998) 5 SCC 192, Haryana State Electricity Board and another Vs.Hakim Singh MANU/SC/0964/1997 , Md. Zamil Ahmed Vs.The State of Bihar and Ors. MANU/SC/0515/2016 ,

(Delivered by Hon'ble Dr. Vijay Laxmi, J.)

1. This special appeal has been filed against the judgment and order dated 20.01.2016 passed by learned Single Judge in Writ Petition No.7501 (SS) of 2005, Sudhir Kumar Mishra vs. The State of Uttar Pradesh and others whereby the order dated 28.09.2006 of the state government rejecting the representation of the petitioner for compassionate appointment was confirmed and Writ Petition was dismissed.

2. The father of the appellant, Shri Rama Shanker Mishra, while working as Collection Amin at Tehsil Bighapur, District Unnao, died on 01.10.1996 leaving behind his widow, three daughters and the petitioner. The mother of the petitioner, Smt. Vijaya Devi, did not claim compassionate appointment but moved an application on 28.08.2000 before the District Magistrate, Unnao, making submissions that she did not claim compassionate appointment since she was neither qualified nor was able to take up employment due to her continued illness. Her three daughters were of marriageable age and were not inclined to take up any employment. Her only son, the petitioner, who was studying in Class-X, was not eligible for appointment as he was minor and was to attain majority in year 2004. In this situation, it was, thus, prayed that in view of amended provisions of Section 5 of the Uttar Pradesh Recruitment of Dependents of Government Servant Dying in Harness Rules, 1974 (in short referred to as "1974 Rules") period of 5 years may be relaxed in respect of her son who may be considered for employment and a post be kept reserved for employment of her son under the Rules.

3. On her son completing the age of eighteen, her mother filed a representation on dated 11.08.2004 before the District Magistrate, Unnao seeking compassionate appointment of her son on the ground that the financial and social problems occasioned by the death of her husband continued. The said request of the petitioner's mother was declined by the order dated 08.07.2005. Being aggrieved with this order dated 08.07.2005, the petitioner filed a writ petition whereby the petitioner was directed by interim order dt. 21.11.2005 to file a fresh representation before the State of U.P. for reconsideration of his case and for allowing relaxation of time limit of 5 years as per

above Rule 1974. The petitioner submitted a representation accordingly on 12/19.12.2005 to the Secretary, Revenue Department, Government of Uttar Pradesh as well as to the District Magistrate, Unnao. The said representation was also rejected vide order dated 28.09.2006 by the State on the ground that it was time barred. The said order was challenged in Writ Petition No.7501 (SS) of 2005 which was dismissed by learned Single Judge hence this writ petition.

4. It is argued by learned counsel for the petitioner that there was no occasion for the State Government to reject the application of the petitioner for compassionate appointment. Learned counsel submitted placing reliance upon the report of Lekhpal and Tehsildar, Unnao dated 01.03.2005 that the said report indicated that the financial condition of petitioner's family continued to be poor and pitiable after death of the employee. The report is made available on the record by the State of U.P. It is submitted that the family was living hand to mouth.

5. The report dated 01.03.2006 reveals that the land admeasuring 1.575 hectare was recorded in the name of petitioner and his mother Vijaya Devi in the revenue records. The widow of the deceased employee is getting the pension from the department. The deceased was survived by his wife, three daughters and one son. The two daughters were still unmarried. The land was barren and their agricultural income was Rs.9,000/- per year. Thus, only means of livelihood was pension. It is submitted that the financial condition of the family continued to be critical and pitiable. Despite the recommendation of the District Magistrate, Unnao for granting relaxation of time beyond 5 years, the representation of the petitioner was illegally rejected by the state government without assigning any reason or ground in the impugned order dated 28.09.2006 and thus the order was challenged in Writ Petition No.7501 (SS) of 2005 which was dismissed, hence this special appeal. The petitioner has relied on the judgment of this Court in Shiv Kumar Dubey and Ors. Vs.State of U.P. and Ors. MANU/UP/0189/2014, 2014 (2)ADJ 312 in support of his case.

6. As against it, learned Additional Chief Standing Counsel vehemently argued that the application of the petitioner's mother requesting to reserve the vacancy till the petitioner attains majority, was not found sustainable in the absence of any such provision under 1974 Rules. It is contended that the elder daughter of the deceased employee, who was major and unmarried during the relevant time, could have sought benefit of seeking compassionate appointment well within the period of limitation. The widow of the deceased employee did not avail the said opportunity. In these circumstances, she was not entitled to the benefit of 1974 Rules and her request for relaxation was not maintainable.

7. It is also contended that compassionate appointment under 1974 Rules is given to grant immediate relief to the member of the family of the deceased employee in order to cope with the sudden demise of the bread earner of the family. It is an special legislation by-passing the regular procedure of making recruitment and, if the family of the deceased employee has been able to maintain itself for sufficiently long time, there is no justification for by-passing the regular recruitment process as happened in this case. Learned Single Judge has rightly observed that since the appellant had been able to survive for sixteen years, that was indicative of a lack of immediacy. The special appeal was liable to be dismissed.

8. We have considered the aforesaid submissions and have gone through the records. To appreciate the contentions, it is necessary to first examine the relevant provisions of the U.P Recruitment of Dependent of the Rules. The expression 'deceased Government servant' is defined by Clause (b) of Rule 2 to mean a Government servant who dies while in service. Rule 2(c) of the Rules defines 'family'. Rule 5 of U.P Recruitment of Dependent of the Rules, 1974 provides as follows:

5. Recruitment of a member of the family of the deceased.—

(1) In case a Government servant dies in harness after the commencement of these rules and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purposes, be given a suitable employment in Government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules if such person fulfils the educational qualifications prescribed for the post, is otherwise qualified for Government service; and makes the application for employment within five years from the date of the death of the Government servant:

Provided that where the State Government is satisfied that the time limit fixed for making the application for employment causes undue hardship in any particular case, it may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner.

Provided further that for the purpose of the aforesaid proviso, the person concerned shall explain the reasons and give proper justification in writing regarding the delay caused in making the application for employment after the expiry of the time limit fixed for making the application for employment along with the necessary documents/proof in support of such delay and the Government shall, after taking into consideration all the facts leading to such delay take the appropriate decision.

(2) As far as possible, such an employment should be given in department in which the deceased Government servant was employed prior to his death.

(3) Every appointment made under sub-rule (1) shall be subject to the condition that the person appointed under sub-rule (1) shall maintain other members of the family of deceased Government servant, who were dependent on the deceased Government servant immediately before his death and are unable to maintain themselves.

9. Rule 8 provides as under:

8. Relaxation from age and other requirements.--(1) The candidate seeking appointment under these rules must not be less than 18 years at the time of appointment.

(2) The procedural requirements for selection, such as written test or interview by a selection committee or any other authority shall be dispensed with, but it shall be open to the appointing authority to interview the candidate in order to satisfy itself that the candidate will be able to maintain the minimum standards of work and efficiency expected on the post. An appointment under these rules shall be made against an existing vacancy only.

10. Now, it is in this background it would be appropriate to mention the principles of the law laid down by this Court and Supreme Court on the subject. In Shiv Kumar Dubey and Ors. vs. State of U.P. and Ors. MANU/UP/0189/2014 this Court after elaborately analysing the basic precepts interpreted the provision of the Rules in the light of the principles of law which emerge from the judgment of this court and Supreme Court. This court thus formulated the principles which must govern compassionate appointment in pursuance of Dying in Harness Rules as under:

(i) A provision for compassionate appointment is an exception to the principle that there must be an equality of opportunity in matters of public employment. The exception to be constitutionally valid has to be carefully structured and implemented in order to confine compassionate appointment to only those situations which subserve the basic object and purpose which is sought to be achieved;

(ii) There is no general or vested right to compassionate appointment. Compassionate appointment can be claimed only where a scheme or rules provide for such appointment. Where such a provision is made in an administrative scheme or statutory rules, compassionate appointment must fall strictly within the scheme or, as the case may be, the rules;

(iii) The object and purpose of providing compassionate appointment is to enable the dependent members of the family of a deceased employee to tide over the immediate financial crisis caused by the death of the bread-earner;

(iv) In determining as to whether the family is in financial crisis, all relevant aspects must be borne in mind including the income of the family; its liabilities, the terminal benefits received by the family; the age, dependency and marital status of its members, together with the income from any other sources of employment;

(v) Where a long lapse of time has occurred since the date of death of the deceased employee, the sense of immediacy for seeking compassionate appointment would cease to exist and this would be a relevant circumstance which must weigh with the authorities in determining as to whether a case for the grant of compassionate appointment has been made out;

(vi) Rule 5 mandates that ordinarily, an application for compassionate appointment must be made within five years of the date of death of the deceased employee. The power conferred

by the first proviso is a discretion to relax the period in a case of undue hardship and for dealing with the case in a just and equitable manner;

(vii) The burden lies on the applicant, where there is a delay in making an application within the period of five years to establish a case on the basis of reasons and a justification supported by documentary and other evidence. It is for the State Government after considering all the facts to take an appropriate decision. The power to relax is in the nature of an exception and is conditioned by the existence of objective considerations to the satisfaction of the Government;

(viii) Provisions for the grant of compassionate appointment do not constitute a reservation of a post in favour of a member of the family of the deceased employee. Hence, there is no general right which can be asserted to the effect that a member of the family who was a minor at the time of death would be entitled to claim compassionate appointment upon attaining majority. Where the rules provide for a period of time within which an application has to be made, the operation of the rule is not suspended during the minority of a member of the family.

11. In Shiv Kumar Dubey case(supra), while interpreting the provisions of Rule 5, this Court observed that appointments to public offices have to comply with the requirements of Article 14 and Article 16 of the Constitution. Article 16 provides for equality of opportunity in matters of public employment. Compassionate appointment is in the nature of an exception to the ordinary norm of allowing equality of opportunity to every eligible person to compete for public employment. The reason for the exception as envisaged in the Rules is that the immediacy of the financial hardship that is sustained by a bereaved family by the death of its earning member is sought to be alleviated in a situation in which the Government servant died while in service. Rule 5 of the Rules applies where a Government servant has died in harness after the commencement of the Rules.

12. The Court further observed that Rules have been framed by the State Government in exercise of the powers conferred by the proviso to Article 309 of the Constitution. The Rules make it abundantly clear that the purpose and object underlying the provision for compassionate appointment is not to reserve a post for a member of the family of a deceased Government servant who has died while in service. The basic object and purpose is to provide a means to alleviate the financial distress of a family caused by the death of its member who was in Government service. This is the underlying theme or thread which cuts across almost every provision of the Rules.

13. It was further observed by the Court that the rationale for imposing a limit of five years beyond which an application cannot be entertained is that the purpose of compassionate appointment is to bridge the immediacy of the loss of an earning member and the financial distress that is sustained in consequence. A lapse of time is regarded by the Rules as leading to a dilution of the immediacy of the requirement. The discretionary power to relax the time limit of five years under first proviso to Rule 5 is in the nature of an exception. It is a power which is vested in the State Government, a circumstance which is indicative of the fact that the subordinate legislation

expects it to be exercised with scrupulous care. Ordinarily, the time limit of five years governs. The State Government may relax the norm on a careful evaluation of the circumstances mandated by the second proviso. It is but a matter of first principle that a discretionary power to relax the ordinary requirement should not swallow the main or substantive provision and render the basic purpose and object nugatory.

14. In *Subhash Yadav vs. State of U.P. through Secretary Education Department (Basic) and Ors.* MANU/UP/2289/2010, the Division Bench of this Court dealt with a situation where the father of the appellant had died in harness on 8 August 1994 when the appellant was six years of age. The appellant attained the age of majority on 5 December 2005 and made an application for compassionate appointment. The State Government declined to accord relaxation of the period of five years and the writ petition filed by the appellant was dismissed by a learned Single Judge who held that since the appellant had been able to survive for sixteen years, that was indicative of a lack of immediacy. The Division Bench held that the Government erred in rejecting the application on the ground that there was an inordinate delay and such a blanket reason without considering anything else would not be in conformity with the power which has been conferred on the State, to relax the time period, which has to be exercised reasonably. Hence, the Division Bench held that the authorities cannot reject an application "blindfold" if it had been moved after five years and were required to apply their mind rationally, exercising the discretion in view of other factors relating to the case.

15. In *Umesh Kumar Nagpal v. State of Haryana and others*, MANU/SC/0701/1994:(1994) 4 SCC 138, the Supreme Court explained the basic purpose of providing compassionate appointment to the dependent of a deceased employee who has died in harness:

The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non- manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency.... For these very reasons, the compassionate employment cannot be granted after a lapse of reasonable period which must be specified in the rules. The consideration for such employment is not a vested right which can be exercised at any time in future. The object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole breadwinner, the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over.

16. In **Director of Education (Secondary) and another v. Pushpendra Kumar and others**, MANU/SC/0373/1998 :(1998) 5 SCC 192, the Supreme Court while granting relief of compassionate appointment gave a direction that if no class III post is available in the institution in

which the deceased employee was employed or in any other institution in the district, the said respondent would be appointed against a Class IV post in the institution in which the deceased employee was employed and a supernumerary post in class IV be created for that purpose . To quote the relevant extract:

The object underlying a provision for grant of compassionate employment is to enable the family of the deceased employee to tide over the sudden crisis resulting due to death of the bread earner which has left the family in penury and without any means of livelihood. Out of pure humanitarian consideration and having regard to the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made for giving gainful appointment to one of the dependents of the deceased who may be eligible for such appointment. Such a provision makes a departure from the general provisions providing for appointment on the post by following a particular procedure. Since such a provision enables appointment being made without following the said procedure, it is in the nature of an exception to the general provisions. An exception cannot subsume the main provision to which it is an exception and thereby nullify the main provision by taking away completely the right conferred by the main provision. Care has, therefore, to be taken that a provision for grant of compassionate employment, which is in the nature of an exception to the general provisions, does not unduly interfere with the right of other persons who are eligible for appointment to seek employment against the post which would have been available to them, but for the provision enabling appointment being made on compassionate grounds of the dependent of a deceased employee.

17. In Sushma Gosain and others v. Union of India and others, MANU/SC/0519/1989 : (1989) 4 SCC 468 Supreme Court observed thus:

The purpose of providing appointment on compassionate ground is to mitigate the hardship due to death of the bread earner in the family. Such appointment should, therefore, be provided immediately to redeem the family in distress. It is improper to keep such case pending for years. If there is no suitable post for appointment supernumerary post should be created to accommodate the applicant.

18. In Jagdish Prasad Vs. State of Bihar and Anr. MANU/SC/0996/1996 Supreme Court observed as under:

3. It is contended for the appellant that when his father died in harness, the appellant was minor; the compassionate circumstances continue to subsist even till date and that, therefore, the Court is required to examine whether the appointment should be made on compassionate grounds. We are afraid, we cannot accede to the contention. The very object of appointment of a dependent of the deceased employees who die in harness is to relieve unexpected immediate hardship and distress cause to the family by sudden demise of the earning member of the family. Since the death occurred way back in 1971, in which year the appellant was four years old, it cannot be said that he is entitled to be appointed after he attained majority long thereafter. In other words, if that contention is accepted, it amounts to another mode of recruitment of the dependent of a deceased Government servant which cannot be encouraged de hors the recruitment rules.

19. In Haryana State Electricity Board and another Vs. Hakim Singh MANU/SC/0964/1997 Supreme Court observed as under:

12. We are of the view that the High Court has erred in over stretching the scope of the compassionate relief provided by the Board in the circulars as above. It appears that High Court would have treated the provision as a lien created by the Board for a dependent of the deceased employee. If the family members of the deceased employee can manage for fourteen years after his death one of his legal heirs cannot put forward claim as though it is a line of succession by virtue of a right of inheritance. The object of the provisions should not be forgotten that it is to give succour to the family to tide over the sudden financial crisis befallen the dependants on account of the untimely demise of its sole earning member.

20. In the leading case of **Md. Zamil Ahmed Vs. The State of Bihar and Ors.** **MANU/SC/0515/2016**, the Supreme Court upheld the validity of the compassionate appointment of the brother of the deceased constable who left behind him illiterate wife and four minor children and disapproved the action taken by the state of terminating his service on the ground that the Appellant being the only close relative of the deceased could be given the appointment in the circumstances prevailing in the family. It was observed that the action on the part of welfare state in terminating the appellant service on the ground that he was not dependent of the deceased cant be countenanced. The state was not permitted to terminate the services of the appellant as constable after 15 years of his appointment for the following reasons:

15. Firstly, the Appellant and wife of the deceased at the time of seeking compassionate appointment did not conceal any fact and nor filed any false or incorrect document/declaration. On the other hand, both of them disclosed their true family relations and conditions prevailing in the deceased family on affidavit.

16. Secondly, the Appellant, who is the brother of the deceased, undertook to maintain the family of the deceased in the event of his securing the compassionate appointment and he accordingly also gave such undertaking to the State.

17. Thirdly, there was no one in the family of the deceased to claim compassionate appointment except the Appellant who, as mentioned above, was the close relative of the deceased, i.e., real younger brother and used to live with the deceased. He was otherwise eligible to claim such appointment being major, educated and only male member in the family.

18. Fourthly, the Appellant after securing the employment throughout maintained the family of the deceased in all respects for the last more than 15 years and he is continuing to do so.

19. In the light of aforementioned reasons, which rightly persuaded the State to grant compassionate appointment to the Appellant, we do not find any justification on the part of the State to dig out the Appellant's case after 15 years of his appointment and terminate his services on the ground that as per the State policy, the Appellant did not fall within the definition of the expression "dependent of deceased" to claim compassionate appointment.

20. The fact that the Appellant was younger brother of the deceased was within the knowledge of the State. Similarly, the State was aware that the brother does not fall within the definition of

dependent at the relevant time and still the State authorities obtained the undertaking from the Appellant that he would maintain the family of the deceased once given the appointment.

21. In our considered view, the aforesaid facts would clearly show that it was a conscious decision taken by the State for giving an appointment to the Appellant being the younger brother of deceased constable for the benefit of the family members of the deceased who were facing financial hardship due to sudden demise of their bread earner. **In our view, it was a right decision taken by the State as a welfare state to help the family of the deceased at the time of need of the family.**

21. In the instant case, the petitioner submitted that when his father died he was only 4 years old and his mother informed the department that she would make application in prescribed form only when he attained majority. The department negated the representation in this matter taking stand that the application was not made within prescribed period. However, the petitioner's request for compassionate appointment was made soon after appellant attained majority. Under Rule 5 the time limit within which the dependant of the deceased employee is to be accommodated is fixed as five years. This period can be extended under proviso to Rule 5 where burden of proving the fact that compassionate circumstances continued to exist even till date was on the petitioner himself which he has successfully discharged in this case. There is sufficient evidence of the petitioner having aged and ailing mother, two unmarried sisters, the family having pension as the only source of livelihood, the agricultural land being barren causing nugatory income of about 9000/- per year, which appeared quite insufficient to enable the family to get over the financial crisis which is being faced by the family after the death of his father.

22. On the basis of objective considerations founded on the disclosures made by the petitioner in this case for compassionate appointment and having considered the reasons for the delay, we are of the opinion that undue hardship within the meaning of the first proviso to Rule 5 of the Rules would be caused to the petitioner and his family by the application of the time limit of five years. The expression 'undue hardship' has not been defined in the Rules. Undue hardship would necessarily postulate a consideration of relevant facts and circumstances of the case. In view of the income of the family, its financial condition, the extent of dependency and marital status of its members, its liabilities, the terminal benefits received by the family; the age, together with the nugatory income from any other sources in this case, we are of the view that the family continues to suffer financial distress and hardship occasioned by the death of the bread winner. Considering the penurious condition of the family, it appears to be one of the rarest of rare cases where due to exceptional circumstances the family needs the extraordinary remedy to elate the condition of family. It would be appropriate to deal with the case of the petitioner in a just and equitable manner.

23. In the result, we allow the appeal and in reversal of the order of the Learned Single Judge of this Court, we direct respondent No. 3 to consider the case of Sudhir Kumar- appellant for compassionate appointment within two months from the date on which the certified copy of this order is made available to the respondent No.3 by petitioner along with his representation.

(2016) 8 ILRA 1009
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.08.2016

BEFORE

THE HON'BLE SHASHI KANT GUPTA, J.
THE HON'BLE KAUSHAL JAYENDRA THAKER, J.

Criminal Appeal No.- 196 Of 1983

Chhotey Shah

...Appellant

Versus

State

...Respondent

Counsel for the Appellant:

V. Saran

Counsel for the Respondent:

A.G.A.

The Division Bench allowed the 33-year-old appeal against life imprisonment under Section 396 IPC for dacoity (with murder), acquitting sole surviving appellant Chhotey Shah due to unreliable identification in pitch-dark conditions, delayed test identification parade (100+ days post-incident), no recovery of looted property linking him, and flawed investigation (fabricated recovery from co-accused, inconsistencies in site plan and witness accounts).

Appeal **allowed**; conviction & life sentence **set aside**, appellant **acquitted** u/s 396 IPC

Held: Para-

Case Law discussed:

Iqbal Vs. State of U.P.(2015) 6 SCC 623, Budh Sen Vs. State of U.P.(1970) 2 SC C 128, Soni Vs. State of U.P. (1982)3 SCC 368 and Subhash and Shiv Shankar Vs.State of U.P. (1987) 3 SCC 331, Ram Babu Vs. State of U.P., (2010) 5 SCC 63,Nirmal Pasi Vs. State of Bihar, 2002 (6) JT 28, Budhsen Vs. State of U.P. and Others, AIR 1970 SC 1321 and that of State of Maharashtra Vs. Sukhdeo Singh, AIR 1992 SC 2100,

(Delivered by Hon'ble Shashi Kant Gupta, J.)

1. This appeal has been preferred by the accused-appellants against the judgment and order dated 15.12.1982 passed by the Special Judge, Badaun in Sessions Trial No. 414 of 1981, under Sections 396/412 IPC, Police Station Dataganj, District Badaun whereby the accused appellants have been convicted and sentenced to undergo imprisonment for life for the offence punishable under Section 396 IPC.

2. The present appeal was filed in the year 1983 against the impugned judgment dated 15.12.1982 and it has come up for hearing before us after lapse of almost a period of 33 years.

3. At the outset, it is pertinent to mention here that during the pendency of this appeal, the co-accused persons namely Ram Chandra and Dwarika, who filed the separate Criminal Appeal No. 3203 of 1982 have died. Accordingly, vide order dated 16.04.2016, this Court had abated the Criminal Appeal no. 3203 of 1982 as dismissed qua Ram Chandra and Dwarika.

4. Now, we are proceeding to consider the present Criminal Appeal No. 196 of 1983 in respect of the sole surviving appellant namely Chhotey Shah.

5. Factual scenario according to the prosecution is essentially as follows:

An armed dacoity was committed in between the night of 15/16th December, 1980, at the house of P.W. 1-Lakhan in village Diyori within the jurisdiction of police station Dataganj. At the time of dacoity i.e. at about 00.30 hours, Lakhan (P.W.1) was sleeping inside his house. His father was sleeping in the Baithak. His wife and mother were sleeping at the verandah inside the house. His son Om Prakash (P.W.3) was sleeping in the Dehliz of the house and the lantern was glowing as usual in the inner verandah where two dacoits entered inside the house by scaling over the wall. On hearing the sound, the complainant (PW 1) woke up when he flashed his torch light, the dacoits caught hold of him. One of them opened the bolt of the front door which facilitated the entry of six more dacoits inside the house. The dacoits, who were about 10 or 11 in number started beating the female members of the house and tried to extract information about their valuables. One of the dacoits climbed on the roof through the stair case. He was armed with a gun. Another dacoit stood guard on the front door with gun. The dacoits resorted to firing from the roof as well as from the front door. They also caught hold of the father of the complainant from his Baithak and brought him inside the house. Om Prakash (P.W. 3), the son of the complainant finding an opportunity escaped from his house and raised an alarm in the village. The dacoits started looting the property of the complainant and in the course of committing dacoity they were entering into and going out of the house. The residents of village assembled with torches and lathis and started pelting brick-bats on the dacoits. One of them namely Naubat (deceased) climbed over the roof of Dal Singh and started throwing brick bats at the dacoits. Whereupon the dacoit, who was on the roof of the house of the complainant, fired a shot at him killing him outright. Budhpal set fire to the Puwal (paddy straw) heaped there which produced a flood of light. After committing dacoity which lasted about 20- 25 minutes, the dacoits fled away towards north. In the course of dacoity complainant's mother Tirka, father of Malkhan and wife Dev Kuar received injuries. The residents of the village who had assembled at the time of dacoity included Ishwari (P.W. 2), Samam, Ram Chander, Budhpal, Sardar and Kanhai etc. Except Budhpal all of them were carrying torches and lathis. It is claimed that in the light of torches, fire and lantern the witnesses succeeded in identifying the accused Ram Chander and Dwarika as they were the residents of the same village. The other dacoits were not known to them but it was claimed that the witnesses had noticed their facial image in the light.

6. After the retreat of the dacoits, the dead body of Naubat was brought down from the roof of Budhpal and was kept in front of complainant's Baithak on a cot. The complainant could not proceed to the police station in the night out of fear. His son Om Prakash scribed the report (ext Ka 1) on his dictation and thereafter the complainant took it to the police station Dataganj where he lodged the report at 6.10 hours on the following morning. A list of looted articles including Radio, cash, ornaments, utensils and clothes was given along with the FIR. The looted utensils viz. Batuya, Thali, Lota and a Glass was allegedly recovered from the co- accused Jeetendra Pal Singh.

7. On the basis of the written report (Ext. Ka-1) a formal F.I.R. (Ext. Ka-14) was prepared by Azhar Husain head constable (P.W. 7) and a case under section 396 I.P.C. was registered against the accused Ram Chander, Dwarika and 8-9 unknown persons vide G.D. (Ext. Ka.15).

8. Sri Soran Singh, S.O. Dataganj (P.W.8) started the investigation and he recorded the statement of the complainant at the police station and proceeded to the place of the occurrence where he made an inquest on the dead body of Naubat, prepared inquest report (Ext. Ka-9), photo of the dead body (Ext. Ka-7), challan (Ext. Ka.11), sample seal (Ext. Ka-10) and sent the dead body for post-mortem through constables Rameshwar Dayal and V.C. Shivlal. He recovered one Towel from the head of the dead body of Naubat and prepared its memo (Ext. Ka-18). He inspected the lantern of the complainant and torches of the witnesses in the light of which they claimed to have identified the dacoits and returned them in their supardagi vide memo (Ext. Ka-2). He prepared the site-plan (Ext. Ka-19) of the place of occurrence. He recovered nine empty cartridges (Ext. 4) from the roof of the complainant under a memo (Ext. Ka-20). He recovered blood stained earth from the roof of Budhpal and Dal Singh (Ext. 6 and 7) and unstained earth (Ext. 8 and 9), kept it in separate sealed container under a memo (Ext. Ka-21). He recovered ashes from the khandahar of Budhpal Singh, took its sample (Ext. 10) under a memo (Ext Ka 22). Three pairs of shoes (Ext. 11) and one cap (Ext. 12) left behind by the dacoits were also recovered by him from the house of the complainant under a memo (Ext. Ka-23).

9. On a tip off by a Mukhbir Khas 14.1.1981 the S.O. Proceeded from the police station, collected witnesses Sita Ram (P.W. 4) and Radhey Shiam (P.W.5) from the bus stand and reached the out-skirts of village Gangola near Dharamshala where he found accused Jitendra Pal Singh, sitting on the foot-path. The accused tried to run away but he was chased by the police men and the witnesses and was apprehended at a short distance of 50 paces on the main road. It is alleged that one bundle containing Thali (Ext 1), Gilas (Ext. 2) and Lota (Ext. 3) were recovered from his possession. It was suspected to be the property looted in the course of dacoity in question. It was, therefore, seized by the S.O. under a memo (Ext. Ka 12) and sealed at the spot. The S.O. prepared the site plan (Ext. Ka-24) of the place of recovery. He sent a report for identification of the recovered property. The identification was held on 27.03.1981 wherein the complainant and his family members identified (Ext. 1 to 3) as belonging to them which was looted in the course of the same dacoity.

10. Accused Dwarika was arrested on 19.1.1981 by S.I. Din Dayal Saroj. Accused Ram Chander surrendered in court.

11. Accused Chhotey surrendered in court on 7.2.1981. The I.O. sent a report on 23.2.1981 for keeping him bapurda He was put to test identification in Budaun jail on 27.3.1981 wherein he was correctly identified by all the six witnesses.

12. After necessary investigation the Investigating Officer submitted charge-sheet (Ext. Ka-25) against all the four accused persons under sections 396 and 412 I.P.C. As the case was exclusively triable by the court of Sessions the learned Magistrate committed the case to the court of Session.

13. The accused were all charged of the offence under section 396 I.P.C. Co-accused Jitendra Pal Singh was charged alternatively for the offence punishable under section 412 I.P.C. The accused pleaded not guilty to the charges framed against them. They denied their participation in the offence and attributed their prosecution to enmity. According to co-accused Ram Chander and Dwarika who were named in the F.I.R., they had enmity with the complainant and the prosecution witnesses on the issue of fishing from the tank. Proceedings were also drawn under sections 107/117 Cr. P. C. between them on account of that dispute. They have filed certified copy of the chalani report under section 107 Cr. P. C. (Ext. Kha-1 and kha-2) in their defence.

14. Accused Chhote Shah has pleaded that he has been falsely implicated due to village rivalry. He had surrendered in the Court of Judicial Magistrate in an another case under section 25 Arms Act. He used to come to the court without Parda and was shown to the prosecution witnesses by the police on 27.2.1981. The accused has filed a certified copy of the order sheet of the case against him under section 25 Arms Act (Ext. Kha-3) and has examined Liakat (D.W. 1) to show that he was known to the prosecution witnesses from before.

15. Accused Jitendra Pal Singh has claimed that the property recovered from him was his. He was not arrested on the road but the property was recovered from his house falsely showing it to be the looted property of the complainant due to his enmity with Soran Singh, S.I., who harboured ill will against him because his (Jeetendra Pal Singh) brother Sukhpal was acquitted in a case wherein he was falsely implicated in a murder case under the pressure of the village's carpenters. The accused has examined Suleman (D.W. 2) in proof of his allegation that recovery of (Ext. 1 to 3) was effected by the S.I. from house search.

16. The prosecution produced in all 8 witnesses in the Court. Of these Lakhan (P.W. 1), Ishwari (P.W. 2) and Om Prakash (P.W. 3) are the witnesses of fact. They claimed to have identified the accused Ram Chandra and Dwarika during the course of dacoity and also identified the accused Chhotey Shah in jail.

17. Sita Ram (P.W. 4) and Radhey Shiam (P.W. 5) are witnesses of the alleged recovery of (Ext. 1 to 3) from the possession of accused Jitendra Pal Singh on 14.1.1981.

18. Dr. A.K. Malpani (P.W.6) conducted post-mortem of deceased Naubat on 17.12.1980. He has proved (Ext. Ka-13) as post-mortem report prepared by him.

19. Azhar Husain (P.W.7) is head constable of police station Dataganj who has proved the F.I.R. (Ext. Ka-14) prepared on the basis of the written report (Ext. Ka-1) and the G.D. entry (Ext. Ka-15). He has also proved G.D. (Ext. Ka 16) dated 14.1.1981 on the arrest of accused Jitendra. Exhibit Ka-17 was proved being the G.D. entry of 19.1.1981 made at 18.05 hours in respect of the arrest of accused Dwarika.

20. Soran Singh (P.W. 8) is S.O. Dataganj who investigated the case. He has proved (Ext. Ka-7 to Ka-11) as the documents prepared by him on the inquest of deceased Naubat. Exhibit Ka-12 has been proved to be the recovery memo of (Ext. 1 to 3) from the possession of accused Jitendra. Exhibit Ka-18, Ka-20 to Ka-24 have been proved to be Fards of the various articles recovered by him from the spot of the occurrence. Exhibit Ka-19-site plan was proved and prepared by him of the place of occurrence and Ext. 24 is the site-plan prepared by him of the place of recovery from accused Jitendra. Exhibit Ka-25 has been proved to be the charge-sheet submitted by him against the accused persons. Exhibit Ka-27 is the report dated 23.2.1981 sent by him for keeping accused Chhotey bapurda.

21. The genuineness of the injury reports of Smt. Kitka (Ext. Ka-3), Smt. Dev Kumar (Ext. Ka-4) and Malkhan (Ext. Ka-5) has been admitted by the learned counsel for the accused. The genuineness of the post-mortem report of Naubat (Ext. Ka-6) has also been admitted by the learned defence counsel. The genuineness of the identification memo of the recovered property (Ext. Ka-13) and the genuineness of the identification memo of accused Chhotey (Ext. Ka-26) has also been admitted by the learned counsel for the accused.

22. The Trial court after hearing the learned counsel for the parties and going through the record found that the prosecution has fully succeeded in bringing home the charges against the appellants beyond reasonable doubt and vide impugned judgment and order dated 15.12.1982 convicted and sentenced the accused appellants, hence the present appeal.

23. Mr. Mohd. Waseem, learned counsel for the appellant has submitted that the appellant namely Chhotey Shah had surrendered before the Court below on 06.02.1981 in an another case under Section 25 Arms Act. He further submitted that the alleged incident had occurred on 15/16.12.1980 at about 00.30 hours and the appellant Chhotey Shah surrendered before the Court below on 06.02.1981 but the test identification parade was conducted on 27.03.1981, as such, there was an inordinate delay in conducting the test identification parade. It was further submitted that the appellant was neither named in the first information report nor any recovery whatsoever was made from his possession. It was further submitted that the appellant was known earlier to the informant side as his maternal aunt (Mausi) was residing in the village in question and he used to visit the village quite often. In support of his submission, he has placed reliance upon the testimony of the D.W. 1 Liyaqat. He further submitted that the alleged recovery was made from the co-accused namely Jeetendra Pal Singh who was acquitted from all the charges levelled against him including under Section 412 IPC by the impugned judgment as the recovery was found by the trial to be false. It was further submitted that the incident had occurred in the pitch dark winter night of 15/16.12.1980 and despite the fact that there was no sufficient light, the witnesses claim to have

identified the accused persons from a distance. It was further submitted that the informant namely Lakhan despite being the head of the family did not suffer any injury while the other family members including old father, daughter and wife suffered several injuries. He further submitted that the site plan was prepared by the Investigating Officer on his own as the informant and other witnesses have specifically stated that the site plan was not prepared in their presence or under their instructions. It was further submitted that the site plan does not mention the place where the P.W.2 - Ishwari had hidden himself and witnessed the incident. Neither any brick bats, which were alleged to have been pelted by the villagers at the accused persons, were recovered from the spot nor any Fard of it was prepared. It was further submitted that the appellant had surrendered himself before the Court below on 06.02.1981 in connection with some other case under Section 25 Arms Act and thereafter during the course of remand he was produced before the Judicial Magistrate and was shown to the witnesses, as such, the test identification was nothing but a farce. In the test identification parade he was identified by all the six witnesses. He further submitted that brick bats were allegedly pelted the deceased Naubat from the terrace of Dal Singh but the alleged body was recovered from the terrace of Budhpal and no explanation has been given by the prosecution as to how the blood was found from the two terraces although they did not form one continuous space. He further submitted that in order to show that there was sufficient light, the prosecution has set up a story that in the Khandahar of Budhpal Singh situated around 20-30 paces away from the place of incident, they set fire to Puwal (paddy straw) which produced a flood of light enabling them to identify the dacoits, who were standing on the terrace of the house in question. He further submitted that the appellant has been implicated falsely due to village party bandi. He further submitted that the prosecution has failed to show the starting point as to how they could be able to know that the appellant was involved in the commission of the present offence.

24. Per contra, Shri Ram Yash Pandey, learned AGA appearing on behalf of the State has supported the impugned judgment and submitted that the Court below has given a cogent, convincing and satisfactory reasons while convicting the appellant. He further submitted that the appellant has been identified by all the witnesses and the name of the appellant Chhotey Shah came into light in the confessional statement of the co-accused Jeetendra Pal Singh from whom the alleged recovery was made.

25. Heard Mohd. Waseem, learned counsel for the appellant, Shri Ram Yash Pandey, learned AGA appearing on behalf of the State and perused the material available on record.

26. The Court below by impugned judgment dated 21.12.1982 has convicted the appellants Chhotey Shah, Ram Chandra and Dwarika under Section 396 IPC, however the co-accused Jeetendra Pal Singh from whose possession the recovery was made, has been acquitted from the charges under Section 396 IPC as well as under Section 412 IPC, as such, the alleged recovery of some utensils from his possession was found to be false and fabricated and as such his (Jeetendra Pal Singh) confessional statement disclosing the name of the appellant also falls to the ground.

27. The incident is said to have been occurred in the midnight of 15/16.12.1980. Admittedly the appellant Chhotey Shah was not named in the first information report, however

other co-accused namely Ram Chandra and Dwarika were specifically named in the FIR as they belong to the same village Diyori, where the incident had occurred. In the said incident, one Naubat Ram, who belongs to the same village died and three inmates also suffered injuries, however the informant, the head of the family, did not receive even a scratch during the course of dacoity.

28. The incident had occurred in the mid night of 15/16.12.1980 and the appellant Chhotey Shah surrendered before the Court below on 06.02.1981 and yet the test identification parade was conducted on 27.03.1981.

29. According to the prosecution story, one lantern was burning inside the house at the time when the dacoity was committed and the informant and other witnesses could able to see the miscreants in the light of torch as well in the light produced by the fire set to Puwal (paddy straw).

30. Now the question remains to be determined as to whether the light available on the spot was sufficient to identify the accused persons including the appellant as the dacoity was committed in the pitch dark winter night of 15/16.12.1980. It must also be borne in mind that in the year 1980 there was no concept of global warming and mid December month used to very cold. There were three sources of light set out by the prosecution. One was the light of lantern hanging inside the house in the verandah. Another was the light that emanated from the Puwal (paddy straw), when it was set on fire at the Khandahar of Budhpal during the course of dacoity and the third source of the light was the torches flashed by the villagers. The material available on record shows that around 10-12 dacoits had barged in to the house of the informant to commit dacoity and as soon as the dacoits entered into his house, he took out his torch and flashed the torch light at them. No enquiry was made as to whether the alleged light available on the spot was sufficient to enable the witnesses to identify the dacoits from a distance.

31. It is worth noting at this stage that the informant and the inmates of the house must be terrified and intimidated after seeing so many dacoits raiding the house and therefore would not have been in proper frame of mind at the relevant time to flash torch light at the accused persons, who were around 10-12 in number. It may also be noted that charge sheet was filed only against five persons and three out of them were shown to be the resident of the village in question. Co-accused Ram Chandra and Dwarika , who belong to the same village where the dacoity was committed admittedly had enmity with the informant side as Criminal case under Sections 107/117 Cr.P.C was pending between them. In these circumstances, it was highly improbable that the residents of the same village without concealing their identity or covering their faces would commit dacoity in the house of the informant and the same analogy goes with the appellant Chhotey Shah also, who was also the resident of the adjoining village and according to D.W. 1- Liyaqat, he, being a wrestler (Pahalwan), used to visit the village in question quite frequently to participate in the Dungal organized in the village in question.

32. It may also be noted that there are material contradictions and inconsistencies in the evidence of the alleged eye witnesses with regard to the fact whether the accused persons were covering their faces or not. According to P.W. 1- Lakhan Ram, during the course of dacoity, dhatas

of dacoits had opened automatically one after the other, however other witnesses P.W. 2 and P.W. 3 have specifically stated that none of them were concealing their identity or covering their faces, therefore, in the present circumstances it is most improbable that the accused persons would not have been covering their faces during the course of dacoity.

33. The story set up by the prosecution that the heap of Puwal was set on fire, does not inspire us. If at all the Puwal was set on fire, the question is as to how long had it lasted and whether the light produced by it was sufficient to enable the witnesses to recognize the dacoits from such a long distance. Thus, we are of the view that since the alleged dacoity was committed in the pitch dark winter night in the month of December and in view of the evidence on record the light available during occurrence was not sufficient for the identification of the real culprits.

34. There is one another important aspect which goes to the root of the matter. The incident had occurred on 15/16.12.1980 and the test identification parade was conducted on 27.03.1981. Thus the test identification parade was conducted nearly after 100 days from the date of incident and 51 days from the date of surrender as the appellant had surrendered on 06.02.1981 before the Court. Holding identification parade after lapse of such a long time creates doubt. No justification has been given by the prosecution for such an inordinate delay. It is difficult to conceive that after such a long time the witnesses would be remembering facial image and profile of the accused persons.

In this regard, we are fortified by the decision of the Apex Court in the cases of **Iqbal Vs. State of U.P. (2015) 6 SCC 623, Budh Sen Vs. State of U.P. (1970) 2 SC C 128, Soni Vs. State of U.P. (1982) 3 SCC 368 and Subhash and Shiv Shankar Vs. State of U.P. (1987) 3 SCC 331.**

35. The test identification report also indicates that all the six persons, who were called for identification had identified the appellant. Thus there was 100% identification. This also creates suspicion about the veracity of the prosecution story. It is difficult to comprehend as to how all the six witnesses would correctly identify the appellant who had allegedly seen him in the pitch dark winter night from a distance after more than three months.

36. At this stage, it would also be relevant to refer to the testimony of the P.W. 8 Soran Singh, the Investigating Officer. According to him, the site plan was prepared in the presence of the informant and the witnesses. In the present case only three witnesses of fact have been produced before the Court below i.e. P.W. 1-Lakhan Ram (informant), P.W. 2- Ishwari (one of the villager) and P.W. 3- Om Prakash (son of the informant). All these three witnesses have categorically stated that the site plan was not prepared in their presence, as such, their deposition completely belied the evidence of the P.W.8- Investigating Officer that it was prepared in the presence of the P.W. 1, P.W. 2 and P.W. 3. Perusal of the statement of the P.W. 8 Investigating Officer further shows that it suffers from a number of deficiencies. The brick bats, which were pelted by the villagers at the house of the informant has not been shown in the site plan nor any Fard of the said brick bats have been prepared. The report of the Forensic Lab has not been placed with regard to the blood which was collected from the terrace of Budhpal and Dal Singh. No effort was made to connect three pairs

of shoes and cap, which were allegedly recovered from the spot. In this reference, the extract of the statement of P.W. 8 is quoted herein below:-

“11. वादी व गवाहान की निशादेही पर मैंने मौका मुआइना किया था। जहाँ से गवाहान ने घटना देखी वह जगह नक्शा में नहीं दिखाई है। ईश्वरी के बयान में नहीं लिखा है कि उसने वहाँ खड़े होकर घटना देखी। मैंने वादी के घर में लालटैन खुद टंगी नहीं देखी। बल्कि (1) स्थान पर गवाहान ने लालटैन का जलना बताया था। वादी के मकान के दक्खिन तरफ वाले कमरे में लालटैन का होना नहीं मालूम पड़ा।

12. नक्शे में ओम प्रकाश के सोने का स्थान नहीं दिखाया है न यह दिखाया है कि उसने घटना वहाँ से देखी। लाखन ने घटना के समय घर में होना बताया नक्शा में नहीं दिखाया है। गवाहान लाखन, ईश्वरी व ओम प्रकाश ने मुलजमान राम चन्द्र व द्वारका के हाथ में तमंचा व बन्दूक होने की बात नहीं बताई।

15. नक्शे में सुलेमान का मकान नहीं दिखाया। न किसी मकान के छर्रे के निशान पाये। यह गलत है कि सुलेमान का मकान व उसमें लगे छर्रे मुकदमें की घटना स्थल से मेल नहीं खाते थे इसलिए उनको नक्शे में न दिखाया हो।”

37. In Paragraph 18 of his testimony P.W. 1 Lakhan Ram has categorically stated that the site plan was not prepared in his presence. The said paragraph 18 is quoted herein below:-

“18. यह मैंने नहीं देखा कि गवाहान ने कहाँ से घटना देखी। मेरे सामने दरोगा जी को किसी ने नहीं बताया कि वहाँ से घटना देखी मेरे सामने दरोगा जी ने नक्शा नहीं बनाया। यह गलत है कि घटना के समय कोई आग या लालटैन नहीं जल रही हो व दरोगा जी ने आग व लालटैन बना दी हो।

38. It is also notable that Rohan Lal and Suleman witnesses of Ext. Ka 18 Ext. ka 20- empty cartridge of tikli, Ext. Ka 21- Blood stained soil, Ext. Ka 22- Ashes of burnt puwal and Ext. Ka 23- Shoes and cap were not produced before the Trial Court to prove the aforesaid recovery from the spot. It was also not explained as to how the P.W. 1 Lakhan who was in the ground floor of his house could able to see or recognize the appellant who was alleged to be present on the terrace. It also appears to be very improbable that dacoits would intimidate and cause injuries to the family members of the informant alone in order to extract information about the valuables and would spare the informant (who was the head of the family) and not cause even a scratch upon his body although he allegedly remained in the house during the course of the alleged dacoity.

39. The testimony of P.W. 2 also appears to be concocted. P.W. 2 tried to implicate the co-accused Jeetendra Pal Singh, who was also the resident of the same village and from whom the false recovery was made by the police. According to the P.W. 2 Jeetendra Pal Singh was also involved in committing dacoity and despite the fact that he knew him from before neither his name was mentioned in the FIR nor in the statement of P.W. 2 recorded under Section 161 Cr.P.C. False recovery was shown from the possession of the co-accused Jeetendra Pal Singh. As a result, the Court below disbelieved the factum of recovery and recorded a categorical finding that the co-accused Jeetendra Pal Singh was not at all involved in the commission of the offence. The relevant paragraphs 41 to 46 of the impugned judgment are quoted herein below:-

"41. Accused Jeetendra Pal Singh is resident of the same village Diyori where the dacoity took place. He is not named in the FIR. Ishwari (PW2) has stated that he saw him

amongst the dacoits but no other witness has corroborated him. Even Ishwari (PW 2) did not name him in his statement under Section 161 Cr.P.C., hence it can not be concluded that any prosecution witness could identify him amongst the dacoits at the time of dacoity.

42. The only evidence against the accused is that of recovery of one Thali (Ext.1), one Gilas (Ext. 2) and one Lota (3) which is alleged to be looted property, the possession of which was transferred through the commission of this dacoity. The recovery is alleged to have been made by the investigating officer on 14.01.1981 ie after about a month of the dacoity. According to the investigating officer (Soron Singh P.W. 8) the accused was apprehended by him in the outskirts of village Gangola on the mettled road near the Dharmshala at about 3.45 PM of 14.01.1981 when the recovery of (Ext. 1 to 3) was made from his possession in the presence of Sita Ram (PW 4) and Radhey Shiam (P.W. 5).

43. The accused does not deny the recovery of (Ext 1 to 3) from his possession. But according to him this recovery was made by the Investigating Officer from his house by house search. Suleman (D.W. 2) has been produced in support of the defence plea that the recovery was made by the S.O from the house search of the accused.

44. Whatever might have been the mode of the recovery of (Ext. 1 to 3), it remains admitted on the part of the accused as well the ext. 1 to 3 belong to him and these were recovered from his possession by the investigating officer.

45. It has only to be seen if (Ext. 1 to 3) were stolen property having been stolen in the course of this dacoity. In the FIR (Ext Ka-1) at serial numbers 20,21 and 22 one Lota, one Thali and Gilas are included in the list of the stolen property along with their weight and value. No other description has been given. According to the complainant as well as the Investigating Officer, no other description of the stolen property was given by the witnesses in the course of his statement under Section 161 Cr.P.C. But both Lakhan (PW 1) and Om Prakash (PW 3) identified (Ext. 1 to 3) as theirs in the course of the identification proceedings held on 27.03.1981 held by Shri V.P. Singh, Executive Magistrate. The genuineness of the identification memo (Ext. Ka 13) has been admitted by the learned counsel for the accused.

46. It is also admitted by all the prosecution witnesses as well as by the Investigating Officer tht utensils of the type of (Ext. 1 to 3) are very common which can be found in most of the houses. It is also admitted by the complainant as well as his son Om Prakash that there was no distinguishable mark on any of these utensils which are in common use of every house. Under these circumstances it cannot be definitely held with all certainty that (Ext. 1 to 3) were stolen property looted in the course of this dacoity. These are minimum requirements of a house hold. It is not at all surprising if these minimum requirements were recovered from the possession of the accused either from his house as alleged by the accused or on the road as alleged by the prosecution. There is also nothing to show that accused Jitendra retained this property knowing or having reason to believe the same to be stolen

property the possession of which was transferred through the commission of dacoity. Accused Jitendra, therefore, cannot be held guilty of the offence under Section 412 Cr.P.C also and he deserves his acquittal. "

40. It is further submitted that the Investigating Officer of the case has completely failed to show as to how and on what basis he has picked up the accused appellant in the present case. It is also notable that Jeetendra Pal Singh from whom the alleged recovery was shown and had disclosed the name of the appellant has been acquitted by the Court below while recording a categorical finding that the alleged recovery made from him was false and fabricated. In view of the above, the story set up by the prosecution that the name of the appellant was disclosed by the co-accused Jeetendra Pal Singh falls to the ground.

41. In the case of **Iqbal Vs. State of U.P. (Supra)**, the Apex Court in paragraphs 5, 11, 15 and 16 has held as follows:

"5. Learned counsel for the appellants contended that at the time of incident, it was pitch dark and it would have been highly improbable for the witnesses to identify the dacoits with flash of torches. It was further submitted that PW1-Patia Singh had given an exhaustive list of more than fifty valuable items which had been stolen, but except three kilograms of ghee in a clay pot, nothing was recovered from the appellants and in the absence of substantive evidence corroborating the identification, the courts below ought not to have convicted the appellants. It was also submitted that the appellants have no criminal antecedents to commit such heinous crime.

38. 11. In our considered view, it is unbelievable that on a new moon night when it was pitch dark, the witnesses who were frightened and who were hiding themselves behind the walls in order to save themselves, could have seen actual faces of the accused persons just by flash of torch lights on their faces and in the light of lantern. Further, there were about 14-15 dacoits in number, all armed with deadly weapons and were continuously making ingress and egress in the house of the deceased, it becomes inconceivable as to how the witnesses standing at a distance in a feeble light would have been able to identify the dacoits.

15. Evidence of identification of the miscreants in the test identification parade is not a substantive evidence. Conviction cannot be based solely on the identity of the dacoits by the witnesses in the test identification parade. The prosecution has to adduce substantive evidence by establishing incriminating evidence connecting the accused with the crime, like recovery of articles which are the subject matter of dacoity and the alleged weapons used in the commission of the offence.

16. It is pertinent to note that in the present case no recovery of articles which are the subject of dacoity was made from the appellants or other non-appealing accused persons. In his complaint, PW1 gave a list enumerating fifty expensive items, such as gold

jewellery, silver articles, sarees and clothes and also cash. As per the recovery memo, what was recovered was just three kilograms of ghee in a clay pot. In his deposition, PW8-Nepal Singh (investigating officer) has stated that at the instance of Kripa, he had recovered a 'chaptaghu' and an 'attire'. However, in the recovery memo, only three kilogram of ghee is mentioned which is said to have been recovered on the disclosure statement of accused Kripa. From the appellants as well as from the non -appealing accused persons, not a single item of valuable out of the whole list of stolen articles was recovered. It is quite unbelievable that within a short span of time i.e. from 21.09.1979 (date of incident) to 9.10.1979 (date of arrest), the accused would have converted or sold out all the valuable items. Even if we accept that they had done so, the prosecution ought to have adduced evidence as to how and in what manner the articles which were the subject matter of dacoity were either disposed of or converted. Murder and robbery were part of the same transaction. Consequent upon the disclosure statement, only three kilograms of ghee was recovered."

42. In the present case also no recovery whatsoever has been made from the possession of the appellant and in fact there was no starting point giving any clue to the Investigating Officer to show the complicity of the appellant in the commission of the alleged offence. In the present case also the alleged incident had occurred in the pitch dark winter night and the witnesses P.W. 2 and P.W. 3 were standing quite far away from the place of occurrence and it becomes inconceivable as to how they would have identified the dacoits in a feeble light. The prosecution has to adduce substantive evidence by establishing incriminating evidence connecting the accused with the crime, like recovery of articles which are the subject matter of dacoity and the alleged weapons used in the commission of the offence. In view of the evidence on the record, it is apparent that available light during occurrence was insufficient for the identification of real culprits.

43. The test identification parade was conducted after more than three months and no explanation has been offered with regard to such inordinate delay. In the circumstances, there were chances that the accused appellant was shown to the identifying witnesses prior to identification parade and during pendency of the trial. The natural possibility of gathering false impressions of the accused appellant by the identifying witnesses after such a long gap cannot be ruled out. No serious effort was made by the Investigating Officer to recover the looted property except few utensils from the co-accused Jeetendra Pal Singh, which too was held by the Court below to be false and fabricated while acquitting the co-accused Jeetendra Pal Singh.

44. In the above context it will be useful to refer to a decision of the Apex Court in the case of **Soni Vs. State of U.P. (Supra)** wherein in paragraph 2 it was held as follows:-

"After hearing counsel on either side we are satisfied that the conviction of the appellant for the offence of dacoity is difficult to sustain. The conviction rests purely upon his identification by five witnesses, Smt. Koori, Pritam Singh, Kewal, Chaitoo and Sinru, but it cannot be forgotten that the identification parade itself was held after a lapse of 42 days from the date of the arrest of the appellant. This delay in holding the identification parade throws a doubt on the genuineness thereof apart from the fact that it is difficult that after lapse of such

a long time the witnesses would be remembering the facial expressions of the appellant. If this evidence can not be relied upon there is no other evidence which can sustain the conviction of the appellant. We therefore allow the appeal and acquit the appellant. "

45. In this connection it will be fruitful to notice the observation made by the Apex Court in the case of **Subhash and Shiv Shankar Vs. State of U.P. (Supra)** in paragraphs 8 and 9 which reads as follows:-

"8. Apart from this infirmity we further find that Shiv Shankar was not put up for test Identification parade promptly. The identification parade has been held three weeks after his arrest and no explanation has been offered for the delay in holding the test identification parade. There is, therefore, room for doubt as to whether the delay in holding the identification parade was in order to enable the identifying witnesses to see him in the police lock-up or in the jail premises and make a note of his features.

9. Over and above all these things there remains the fact that a sufficiently long interval of time had elapsed between the date of occurrence when the witnesses had seen Shiv Shankar for a few minutes and the date of the test identification parade. It is, no doubt, true that all the three witnesses had correctly identified Shiv Shankar at the identification parade but it has to be borne in mind that nearly 4 months had elapsed during the interval. It is relevant to mention here that neither in Exhibit Kha I nor in their statements during investigation, the eye witnesses have given any descriptive particulars of Shiv Shankar. While deposing before the Sessions Judge they have stated that Shiv Shankar was a tall person and had 'sallow' complexion. If it is on account of these features the witnesses were able to identify Shiv Shankar at the identification, parade, they would have certainly mentioned about them at the earliest point of time because their memory would have been fresh then. Thus in the absence of any descriptive particulars of Shiv Shankar in Exhibit Kha 1 or in the statements of witnesses during investigation, it will not be safe and proper to act upon the identification of Shiv Shankar by the three witnesses at the identification parade and hold that he was one of the assailants of Ram Babu. As pointed out in *Muthu Swami v. State of Madras*, A.I.R. 1954 S.C 4 where an identification parade is held about 2-1/2 months after the occurrence it would not be safe to place reliance on the identification of the accused by the eye witnesses. In another case *Mohd. Abdul Hafeez v. State of Andhra Pradesh*, A.I.R. 1983 S.C. 361 it was held that where the witnesses had not given any description of the accused in the First Information Report, their identification of the accused at the Sessions trial cannot be safely accepted by the court for awarding conviction to the accused. In the present case there was a long interval of nearly 4 months before the test identification parade was held and it is difficult to accept that in spite of this interval of time the witnesses were able to have a clear image of the accused in their minds and identify him correctly at the identification parade. "

46. Thus, in the aforesaid case, the Apex Court while considering the inordinate delay in holding the identification parade observed that "there is room for doubt as to whether delay in holding the test identification parade was in order to enable the identifying witnesses to see him in

the police lock-up or in the jail premises and make a note of his features." In the present case also a sufficiently long interval of time (nearly 100 days) had elapsed between the date of occurrence and the date of test identification parade. In the present case also neither in the FIR nor in the statements recorded during the investigation the alleged witnesses had given any particulars of the appellant. It is also notable that none of the injured namely Tirka, Malkhan and Dev Kumari, mother, father and wife respectively of the complainant have been produced before the Court below for recording their testimonies. The Doctor who allegedly examined the injuries of the aforesaid persons was not also produced. Non examination of the material witnesses to prove the injuries of the injured persons creates suspicion in the prosecution story.

47. The prosecution case in this appeal would be hit by 3 aspects; (i) No recovery of articles allegedly looted in the commission of the alleged dacoity; (ii) The evidence of police officials do not indicate whether they had even tried to recover the same; (iii) This appeal requires to be allowed as there is no cogent material on record to show as to how the suspicion of the Investigating officer had fallen on the present appellant. Prosecution story with regard to the recovery of utensils from the possession of the co-accused Jeetendra Pal Singh has been found by the Court below to be false, therefore, disclosure of the name of the appellant by him falls flat on the ground. The main aspect on which the conviction is based also is faulty. The conviction based only on the basis of test identification parade cannot be sustained. The decision in the case of Ram Babu Vs. State of U.P., (2010) 5 SCC 63, relied by the learned A.G.A. will be of no avail in the fact of this case as in the case of Nirmal Pasi Vs. State of Bihar, 2002 (6) JT 28, Budhsen Vs. State of U.P. and others, AIR 1970 SC 1321 and that of State of Maharashtra Vs. Sukhdeo Singh, AIR 1992 SC 2100, will enure for the benefit of the accused as the test identification parade took place after a long time and the corroboration is also not justified in view of the insufficient light during the occurrence. Therefore, the appellant could not have been convicted on the basis of the identification made by the witnesses. The standard of proof required for convicting an accused under Section 396 IPC as laid down in the case of Iqbal (supra) are absent in this case hence this appeal will have to succeed.

48. We are fortified in our opinion by the judgment discussed herein above, we hold that there was no starting point. The test identification parade is the sole basis, on which the learned Judge has convicted the accused which is bad in the eye of law. The non-recovery of any incriminating article has also not been considered by the learned Trial Judge which would also prove fatal to the prosecution in view of the latest decision by the Supreme Court in Iqbal and another (supra) hence on all these three counts the conviction of the appellant cannot be sustained.

49. Considering the facts and circumstances of the case, we are of the considered opinion that the view taken by the Court below while convicting the accused-appellant - Chhotey Shah is palpably wrong and the findings recorded by the Court below are perverse, erroneous and can not stand the scrutiny of law. In our considered opinion, the reasons given by the Trial Court are not sufficient to convict the accused-appellant Chhotey Shah.

50. In the facts and circumstances of the case and the evidence led by the parties renders the origin and genesis of the occurrence doubtful and as such the accused-appellant- Chhotey Shah is entitled to benefit of doubt and acquittal.

51. On the basis of aforesaid discussion in our considered opinion and also applying the rule of caution, conviction of the accused-appellant namely Chhotey Shah can not be sustained and is liable to be set-aside and in the circumstances of the case, the accused-appellant Chhotey Shah deserves acquittal.

52. In the result, we find and hold that the present appeal has got merit and the appeal is allowed. The impugned judgment and order dated 15.12.1982 passed by Special Judge, Badaun, in Sessions Trial No. 414 of 1981 is set-aside and the appellant namely Chhotey Shah is acquitted of the charges levelled against him and his conviction and sentence are hereby quashed and set-aside. The appellant namely Chhotey Shah is on bail. He need not to surrender. His personal and surety bonds are hereby cancelled and sureties are discharged from their liability.

54. Let a copy of this judgment along with the trial court record be sent to the court concerned for compliance.

(2016) 8 ILRA 1024
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.08.2016

BEFORE

THE HON'BLE DILIP B BHOSALE, C.J.
THE HON'BLE YASHWANT VARMA, J.

Special Appeal Defective No.- 507 Of 2016

State Of U.P. & Ors.

...Appellants

Versus

Shere Azam & Anr.

...Respondents

Counsel for the Appellants:

Vivek Shandilya

Counsel for the Respondents:

J.P. Singh

A writ petition was preferred by the opposite party No.1 (the original petitioner) seeking a direction commanding the third appellant to pass appropriate orders for release of his salary without being fettered in any manner by clause 5 of a Government Order dated 29 October 2013. Clause 5 of the said Government order mandated that vacancies in the Class IV cadre of the employees of Madarsas could be filled only by way of outsourcing. The original petitioner claims that he had been appointed by the second respondent as a peon on 27 March 2013. It was contended in the writ petition that since the petitioner has come to be appointed by the second respondent prior to the promulgation of the Government Order dated 29 October 2013, the approval to his appointment could not be withheld.

"Petitioner claims to be selected as Peon in Madarsa Darul Uloom (Niswan) Mau, district Mau (for short, the "Institution"). The Committee of Management of the Institution sent the papers relating to selection to the District Minority Welfare Officer to consider the papers for approval of the selected person. The Inspector/Registrar, Board of Madarsa Education, U.P. Lucknow vide impugned order dated 19th September, 2014, has rejected the claim of the petitioner on the ground that appointment on Class-IV posts shall be made by the outsourcing in terms of the Government Order dated 06th January, 2011.

Upon a consideration of the rival submissions as also the material placed for consideration before the learned Single Judge, we find that Lala Babu Baijal had struck down the Government Order dated 6 January 2011 which had stipulated that all future appointments on Class IV post in institutions governed by the 1921 Act would be only by way of outsourcing.

We are, therefore, of the opinion that the ends of justice would merit a remand of the matter to the appellant No.3 before whom the rival contentions noticed above are placed and the respective parties permitted to assert the same and for the third appellant to take a considered decision thereon. This is necessitated not just on account of the submissions urged on behalf of the appellants but also in order to enable the third appellant to consider the submission of the original petitioner in respect of non-applicability of the Government Order dated 29 October 2013 as also the issue of a non-existence of a prohibition under the 2016 Regulations.

We accordingly dispose of the Special Appeal and modify the judgment rendered by the learned Single Judge with the following substituted directions:-

The original petitioner shall within a period of two weeks from today, submit his representation with respect to the grant of approval to his appointment as peon in the Madarsa in question. The appellant No.3 shall thereafter and after putting the Madarsa as also other concerned parties to notice proceed to consider and dispose of the said representation by way of a reasoned and speaking order within a period of eight weeks therefrom. All rights and contentions of the parties are left open for adjudication by the appellant No.3.

Held: Para-

Case Law discussed:

Ali Ahmad Vs. State of U.P.¹,

Committee of Management, Lala Babu Baijal Memorial Inter College and another Vs State of U.P. and Others².

State of U.P Vs. The U.P. Pradhanacharya Parishad, Lucknow and another⁴.

(Delivered by Hon'ble Dilip B Bhosale, Chief Justice
&
Hon'ble Yashwant Varma, J.)

1. Heard Sri Vivek Shandilya, learned Additional Chief Standing Counsel for the appellants and Sri J.P. Singh for the respondent No.3.

2. The State and the Department of Minority Welfare is in appeal questioning the correctness of a judgment rendered by the learned Single Judge dated 22 April 2015.

3. A writ petition was preferred by the opposite party No.1 (the original petitioner) seeking a direction commanding the third appellant to pass appropriate orders for release of his salary without being fettered in any manner by clause 5 of a Government Order dated 29 October 2013. Clause 5 of the said Government order mandated that vacancies in the Class IV cadre of the employees of Madarsas could be filled only by way of outsourcing. The original petitioner claims that he had been appointed by the second respondent as a peon on 27 March 2013. It was contended in the writ petition that since the petitioner has come to be appointed by the second respondent prior to the promulgation of the Government Order dated 29 October 2013, the approval to his appointment could not be withheld.

4. From a reading of the judgment of the learned Single Judge, it further appears that reliance was placed upon an order passed on Ali Ahmad Vs. State of U.P.1 which had been disposed of in the following terms:-

"Petitioner claims to be selected as Peon in Madarsa Darul Uloom (Niswan) Mau, district Mau (for short, the "Institution"). The Committee of Management of the Institution sent the papers relating to selection to the District Minority Welfare Officer to consider the papers for approval of the selected person. The Inspector/Registrar, Board of Madarsa Education, U.P. Lucknow vide impugned order dated 19th September, 2014, has rejected the claim of the petitioner

on the ground that appointment on Class-IV posts shall be made by the outsourcing in terms of the Government Order dated 06th January, 2011.

Learned Counsel for the petitioner submits that paragraph-2 of the Government Order dated 06th January, 2011 has already been set aside by this Court in the case of Committee of Management, Lala Babu Baijal Memorial Inter College and another Vs. State of U.P. and others, 2012 (4) ADJ 586. No other ground has been mentioned in the impugned order.

Learned Standing Counsel does not dispute the said legal proposition.

In view of the aforesaid facts and circumstances of the case, keeping this writ petition pending would not serve the purpose of either of the parties, therefore, with the consent of learned Counsel appearing for the parties, this writ petition is finally disposed of and the impugned order dated 19th September, 2014, passed by the Inspector/Registrar, Board of Madarsa Education, Lucknow, which is liable to be set aside, is set aside.

The Inspector/Registrar is directed to consider the matter afresh on the basis of the papers submitted by the Committee of Management for approval in accordance with law.

No order as to costs."

5. The learned Single Judge has proceeded to dispose of the writ petition with a direction that the claim of the petitioner be considered in light of the order passed in **Ali Ahmad. Ali Ahmad** itself, it becomes relevant to note, had come to be disposed of noticing the judgment rendered by a learned Single Judge in **Committee of Management, Lala Babu Baijal Memorial Inter College and another Vs. State of U.P. and others**². The learned Single Judge in **Lala Babu Baijal** had struck down the provisions of a Government Order dated 6 January 2011, which mandated that the appointment on Class IV posts in Intermediate Colleges would be made only by way of outsourcing.

6. Shri Shandilya, learned counsel appearing for the appellants has submitted that neither the Government Order dated 6 January 2011 nor the judgment rendered by the Court in **Lala Babu Baijal** was applicable inasmuch as both had been rendered with reference to the provisions of the U.P. Intermediate Education Act 1921. It was his submission that Madarsas including the one in which the petitioner is stated to have been appointed were governed by the provisions of the *Uttar Pradesh Ashashkiya Arabi Tatha Farsi Madarson Ki Manyata Niyamawali*, 1987. It was further submitted that the Government Order dated 29 October 2013 had neither been challenged nor was the said Government Order struck down by the Court in **Lala Babu Baijal**. The learned counsel for the appellant therefore submits that the order passed in **Ali Ahmad**, which itself came to be rendered upon concession, was clearly not applicable. He further submitted that even otherwise the judgment in **Lala Babu Baijal** no longer holds the field consequent to the amendments effected to Regulation 101 framed under the provisions of the 1921 Act. It was his contention that the above change in the statutory regimen and its consequential impact on **Lala Babu Baijal** was duly noticed

by a Division Bench of the Court in **State of U.P Vs. The U.P. Pradhanacharya Parishad, Lucknow and another**⁴.

7. On the other hand, learned counsel for the original petitioner, apart from reiterating the submissions advanced on the writ petition, has further contended that *the Uttar Pradesh Non-Governmental Arabic And Persian Madarsa Recognition, Administration and Services Regulation, 2016*⁵ which have been recently promulgated on 22 July 2016, themselves do not impose any restriction on Class IV posts being filled only by way of outsourcing.

8. Upon a consideration of the rival submissions as also the material placed for consideration before the learned Single Judge, we find that Lala Babu Baijal had struck down the Government Order dated 6 January 2011 which had stipulated that all future appointments on Class IV post in institutions governed by the 1921 Act would be only by way of outsourcing.

9. The Court in **Lala Babu Baijal** had found that the appointments to class IV posts were governed by the regulations framed under the 1921 Act and in the absence of any such restriction having been imposed under the regulations, the right to make an appointment to a Class IV post could not have been fettered by issuance of a mere Government Order. However after the judgment had been rendered in **Lala Babu Baijal**, Regulation 101 was amended imposing certain restrictions under the 1921 Act. The Governor granted prior approval for the amendment of Regulation 101 on 4 September 2013. The amended regulation was published in the official gazette on 24 April 2014.

10. It becomes relevant to note that on 18 December 2013, a learned Single Judge had stayed the communication of the Governor dated 4 September 2014. However, the amended regulation as notified on 24 April 2014 was not stayed. It is this position which was noticed by the Division Bench in **Pradhanacharya Parishad**. The Division Bench has held as follows:-

"It is not possible to subscribe to this submission for the simple reason that amended Regulation 101 was notified on 24 April 2014, which was subsequent to the interim order of the learned Single Judge dated 18 December 2013. At the stage when the interim order was issued on 18 December 2013, all that had happened, was that a communication was issued on 4 September 2013 indicating the prior approval of the Governor. Regulation 101 as amended was notified much later. As a matter of fact, several writ petitions have been filed, as stated by the learned Standing Counsel, to challenge the vires of Regulation 101, which are pending adjudication at Allahabad. The State has filed its counter affidavit in those writ petitions so as to facilitate a final hearing and disposal.

The respondents filed a writ petition before the learned Single Judge on 29 August 2014, which was after amended Regulation 101 had come into force. Unless they were to challenge amended Regulation 101 and were in a position to obtain an interim order or, as the case may be, a final order, it would not be possible for them to obtain relief merely on the basis of the judgment in the earlier writ petition filed by Committee of Management Lala Babu Baijal Memorial Inter College. That judgment was rendered in the context of the second paragraph of the Government

Order dated 6 January 2011 and much before Regulation 101 was amended by the issuance of a gazette notification on 24 April 2014.

Hence and for these reasons, the mandamus which has been issued by the learned Single Judge by the impugned judgment and order dated 16 September 2014 is unsustainable. The learned Single Judge has not had regard to the provisions of amended Regulation 101 or to the admitted position that there was no challenge thereto in the writ petition."

11. The other important aspect of which mention must necessarily be made is that admittedly the services of the original petitioner as also the administration of the Madarasa in question is governed by the U.P. Board of Madarsa Education Act 2004 and the Uttar Pradesh Ashashkiya Arabi and Parsi Madarson Ki Manyata Niyamawali, 1987 and not the 1921 Act. In fact, the learned counsel for the original petitioner has also placed before us the 2016 Regulations which have been promulgated and published in the official gazette on 22 July 2016.

12. We are, therefore, of the opinion that the ends of justice would merit a remand of the matter to the appellant No.3 before whom the rival contentions noticed above are placed and the respective parties permitted to assert the same and for the third appellant to take a considered decision thereon. This is necessitated not just on account of the submissions urged on behalf of the appellants but also in order to enable the third appellant to consider the submission of the original petitioner in respect of non-applicability of the Government Order dated 29 October 2013 as also the issue of a non-existence of a prohibition under the 2016 Regulations.

13. We accordingly dispose of the Special Appeal and modify the judgment rendered by the learned Single Judge with the following substituted directions:-

14. The original petitioner shall within a period of two weeks from today, submit his representation with respect to the grant of approval to his appointment as peon in the Madarsa in question. The appellant No.3 shall thereafter and after putting the Madarsa as also other concerned parties to notice proceed to consider and dispose of the said representation by way of a reasoned and speaking order within a period of eight weeks therefrom. All rights and contentions of the parties are left open for adjudication by the appellant No.3.

(2016) 8 ILRA 1029
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.08.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Writ Tax No.- 1160 Of 2009

M/S Hotline Electronics Limited ...Petitioner
Versus
State Of U.P. Ors. ...Respondents

Counsel for the Petitioner:
Arun Kumar Gupta, N.C. Gupta

Counsel for the Respondents:
C.S.C.

This writ petition has been filed challenging the validity of "State Development Tax" (SDT) levied at the rate of 1% and seeking a writ of mandamus declaring the levy of SDT on Eligibility Certificate holders as ultra vires. The petitioner has also prayed for quashing of the assessment order dated 05.03.2009 whereby 1% SDT has been imposed on the sale of Television chassis, coloured televisions, television parts and accessories.

The Court held that the State Legislature is fully competent under Entry 54, List II to levy tax on sale or purchase of goods. SDT is a tax on the taxable turnover of dealers and its incidence is squarely on the event of sale or purchase of goods. The definition of 'tax' under Section 2(n) is inclusive and after amendment specifically includes SDT. Section 3-H is a valid charging provision. The levy of SDT is in addition to trade tax and is adjustable against the monetary limit of the Eligibility Certificate. The argument that SDT is not a tax on sale or purchase has no merit.

Held: Para-The State Development Tax (SDT) introduced by the U.P. Trade Tax (Amendment) Act, 2005 is intra vires the Constitution and the U.P. Trade Tax Act, 1948. The writ petition lacks merit and is **dismissed**. No costs.

Case Law discussed:
State of U.P. and others vs. Systematic Conscom Limited,
M/s. Ganga Saran & Sons (Pvt.) Ltd., Calcutta vs. Income Tax Officer & others.

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Prabhat Chandra Tripathi, J.)

1. Heard Sri N.C. Gupta, learned counsel for petitioner and learned Standing Counsel for respondents, and perused record.

2. Petitioner has challenged validity of "State Development Tax" (hereinafter referred to as 'SDT') and has sought a writ of mandamus declaring levy of 'SDT' at the rate of 1% from Eligibility Certificate holders, as ultravires. It has also prayed for a writ of certiorari for quashing assessment order dated 5.3.2009 which has included 1% 'SDT' on the sale of Television chasis, coloured television, television parts and its accessories.

3. Petitioner is a Private limited company registered under Indian Companies Act, 1956 (hereinafter referred to as 'Act, 1956') and is engaged in the business of manufacture and sale of Television chasis, Coloured Televisions, Television parts and accessories. It had established its new unit in building 8-A, Udhyog Vihar, Greater Noida, Gautam Buddh Nagar.

4. Certain tax exemptions have been provided subject to certain conditions under Section 4-A of U.P. Trade Tax Act, 1948(hereinafter referred to as 'Act, 1948'). Petitioner satisfying requirement therein, completed formalities and applied for grant of exemption from payment of tax under Section 4-A of Act, 1948 in the year 2001. A Divisional Level Committee considered the matter and after satisfying that Petitioner is entitled for such exemption, Eligibility Certificate was issued by competent authority, allowing tax exemption for 10 years i.e. with effect from 24.10.2001 to 23.10.2011.

5. Provincial legislature promulgated "Uttar Pradesh Trade Tax (Amendment) Act, 2005" (hereinafter referred to as "Amendment Act, 2005") making amendment in Act, 1948. By Section 4 of Amendment Act, 2005, Section 3-H has been inserted in Principal Act i.e. Act, 1948 and consequential amendments have also been made in Section 4-A and 4-AA of Act, 1948.

6. Sections 4,5 and 6 of Amendment Act, 2005 inserting Section 3-H and making amendments in Sections 4-A and 4-AA are reproduced as under:-

"4. Insertion of a new Section 3-H- After Section 3-G of the principal Act, the following Section shall be inserted, namely:-

***"3-H. State Development Tax-(1)** There shall be levied a State Development Tax at the rate not exceeding one per cent of the taxable turnover as the State Government may be notification specify on the dealers whose aggregate turnover as referred to in sub-section (2) of Section 3 exceeds fifty lakh rupees. The State Development Tax shall be realised in addition to the tax payable under any other provision of this Act. This tax shall cease to be levied after a period of five years from the date of publication of the notification issued by the State Government under this Section.*

1. The facility of composition of tax in relation to compoundable goods under Section 7-D shall also be available in respect of State Development Tax.

2. The State Development Tax shall be adjustable in the monetary limit specified in the eligibility certificate issued under Section 4-A.

3. *No State Development Tax shall be liviable on.-*

(a) the news-papers and other goods or the dealers specified or notified under Section 4;

(b) declared goods under Section 14 of the Central Sales Tax, 1956;

(c) the goods liable for the payment of additional excise duty;

(d) such goods as may be specified by notification by the State Government."

5. **Amendment of Section 4-A-** *In Section 4-A of the Principal Act, in sub-section (1) for the words "notwithstanding anything contained in this Act". Words, figures and letter 'notwithstanding anything contained in any other provisions except the provisions of Section 3-H of this Act' shall be substituted.*

6. **Amendment of Section 4-AA-** *In Section 4-AA of the Principal Act, for the words "Notwithstanding anything contained in this Act", the words, figure and letter "Notwithstanding anything contained in any other provisions except the provision of Section 3-H of this Act" shall be substituted.*

7. Learned counsel for petitioner contended that imposition of 'SDT' by inserting 3-H and making it dominant to Section 4-A, so as to attract levy of 'SDT' upon such units which are availing tax exemption is illegal and arbitrary. It is said that under Entry 54, seventh Schedule, List II of the Constitution of India, word 'Sale and purchase' would not embrace anything regarding development of State and therefore levy of 'SDT' under Act, 1948 is beyond legislative competence and is ultravires.

8. Respondents have filed counter affidavit justifying imposition of 'SDT' and have also averred that State Legislature is fully competent to make provision for levy of 'SDT'.

9. The only issue up for consideration is whether State legislature is competent to make provision for levy of 'SDT' under Act, 1948.

10. Provincial legislature is competent to make laws with reference to Entry 54 Schedule 7 List II of the Constitution of India on the subject of "sale and purchase of goods other than newspapers subject to provisions of Entry 92-A of list I". Entry 54 reads as under:-

"54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92 A of List I"

11. Provincial Legislature, in reference to entry 54, thus, is competent for making laws for imposing tax. The incidence of tax must be sale or purchase of goods.

12. The word 'tax' itself has not been defined in the Constitution but the term 'tax' on the "sale or purchase of goods" has been defined in Article 366 (29-A) and it reads as under:-

"(29A) tax on the sale or purchase of goods includes:-

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(b) a tax on the transfer of property in goods (whether as goods or in some other form) invoked in the execution of a works contract;

(c) a tax on the delivery of goods on hire purchase or any system of payment by instalments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated contact no. ajmer district court officers association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made."

13. The definition of tax on sale or purchase of goods under Article 366(29-A) is inclusive and covers different kinds of transactions which otherwise in common parlance may not come within the term "sale or purchase of goods". Constitution, however nowhere explains or defines the term 'Tax' by itself.

14. Under Act, 1948, Section 2(n) has endeavoured to define 'tax' but here again definition is inclusive and reads as under:-

"2. Definitions.- In this Act, unless there is anything repugnant the subject or context:-

(a)...

(n). 'Tax' includes an additional tax and the composition money accepted under Section 7-D."

15. It does not say that 'tax' would mean only 'Trade Tax' or any particular kind of trade tax. Anything which can be said to be 'tax' with whatever adjective it may be called, but if it is on the incident of 'sale or purchase of goods', as defined under Section 366 (29-A), such 'tax' would be within the ambit of Act, 1948.

16. We also find that the term 'Trade Tax' has been separately defined under Section 2 (bb) of Act, 1948 and reads as under:-

"2(bb) 'Trade Tax' means a tax payable under this Act on sales or purchases of goods, as the case may be;"

17. A perusal of aforesaid shows that trade tax is one of the tax chargeable and leviable under Act, 1948 and within the ambit of Section 2 (n) but there may be other taxes also which can be imposed under Act, 1948 subject to the condition that incident of tax is "sale or purchase of goods", within the ambit of definition under Article 366(29-A) of the Constitution.

18. Even charging Section i.e. Section 3 provides that a dealer shall be liable to pay 'tax' for each assessment year as are provided under various Sections mentioned therein. Therefore, to read Act, 1948 as if therein, legislature can impose only 'Trade Tax' and not anything else is nothing but a complete lack of understanding in appreciation of above statute.

19. In **State of U.P. and others vs. Systematic Conscom Limited 2013 NTN 266(SC)** referring to amendment Act, 2005 and Section 3-H. Court observed that the said amendment has introduced levy and collection of SDT. It bears resemblance to the levy and collection of Turnover Tax. It is levied on a particular class of dealer at a particular rate. When coming to the authority of the State to make provisions for different taxes, Court observed that taxation is a mode of raising revenue for public purposes. The term is ordinarily used to express the exercise of the sovereign power to raise revenue for the expenses of the Government. In the Modern times, Governments are accustomed to levy a great variety of taxes; sometimes relying upon a single kind for all needs of the State and sometimes levying a number of different kinds with a view to distribute the burden more equally or more to the general acceptance. Taxes are often spoken of as special if levied for a special purpose, and general if levied for some of the ordinary purposes of a government. A special tax as the term, used in the statutes, is sometimes held to mean an 'additional tax' over and above the general tax. The broad feature of 'taxation' would include, the persons, proper or occupation to be taxed; the amount or rate of tax; the purposes for which taxes shall be levied; the mode, method or kind of tax; the apportionment of the tax; the situs for taxation of goods; and the method of collection.

20. Court also held Section 3-H as a charging provision since it has all ingredients of charging provisions as explained in **M/s. Ganga Saran & Sons(Pvt.) Ltd., Calcutta vs. Income Tax Officer & others, (1981) 3 SCC 143**. The four components of incidence of tax was explained as, first, the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second, is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third, is the rate at which tax is imposed, and the fourth, is the measure or value to which the rate will be applied for computing tax liability. Court said that levy would only exist in law when all aforesaid components are clearly and definitely ascertainable. Section 3-H provides for imposition of 1% of SDT separately on the taxable turnover, thereby creating an independent charge. It has not led to any change to the rate of tax on goods.

21. On the transaction of sale or purchase of goods, legislature proposes to impose tax termed as 'SDT' and with this intention, Amendment Act, 2005 has been enacted. By Section 3 thereof an amendment has been made under Section 3(1) of Act, 1948 and besides Section 3 A and Section 3D, Section 3-H has been mentioned in Section 3. Further Section 3-H itself has separately been inserted as a new Section imposing 'SDT' at the rate

not exceeding 1% on taxable turnover, as the State may, by notification, specify on the dealers whose aggregate turnover as referred to in Section 3(2) exceeds fifty lakh rupees. 'SDT' shall be realised in addition to 'tax' payable under any other provision of Act, 1948. This tax shall cease to be levied after a period of five years from the date of publication of notification issued by State Government under this Section.

22. The point of levy of Tax i.e. 'SDT' falls on sale or purchase therefore, is leviable and permissible under Act, 1948. The definition of 'tax' has also been amended by legislature by Section 2 of Amendment Act, 2005 and now the definition of 'tax' reads as under:-

"(n) Tax includes an additional tax, and the composition money accepted under Section 7-D and the State Development Tax"

23. Definition of tax therefore includes 'State Development Tax' i.e. 'SDT' and it is chargeable only when there is an event of sale or purchase as defined under Act, 1948.

24. State legislature is empowered to make laws in respect to tax leviable on the event of sale or purchase of goods and 'SDT' being a tax under Section 2(n) as amended by Amendment Act, 2005 is a 'Tax' imposed on the 'Turnover' which is defined as aggregate amount for which goods are supplied or distributed on sale or purchase by dealer either directly on cash or additional payment or on other valid consideration. There is no bar under Act, 1948 to impose 'tax' other than 'Trade Tax' for the reason that Act, 1948 has been made to provide tax on sale or purchase and is not confined to 'Trade Tax'. Power to levy 'tax' is an inherent attribute of sovereign function of State. It has power under charging provisions, to levy tax on the taxable turnover of dealer at the rates prescribed under provisions of Act, for raising revenue for public purposes. Ordinarily, it is used to express exercise of sovereign power to raise revenue for the expenses of government.

25. In the present case, State has framed law for imposition of tax on sale or purchase of goods under Act, 1948. It had made provisions for imposition of Trade Tax in general and 'additional tax'. The definition of 'tax' is inclusive and can be extended to other taxes. To make this clear, legislature has also amended definition of 'tax' by including therein 'SDT' also.

26. Despite repeated query, learned counsel for petitioner could not show as to how State Legislature is not competent to include within the ambit of term 'tax', 'SDT' in Act, 1948 when charging section provides tax on sale or purchase of goods. The validity of principal legislation can be challenged on limited grounds i.e. violation of provisions of Constitution of India; or for want of legislative competence but none of such grounds exists in the case in hand.

27. We, therefore, find no merit in this petition. Dismissed.

28. No costs.

(2016) 8 ILRA 1035
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.08.2016

BEFORE

THE HON'BLE VIKRAM NATH, J.
THE HON'BLE RAVINDRA NATH KAKKAR, J.

Jail Appeal No.- 1592 Of 2011

Munish

...Appellant

Versus

State

...Respondent

Counsel for the Appellant:

From Jail

Counsel for the Respondent:

A.G.A

This appeal has been preferred against the State vs. Munish, convicting the appellant under Sections 376 I.P.C. and 3(2)(v) of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (in short '1989 Act'), and sentencing him under Section 376 IPC for 10 years rigorous imprisonment with fine of Rs.1000/- and in default of payment of fine 6 months rigorous imprisonment and under Section 3(2)(v) of 1989 Act life imprisonment. Both sentences were ordered to run concurrently.

The prosecution case, in brief, is that one Chhote Lal who along with his wife used to work at a brick kiln of Bahadurpur village, reported to the police that on 24.5.2008 they were at his tent (dwelling place) at brick kiln. Due to scorching heat the informant along with his four year old daughter Rita was lying on a brick stack. At about 10 O' Clock in the night, appellant Munish who too was engaged for withdrawal of bricks from the kiln, appeared there and said that a ghost had overcome him and requested to light a deepak (earthen lamp) in his name. On being told the informant went to light an earthen lamp and on coming back did not find his 4 year old daughter Rita there. On raising an alarm that his daughter had been taken away by Munish Botham, his wife with Dhaniram and Raghunath rushed to the spot and search was undertaken. They heard the screaming of the girl and in torch light Munish Botham was seen grappling the girl in the Nali of tube well belonging to one Devraj. The girl was weeping and on arriving at the scene, Munish fled. The blood was coming out from her private parts.

Considering the entire aspects of the matter and looking to the circumstances of the case, we are of the view that the judgment and order of conviction and sentence passed by the trial court so far as under Section 376 I.P.C. is well discussed and the lower court has rightly observed that the prosecution has succeeded to prove the guilt of the accused-appellant under Section 376 I.P.C. beyond any reasonable doubt. Accordingly, the judgment and conviction so far as under Section 376 I.P.C. by the court below is concerned is hereby confirmed.

There is no evidence whatsoever to prove the commission of offence under Section 3(2)(v) of the 1989 Act. The mere fact that the victim happened to be a girl belonging to a Scheduled Caste

community does not attract the provisions of the Act. Apart from the fact that the prosecutrix belongs to the 'Chamar' Community, there is no other evidence to support the charge under Section 3(2)(v) of the 1989 Act. The Trial Judge was perhaps persuaded to affirm the conviction on the basis that the prosecutrix belongs to a Scheduled Caste community. The conviction of the appellant under section 3(2)(v) of the 1989 Act must, therefore, be set aside.

In the result, the appeal is allowed in part while setting aside the conviction and sentence for the offence under Section 3(2)(v) of the 1989 Act. The conviction and sentence for offence under Section 376 I.P.C. is confirmed. The appellant is acquitted for the charge under Section 3(2)(v) of the 1989 Act.

Held: Para-

Case Law discussed:

Sri Narayan Shah and another Vs. State of Tripura, 2005 (Criminal) Page 410,
Jai Prakash Singh Vs. State of Bihar, (2012) 4 SCC Page 379,
Kalicharan Vs. State of U.P., 2015 (6) ALJ Page 147,
State of U.P. Vs. Naresh, (2011) 4 SCC Page 324,
State of M.P. & Anr. Vs. Ram Krishna Balothia & Anr, 1995,
Dinesh alias Buddha v. State of Rajasthan, (reported in AIR 2006 SC 1267) in paragraph no.15,
Masumsha Hasanasha Musalman v. State of Maharashtra, reported in AIR 2000 SC 1786

(Delivered by Hon'ble Ravindra Nath Kakkar, J.)

1. This appeal has been preferred against the judgment and order dated 17.9.2010 passed by the Special Judge, SC & ST Act, Kannauj, in S.T.No. 292 of 2008 arising out of Case Crime No.108 of 2003, State vs. Munish, convicting the appellant under Sections 376 I.P.C. and 3(2)(v) of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (in short '1989 Act'), and sentencing him under Section 376 IPC for 10 years rigorous imprisonment with fine of Rs.1000/- and in default of payment of fine 6 months rigorous imprisonment and under Section 3(2)(v) of 1989 Act life imprisonment. Both sentences were ordered to run concurrently.

2. The prosecution case, in brief, is that one Chhote Lal who along with his wife used to work at a brick kiln of Bahadurpur village, reported to the police that on 24.5.2008 they were at his tent (dwelling place) at brick kiln. Due to scorching heat the informant along with his four year old daughter Rita was lying on a brick stack. At about 10 O' Clock in the night, appellant Munish who too was engaged for withdrawal of bricks from the kiln, appeared there and said that a ghost had overcome him and requested to light a deepak (earthen lamp) in his name. On being told the informant went to light an earthen lamp and on coming back did not find his 4 year old daughter Rita there. On raising an alarm that his daughter had been taken away by Munish Botham, his wife with Dhaniram and Raghunath rushed to the spot and search was undertaken. They heard the screaming of the girl and in torch light Munish Botham was seen grappling the girl in the Nali of tube well belonging to one Devraj. The girl was weeping and on arriving at the scene, Munish fled. The blood was coming out from her private parts. The informant lodged a first information report which was registered by Constable Clerk Maya Ram at G.D. report no.21 at about 17.30 O' Clock on 28.5.2008. The victim was medically examined by Dr. Renu Singh on 28.5.2008 and medical

examination report Exhibit Ka-4 was prepared. The case was investigated by Circle Officer Ram Swarup Singh who inspected the place of occurrence, prepared the site plan (Ex.Ka-7) and after collection of sufficient evidence, submitted charge sheet against the accused appellant. The court took cognizance of the offence and complying with the provisions of Section 207 Cr.P.C. the appellant was provided copies of documents, and since offences were cognizable by Sessions Court, committed the case to Sessions Judge for trial, The Sessions Court framed charge against the appellant under Section 376 I.P.C. read with Section 3 (2)(v) of 1989 Act to which the appellant pleaded not guilty and claimed to be tried.

3. To prove its case the prosecution examined PW-1 Chhote Lal, PW-2 Reena, PW-3 Dr. Renu Gupta, PW-4 Head Constable Maya Ram and PW-5 Ram Swarup Singh, Circle Officer (Investigating Officer).

4. After the prosecution evidence was closed, statements of accused appellant under Section 313 Cr.P.C. were recorded by the trial court. The appellant denied the alleged incident and stated that the appellant was falsely implicated in the alleged incident on account of enmity.

5. PW-1 Chhote Lal, who is the first informant, stated that the incident occurred about 9 months ago at a brick kiln of village Bahadurpur, where he along with his wife used to mould bricks. On the fateful day it was about 10 O' Clock in the night. The informant with his daughter Rita aged about 4 years was lying on a brick stack. At that time appellant Munish came there and said he had been overwhelmed by evil spirit (ghost) and asked him to light an earthen lamp of his name. The informant went to light the lamp and when he returned, he did not find his daughter Rita there. He raised an alarm upon which his wife along with Dhaniram and Raghunath came there and on search being made, he heard screams of the victim. They rushed to her and found that the appellant had grabbed the victim and seeing the informant and others, he fled away. The informant took his daughter and found that the blood was coming out from her private parts and soon noticed that the appellant had sexually assaulted his daughter. Thereupon, the FIR was lodged which he also proved as Ex. Ka-1.

6. PW-2 Reena is mother of he victim Rita. She stated in her evidence that about 10 months ago she along with his two year son was sleeping in the hut at brick kiln and her husband with daughter Rita was sleeping on the brick stack. At about 10.00 O' Clock in the night, her husband came in the hut and informed that Munish had been overwhelmed by ghost and so he had to light an earthen lamp for him. When her husband went back to the stack, her daughter was not there. They carried out search here and there and on hearing screams of the girl, they rushed to that direction and reached near a tube well where in the Nali Munish had grabbed the girl and sexually assaulted. However, he managed to flee from the spot seeing the informant and others.

7. PW-3 Dr. Renu Gupta conducted medical examination of the victim Rita and on examination of internal organs it was found that hymen was torn in the shape of 6 O' Clock and perennial tear also was in the same position. It was half cm. deep and extended upto anus with reddish corners. No fresh bleeding was there. Two slides of vaginal smear were prepared by the

doctor and were sent for sperm examination. The doctor also proved the medical examination report (Ex. Ka-3).

8. PW-4 Head Constable Maya Ram had registered the first information report (Ex. Ka-6) in the G.D. and PW-5 Ram Swarup Singh, Circle Officer had conducted investigation of the case and prepared the site plan (Ex.Ka-7 and Ex.Ka-8) and after collecting sufficient evidence submitted charge sheet against the appellant.

9. We have heard Sri Ambrish Kumar, learned counsel for the appellant, Sri P.S. Yadav, learned A.G.A. for the State and perused the lower court record.

10. The main contention of the learned counsel for the appellant is with regard to the delay in lodging the F.I.R. His next submission is that the victim was aged about four years but neither her statement under Section 164 had been recorded nor the victim had been produced for cross-examination before the trial court. It is next submitted that there is neither an eye witness nor independent witness of the alleged incident. The testimony of P.W.1 and P.W.2 are that of related witnesses who are father and mother of the victim. Lastly argued that there is laches and discrepancy in the investigation as statement under Section 164 Cr.P.C. of the victim has not been recorded. The source of light (torch) has not been taken nor produced and there is a contradiction on the point of recovery of the clothes of victim whether it is a 'salwar' or 'frock' and also there is a contradiction in the testimony regarding the colour of the clothes. Learned counsel for the appellant vehemently argued that the offence under Section 3(2)(v) of 1989 Act is not proved, hence prayed to allow the appeal and acquit the accused.

11. Per contra, learned A.G.A. has contended that the judgment of the trial court is just and well reasoned. The finding recorded by the court below of conviction and sentence is based on the ocular testimony corroborated with the medical testimony; there is also an explanation in delay in lodging the FIR. The benefit on the basis of laches and discrepancies in the investigation does not go to vanish the whole prosecution story and the explanation was also given of non- recording of statement under Section 164 Cr.P.C. considering the age of the victim of only 4 years and that the victim was not in a position to withstand the cross-examination and due to the lack of understanding she had not been produced as a prosecution witness. Under the fact and circumstances the testimony of the eye witnesses, namely, P.W.1 Chhote Lal father of the victim and P.W.2 Reena, the mother of the victim establishes the offence of rape against her daughter. So this argument of the learned counsel for the appellant has no merit and accordingly learned A.G.A. prayed for the dismissal of the appeal.

12. We have considered the submissions advanced by both the parties and perused the material available on record. So far as submission of the learned counsel with regard to the delay in lodging the FIR is concerned, perusal of the record shows that the incident is of 24.5.2008 at about 10 o'clock night and report was lodged on 25.5.2008 at 14.00 p.m. and the distance of the Police Station is 3 kms from the place of occurrence. In the written report (Ex.Ka-1), the complainant

Chhote Lal has given an explanation that due to the fear of accused Munish he could not lodge the FIR in the night on the date of incident.

13. With regard to the delay in lodging the FIR, the Hon'ble Apex Court has propounded the principle for the appreciation of the aspect of delay if any caused in lodging of the FIR. Hon'ble Apex Court has laid down the following proposition in the case of *Jai Prakash Singh Vs. State of Bihar*, (2012) 4 SCC Page 379. The relevant paragraph no.12 is reproduced hereinunder :-

"12. The FIR in criminal case is a vital and valuable piece of evidence though may not be substantive piece of evidence. The object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well as the names of eye- witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it loses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question."

14. It is settled law that if delay in lodging the FIR cannot be explained substantively, then it would be fatal to the case of prosecution. However, it is obligatory on the part of the court to take notice of delay and examine the same in the back drop of the case whether any acceptable explanation has been offered by the prosecution and whether the same deserves acceptance being substantive. In view of the proposition cited above, inference can safely be drawn that the delay should be explained and if not explained even then the court has to consider the aspect of delay in lodging the FIR in the light of totality of evidence and draw inference about the veracity of the prosecution version considering the fact and circumstances of the case which varies from case to case. Moersa, on the score of delay, the entire story of the prosecution cannot be discarded. In the case of **Sri Narayan Shah and another Vs. State of Tripura, 2005 (Criminal) Page 410**, the Hon'ble Apex Court has held that *"mere delay in lodging the FIR is really of no consequence, if the reason is explained because in cases of rape generally the family remains reluctant to report the matter to the Police to save the shame and prestige of the family."*

15. As per the above legal proposition and as we have already stated that in the written report there was an explanation by the complainant, the father that the victim of rape happens to be four year infant and that due to the fear of accused Munish he could not lodge the report of the alleged incident.

16. With regard to the next submission of the learned counsel that the victim was not produced before the trial court by the prosecution as a witness and the statement under Section 164 Cr.P.C. of the victim was not recorded during investigation, we cannot subscribe any benefit on this score because the age of the victim at the time of commission of the crime was merely four years and as per the prosecution version on 24.5.2008 at about 10 O'clock in the night appellant accused

Munish said to the father of the victim that a ghost had overcome him so light a deepak (earthen lamp) in his name and on being told the informant went to light the earthen lamp and when he returned his four year old daughter Reeta was not there. He and his wife rushed to the spot and they heard the screaming of the girl and in the torch light they saw that the accused Munish was grappling the victim in the Nali of the tubewell belonging to one Devraj and the girl was weeping and the blood was oozing out from her private part. P.W.1 - father of the victim Chhote Lal and P.W. 2 Reena, mother of the victim, supported the prosecution version. Learned counsel for the appellant was not able to discredit their testimony on the point of time, place and occurrence and naming of the accused and the involvement and complicity of the accused in the commission of the alleged crime. On a careful scrutiny of the evidence available on record and the quality of statement given by P.W.1 and P.W.2 inspire confidence and it is found to be absolutely trustworthy unblemished and is of sterling quality. What would be more relevant is the consistency of the statement right from the starting point till the end, namely, at the time the witness makes the initial statement and ultimately testimony before the court. It is found to be natural and consistent with the case of the prosecution. To be more precise the version of the above said witnesses on the score of prosecution version is found to remain intact. They have stated in their testimony that when they reached the spot after hearing the shrieks of the prosecutrix/victim they saw that the appellant accused Munish grappled the victim at the place of occurrence, i.e., Nali of tubewell belonging to one Devraj, blood was oozing out from her private parts of the body. It is of a common prudence that the father and mother of the victim would not speak lie. Under the facts and circumstances as stated above, although it is true that P.W.1 and P.W.2 are father and mother of the victim but only on this ground their testimony cannot be discarded or disbelieved. The court simply has to examine the testimony with due care and caution. As we have already stated the microscopic analysis of their testimony is worthy of credit, therefore, non-production of the victim before the trial court or non recording of the statement under Section 164 Cr.P.C. has no relevance considering the age of the victim and the ocular testimony which has come before the trial court discussed above.

17. So far as the submission made by the learned counsel for the appellant with regard to the deficiency in the investigation such as "non production of the torch", on this point it would be relevant to record that there are settled legal propositions that only on the basis of faulty or defective investigation testimony of the eye witnesses cannot be brushed aside. If a defective and wrong sketch map has been prepared by the Investigating Officer without inspecting the place of occurrence, the Hon'ble Apex Court in the case of **Kalicharan Vs. State of U.P., 2015 (6) ALJ Page 147** held that "*on the ground of defective investigation the prosecution case cannot be thrown out*. If there is discrepancy in the preparation of a defective site plan mentioning the wrong details, no benefit can be accorded to the accused where the prosecution witnesses, namely, P.W.1 and P.W.2 father and mother of the victim had clearly and cogently established the date, time and place of occurrence. Under such legal proposition we are of the view that the submissions raised by the learned counsel for the accused appellant has no substance.

18. With regard to the submission raised by the learned counsel for the appellant regarding the recovery of the clothes of the victim and produced during trial and the statements of P.W.1 and P.W.2 has variations, we have given our conscious thought and perused the records of the court

below. There is a categorical statement of P.W.1 and P.W.2 that the accused Munish ran away with the underwear of the victim and a frock as stated by P.W.2 and P.W.1 was seized by the Investigating Officer. The articles produced before the court happens to be the salwar. The witnesses were cross-examined at length but nothing unnatural had come on the testimony. So far as the legal proposition is concerned, Hon'ble the Apex Court in the case of **State of U.P. Vs. Naresh, (2011) 4 SCC Page 324** held as under :-

"In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety.

The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

"Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility."

Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier."

19. On the basis of the above legal proposition the statement of P.W.1 and P.W.2 so far as the recovery of clothes are concerned, we find that whether salwar or frock hardly matters as it does not go to the root of the case or materially affect the core of prosecution case and as we have already stated that the evidence of P.W.1 and P.W.2 being the father and mother and they had given their eye version of the commission of crime, the presence, involvement and complicity and the commission of crime only against the appellant accused which inspire the confidence and credibility and trustworthiness of P.W.1 and P.W.2. Therefore, we are not inclined to give any benefit on the point of the submission raised by the appellant's counsel.

20. As per the aforesaid discussion so far as the conviction under Section 376 I.P.C. recorded by the court below is concerned, there is nothing on record to show that the injuries of the victim were forged or manufactured. The ocular testimony of P.W.1 and P.W.2, father and mother respectively as regard the commission of the offence of rape is fully corroborated by medical evidence. FIR also supports the ocular testimony of P.W.1 and P.W.2 as well as the medical evidence, the seizure memo of salwar as well as the position of the salwar itself also corroborate the testimony of ocular witnesses of the incident. Running away from the place of occurrence of the

accused, which is proved by the eye witnesses P.W.1 and P.W.2, finds support to the prosecution version and the victim was profusely bleeding from her private parts establishes the commission of the offence of rape.

21. Considering the entire aspects of the matter and looking to the circumstances of the case, we are of the view that the judgment and order of conviction and sentence passed by the trial court so far as under Section 376 I.P.C. is well discussed and the lower court has rightly observed that the prosecution has succeeded to prove the guilt of the accused-appellant under Section 376 I.P.C. beyond any reasonable doubt. Accordingly, the judgment and conviction so far as under Section 376 I.P.C. by the court below is concerned is hereby confirmed.

22. The last submission with regard to the commission of offence under Section 3(2)(v) of the 1989 Act, we are in full agreement with the contention raised by the learned counsel for the appellant. For ready reference the provisions of Section 3(2)(v) of the 1989 Act is reproduced hereinunder :-

"commits any offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine"

23. At the outset we may observe that there is no evidence whatsoever to prove the commission of offence under Section 3(2)(v) of the 1989 Act. The mere fact that the victim happened to be a girl belonging to a Scheduled Caste community does not attract the provisions of the Act. Apart from the fact that the prosecutrix belongs to the 'Chamar' Community, there is no other evidence to support the charge under Section 3(2)(v) of the 1989 Act. The Trial Judge was perhaps persuaded to affirm the conviction on the basis that the prosecutrix belongs to a Scheduled Caste community. The conviction of the appellant under section 3(2)(v) of the 1989 Act must, therefore, be set aside. So far as the legal proposition is concerned, in the case of **State of M.P. & Anr. Vs. Ram Krishna Balothia & Anr, 1995 Criminal Law Journal 2076**, Hon'ble Apex Court has observed as under :-

"The offences which are enumerated under Section 3 are offences which, to say the least, denigrate members of Scheduled Castes and Scheduled Tribes in the eyes of society, and prevent them from leading a life of dignity and self-respect. Such offences are committed to humiliate and subjugate members of Scheduled Castes and Scheduled Tribes with a view to keeping them in a state of servitude. These offences constitute a separate class and cannot be compared with offences under the Penal Code."

24. The expression "on the ground" has been subject matter of decision in a number of cases decided under the 1989 Act. In the case of **Masumsha Hasanasha Musalman v. State of Maharashtra**, reported in AIR 2000 SC 1786 it was held that *"To attract the provisions of Section 3(2)(v) of the Act, the sine qua non is that the victim should be a person who belongs to a Scheduled Caste or a Scheduled Tribe and that the offence under the Indian Penal Code is committed against him on the basis that such a person belongs to a Scheduled Caste or a Scheduled Tribe. In the absence of such ingredients, no offence under the Section 3(2)(v) of the Act, is constituted."* In the case of **Dinesh alias Buddha v. State of Rajasthan**,

(reported in AIR 2006 SC 1267) in paragraph no.15 it was held that "*sine qua non for application of Section 3(2)(v) is that an offence must have been committed against a person on the ground that such person is a member of the Scheduled Castes or the Scheduled Tribes. In the instant case no evidence has been led to establish this requirement. It is not the case of the prosecution that the rape was committed on the victim since she was a member of a Scheduled Caste. In the absence of evidence to that effect, Section 3(2)(v) has no application.*" In the case of **Ramdas and Ors. v. State of Maharashtra, (reported in AIR 2007 SC 155)** in paragraph no.10 it has been held that "*at the outset we may observe that there is no evidence whatsoever to prove the commission of offence under Section 3(2)(v) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The mere fact that the victim happened to be a girl belonging to a Scheduled Caste does not attract the provisions of the Act. Apart from the fact that the prosecutrix belongs to the Pardhi Community, there is no other evidence on record to prove any offence under the said enactment.*"

25. The words "on the ground" shows that the prosecution is required to prove that the target of crime was selected 'on the ground' that he/she belonged to Scheduled Caste or Scheduled Tribe, or that crime was committed for the reason that such person belonged to such community tribe. In other words, it must be shown that if the victim would not have belonged to Scheduled Castes or Scheduled Tribes, the crime would not have been committed. The cause for the offence must contain an element of a caste/racial prejudice. If an accused committed rape on a woman/girl belonging to a Scheduled Caste only to satisfy his sexual lust, without any prejudice of caste to which the girl belonged, he would be guilty of offence under Section 376 I.P.C. but he would not be guilty of offence under Section 3(2)(v) of the 1989 Act, as he did not commit sexual intercourse with the girl on the ground that she was a Scheduled Caste girl. To attract the above mentioned provisions of Section 3(2)(v) of the 1989 Act mere knowledge that the victim belonged to a Scheduled Caste or Scheduled Tribe community or mere intention to commit an offence against a member of a Scheduled Caste or Scheduled Tribe is not sufficient but something more is needed, i.e., a graver kind of mens rea denoted by the phrase "on the ground" in the provision, is required.

26. The Trial Court has also not noticed any evidence to support the charge under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and was perhaps persuaded to affirm the conviction on the basis that the prosecutrix belongs to a Scheduled Caste community. The conviction of the appellants under section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 must, therefore, be set aside.

27. In the above circumstances we find that the conviction and sentence for offence under Section 3(2)(v) of the 1989 Act are not sustainable in the eye of law and is liable to be set aside.

28. In the result, the appeal is allowed in part while setting aside the conviction and sentence for the offence under Section 3(2)(v) of the 1989 Act. The conviction and sentence for offence under Section 376 I.P.C. is confirmed. The appellant is acquitted for the charge under Section 3(2)(v) of the 1989 Act. It is made clear that the accused appellant Munish shall now serve out the sentence for the offence under section 376 I.P.C.

(2016) 8 ILRA 1044
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.08.2016

BEFORE

THE HON'BLE DR. DEVENDRA KUMAR ARORA, J.

Misc. Single No.- 1849 Of 2015

Vishram Yadav

...Petitioner

Versus

Commissioner Devi Patan Mandal Gonda & Anr.

...Respondents

Counsel for the Petitioner:

Nitin Srivastava

Counsel for the Respondents:

C.S.C.

The petitioner has filed the instant writ petition.

Submission of learned Counsel for the petitioner is that the petitioner was issued a firearm license of S.B.B.L. Gun No.10075/93, License No.185. An FIR was lodged against the petitioner under Sections 323, 504, 506 IPC and Section 3(1)10 of SC/ST Act at Police Station Khargupur, District Gonda. Thereafter, the firearm license of the petitioner was cancelled by the District Magistrate. The petitioner preferred an Appeal before the learned Commissioner, who after setting aside the order dated 28.05.2009 remanded the matter to the District Magistrate for consideration afresh, and also directed to pass appropriate order after providing adequate opportunity to the petitioner. Thereafter, vide impugned order dated 24.04.2013, the District Magistrate, Gonda reiterated his earlier order of rejection without considering and dealing with the pleas as raised by the petitioner.

Mere fact that some reports had been lodged against the petitioner could not form basis of cancelling the license. There is no dispute to the fact that the petitioner is a political person and was the Gram pradhan of the Village. Moreover, in the criminal case, petitioner has been acquitted by the Trial Court and the judgment of acquittal was brought to the notice of the Appellate Court but the Appellate Authority ignored this vital aspect of the matter, which is a serious omission on his part.

It is well settled in law that mere pendency of criminal case or apprehension of abuse of arm is not sufficient grounds for passing the order of suspension or revocation of license under Section 17 (3) of the Act. Here, as averred above, the petitioner has been acquitted in the said criminal case.

The licensing authority is directed to renew the firearm license of the petitioner, which was cancelled, within a maximum period of three months from the date of production of certified copy of this order.

Held: Para-

Case Law discussed:

Ram Sanehi vs. Commissioner Devi Patan Division, Gonda and another [2004(22) LCD 1643],
Rayees Ahmad vs. State of U.P. and others [2002(20) LCD 913],
Sheo Prasad Misra Vs. The District Magistrate, Basti & others; 1979 (16) ACC 6 (sum),
Habib Vs. State of U.P. reported in 2002 ACC 783,
Devi Patan Division, Gonda & another [supra],

(Delivered by Hon'ble Dr. Devendra Kumar Arora, J.)

1. Heard Sri Nitin Srivastava, learned Counsel for the petitioner and the learned Standing Counsel.

2. Feeling aggrieved by the cancellation of his firearm licence by the District Magistrate vide order dated 18.2.2015 and rejection of his appeal by the Commissioner, Devi Patan Mandal, Gonda, vide order dated 18.2.2015 preferred against the order of cancellation, the petitioner has filed the instant writ petition.

3. Submission of learned Counsel for the petitioner is that the petitioner was issued a firearm license of S.B.B.L. Gun No.10075/93, License No.185. An FIR was lodged against the petitioner under Sections 323, 504, 506 IPC and Section 3(1)10 of SC/ST Act at Police Station Khargupur, District Gonda. Thereafter, the firearm license of the petitioner was cancelled by the District Magistrate vide order dated 28.05.2009. Against the order dated 28.05.2009, the petitioner preferred an Appeal before the learned Commissioner, who after setting aside the order dated 28.05.2009 remanded the matter to the District Magistrate for consideration afresh, and also directed to pass appropriate order after providing adequate opportunity to the petitioner. Thereafter, vide impugned order dated 24.04.2013, the District Magistrate, Gonda reiterated his earlier order of rejection without considering and dealing with the pleas as raised by the petitioner. Therefore, the impugned order of cancellation of firearm licence is wholly erroneous and against the provisions of Arms Act.

4. Learned Counsel for the petitioner has vehemently contended that the impugned orders have been passed without considering the facts in its entirety and in utter disregard to the law as propounded by this Court in number of cases, namely, **Ram Sanehi vs. Commissioner Devi Patan Division, Gonda and another [2004(22) LCD 1643]** and **Rayees Ahmad vs. State of U.P. and others [2002(20) LCD 913]**.

5. Concluding his arguments, learned Counsel for the petitioner submitted that the grounds which are mentioned in Section 17(3) of the Arms Act are not at all attracted in the case of the petitioner and the petitioner has not contravened any of the conditions as enumerated in the licence and as such the impugned order passed by the District Magistrate as also the order passed by the Appellate Authority is illegal and legally not sustainable.

6. Learned Standing Counsel, while refuting the allegations of the petitioner, submitted that the impugned orders were passed strictly in accordance with law and provisions of Arms Act and

both the orders do not suffer from any infirmity. The licensing authority after considering the material facts on record has given a categorical finding of fact that the petitioner has violated the terms and conditions of arm license.

7. The question as to whether mere involvement in a criminal case or pendency of a criminal case can be a ground for revocation of licence under Arms Act, has been dealt with by a Division Bench of this Court **Sheo Prasad Misra Vs. The District Magistrate, Basti & others**; 1979 (16) ACC 6 (sum), wherein the Division Bench relying upon the earlier decision of Masiuddin Vs. Commissioner, Allahabad, found that mere involvement in criminal case cannot in any way affect the public security or public interest. The law propounded in the said decisions has been subsequently followed in **Habib Vs. State of U.P.** reported in 2002 ACC 783, and Ram Sanehi Vs. Commissioner, Devi Patan Division, Gonda & another [supra] and other cases.

8. Mere fact that some reports had been lodged against the petitioner could not form basis of cancelling the license. There is no dispute to the fact that the petitioner is a political person and was the Gram pradhan of the Village. Moreoso, in the criminal case, petitioner has been acquitted by the Trial Court and the judgment of acquittal was brought to the notice of the Appellate Court but the Appellate Authority ignored this vital aspect of the matter, which is a serious omission on his part.

9. The order passed by the District Magistrate cannot be upheld in absence of anything as contained in Section 17(3) of the Act. The Appellate Court has also committed an error in not considering the facts in its correct prospective and has also failed to appreciate the grounds mentioned in Section 17(3) of the Arms Act regarding revocation or for suspending a licence. It is well settled in law that mere pendency of criminal case or apprehension of abuse of arm is not sufficient grounds for passing the order of suspension or revocation of license under Section 17 (3) of the Act. Here, as averred above, the petitioner has been acquitted in the said criminal case. In the backdrop of the aforesaid facts, the order passed by the Appellate Authority cannot be legally sustained.

10. Accordingly, the orders dated 18.2.2015 passed by the Commissioner and the order dated 24.4.2013 passed by the District Magistrate are hereby quashed. The licensing authority is directed to renew the firearm license of the petitioner, which was cancelled, within a maximum period of three months from the date of production of certified copy of this order.

11. The writ petition stands allowed in above terms.

(2016) 8 ILRA 1047
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.08.2016

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Appeal No.- 1995 Of 2014

Daya Ram Kurmi Alias Juraha Kurmi ...Appellant
State Of U.P. Versus
 ...Respondent

Counsel for the Appellant:

Jainendra Kumar Mishra, Deepak Dubey, Jitendra Kumar Mishra

Counsel for the Respondent:

Govt. Advocate

The aforesaid Criminal Appeal No.1995 of 2014 has been preferred by the appellant, Daya Ram Kurmi @ Juraha Kurmi against the judgment and order of conviction dated 09.04.2014 passed by Additional Sessions Judge, convicting to appellant under Section 302 IPC is hereby set aside. Appellant is acquitted of all the charges framed against him. Appellant is in jail. He shall be released forthwith unless and until he is wanted in any other case.

The allegations that informant's brother Laxmi Bhurji son of Suraj Deen was returning home after taking bath at tube-well of Ram Asrey Kurmi and had walked some paces on Pakka Road, when accused Daya Ram Kurmi @ Juraha Kurmi resident of Jhuraha Khera alias Mampur, in company with one more person came out of Bilayati Babul bushes, caught hold of him. When he raised alarm then the first informant and his wife Smt. Somwati-who were going for marketing at Bindki-saw the incident. It was around 2.00 P.M., Daya Ram Kurmi alias Juraha Kurmi and one more person possessing country made pistol in their hands, caught his brother and Daya Ram Kurmi alias Juraha Kurmi with intention to kill fired on his brother and his companion also fired by his country made gun. Alarm was raised by informant and his wife and a number of villagers arrived on the spot. In the meanwhile, the assailants made their escape good by disappearing towards the eastern side of 'Babool' bushes. The informant's brother died on the spot. The dead body was lying on the road. Motive for committing the offence was indicated in the first information report itself that there was some dispute with regard to insisting on obtaining forceful possession of 1/3 share of Chheda Ram in the house built on the leased land of the first informant and this was opposed by the deceased Laxmi Bhurji. Because of aforesaid enmity, first informant's brother was killed by the accused persons. It has further been alleged in the first information report that unknown person can be identified in case he appears before the first informant.

In this factual backdrop, it can hardly be believed that he saw the occurrence of firing which he claims to have taken place before him. Since contents of the first information report were neither dictated by him nor were read-over to him, whole first information report becomes handi work of third person. In such circumstances, it would have been proper for the prosecution to have examined the scribe Krishna Kumar who could have elaborated on point of dictation of written report by the first informant. In the absence of non examination of

the scribe, piecemeal testimony of Satya Narayan PW-1 on point of occurrence renders entire written report dubious and not believable.

At this juncture, we may observe that it is cardinal principle of criminal jurisprudence that it is solemn duty of the prosecution to prove its case and the charge on its own strength beyond reasonable doubt and in case charge is not proved beyond doubt coupled with the circumstances of the case, then concerned accused persons shall be entitled to benefit of doubt.

In the light of aforesaid observations on the factual as well as legal merit of the entire case, we are of firm opinion that Government Appeal No.2915 of 2014 in form of leave to appeal is refused as it is devoid of merit and without any force and is, accordingly, dismissed.

Held: Para-

Case Law discussed:

(Delivered by Hon'ble Bala Krishna Narayana, J.
&
Hon'ble Arvind Kumar Mishra-I, J.)

1. The arguments of these cases concluded on 16.08.2016. Following order was passed by us on that date:

"Heard Sri Manish Tiwary and Sri A.K. Awasthi, learned counsel for the appellant, learned AGA Sri Saghir Ahmad assisted by Sri J.K. Upadhya, Smt. Manjoo, learned brief holders for the State in Criminal Appeal No.1995 of 2014.

Learned AGA Sri Saghir Ahmad assisted by Sri J.K. Upadhya, Smt. Manjoo, learned brief holders for the State and Sri Bholeshwar, learned counsel for the accused-respondent in Government Appeal No.2915 of 2014.

We will give reasons later but we make the operative order now.

The appeal is allowed. Impugned judgment and order dated 09.04.2014 passed by Sri Pawan Pratap Singh (H.J.S.), Additional Sessions Judge, Court No.7, Fatehpur in S.T. No.222 of 2005 (State Vs. Daya Ram Kurmi and another) convicting to appellant under Section 302 IPC is hereby set aside. Appellant is acquitted of all the charges framed against him. Appellant is in jail. He shall be released forthwith unless and until he is wanted in any other case.

Government Appeal No.2915 of 2014 is dismissed

There shall be however no order as to cost"

2. Here are the reasons:-

3. The aforesaid Criminal Appeal No.1995 of 2014 has been preferred by the appellant, Daya Ram Kurmi @ Juraha Kurmi against the judgment and order of conviction dated 09.04.2014 passed by Additional Sessions Judge, Court No. 7, Fatehpur, in Sessions Trial No.222 of 2005, State Vs. Daya Ram Kurmi and another, arising out of Case Crime No. 89 of 2004, under Section 302 I.P.C., Police Station Bindki, District Fatehpur, whereby he has been sentenced to life imprisonment coupled with fine of Rs.5,000/- and in default of payment of fine, he will have to suffer two months' additional rigorous imprisonment.

4. The aforesaid Government Appeal No. 2915 of 2014 has been preferred by the State-appellant against the same judgment but pertains to order of acquittal dated 09.04.2014 passed by Additional Sessions Judge, Court No. 7, Fatehpur, in Sessions Trial No.222 of 2005, State Vs. Daya Ram Kurmi @ Juraha Kurmi and another, arising out of Case Crime No.89 of 2004 under Section 302 I.P.C., Police Station Bindki, District Fatehpur, whereby accused-respondent Puttan @ Pushpendra Kumar has been acquitted of charge for offence punishable under Section 302 I.P.C.

5. Since both the appeals referred to above, arise out of one judgment (S.T. No.222 of 2005) pertaining to one and the same incident involving common question of law, hence the same are being heard together and decided by a common judgment.

6. Heard Shri Manish Tiwary, Sri A.K. Awasthi learned counsel for the appellant and learned AGA Sri Saghir Ahmad assisted by Sri J.K. Updhyaya Smt. Manjoo Thakur, learned brief holders for the State in Criminal Appeal No.1995 of 2014.

7. We have also heard learned AGA Sri Saghir Ahmad assisted by Sri J.K. Updhyaya, Smt. Manjoo Thakur, learned brief holders on behalf of State-appellant and Sri Bholeswar learned counsel for the accused-respondent Puttan @ Pushpendra Kumar, in Govt. Appeal No.2915 of 2014 and perused the lower court record.

8. The factual sketch of the prosecution case as emanates from record and particularly from perusal of the first information report appears to be; that the first informant Satya Narain Bhurji son of Suraj Deen, resident of Paradan, Police Station Bindki District Fatehpur lodged a written report at the aforesaid police station on 20.6.2004 at 4.30 P.M. regarding commission of offence of murder of his brother, Laxmi Bhurji by the accused Daya Ram Kurmi alias Juraha Kurmi-present-appellant and Puttan alias Pushpendra Kumar accused-respondent in Govt. Appeal No.2915 of 2014 (in short referred to as "accused persons") with the allegations that informant's brother Laxmi Bhurji son of Suraj Deen was returning home after taking bath at tube-well of Ram Asrey Kurmi and had walked some paces on Pakka Road, when accused Daya Ram Kurmi @ Juraha Kurmi resident of Jhuraha Khera alias Mampur, in company with one more person came out of Bilayati Babul bushes, caught hold of him. When he raised alarm then the first informant and his wife Smt. Somwati-who were going for marketing at Bindki-saw the incident. It was around 2.00 P.M., Daya Ram Kurmi alias Juraha Kurmi and one more person possessing country made pistol in their hands, caught his brother and Daya Ram Kurmi alias Juraha Kurmi with intention to kill fired on his brother and his companion also fired by his country made gun. Alarm was raised by informant and

his wife and a number of villagers arrived on the spot. In the meanwhile, the assailants made their escape good by disappearing towards the eastern side of 'Babool' bushes. The informant's brother died on the spot. The dead body was lying on the road. Motive for committing the offence was indicated in the first information report itself that there was some dispute with regard to insisting on obtaining forceful possession of 1/3 share of Chheda Ram in the house built on the leased land of the first informant and this was opposed by the deceased Laxmi Bhurji. Because of aforesaid enmity, first informant's brother was killed by the accused persons. It has further been alleged in the first information report that unknown person can be identified in case he appears before the first informant. The incident has been witnessed by a number of persons. Report be lodged and action be taken. The scribe of written report is Krishna Kumar. This report is Ext. Ka. 1.

9. Contents of the aforesaid report were taken down in the check FIR at 4.30 P.M. on 20.6.2004 at Case Crime No.89 of 2004 under Section 302 I.P.C. Check FIR is Ext. Ka. 12 on record. On the basis of entry so made in the aforesaid check FIR, a case was registered against the accused persons at Case Crime No. 89 of 2004 under section 302 I.P.C. at the concerned police station on 20.6.2004 at serial no. 32 of General Diary at 4.30 P.M.

10. Relevant to note that the defence admitted the aforesaid two papers check FIR and entry no. 32 of the General Diary whereby the case was registered against the accused persons, therefore, the formal proof of the same was dispensed with and both these papers were exhibited by the trial court. Registration of the case vide entry no. 32 of General Diary dated 20.6.2004 is Ext. Ka. 13.

11. Thereafter, the investigation of the case followed soon after the registration of the case. As per testimony of S.I. Subhash Chandra Shukla PW- 4, the case was registered in his presence on 20.6.2004. At that point of time, S.I. Subhash Chandra Shukla was In-charge Station House Officer of Police Station Bindki. He, after doing the needful, proceeded to the place of occurrence and took possession of the dead body of Laxmi Bhurji. He appointed witnesses for preparation of inquest report and prepared inquest report Ext. Ka- 3 on 20.6.2004. The preparation of inquest commenced at 04:30 P.M. and completed at 06.50 P.M. the very same day. In the opinion of inquest witnesses and the Investigating Officer, it was thought proper to the send the dead body of Laxmi Bhurji for post mortem examination in order to ascertain real cause of death. Therefore, relevant papers were prepared viz.- letter to the Chief Medical Officer Fatehpur, Ext. Ka-4, letter to R.I. Ext. Ka-5, Police Form-13 challan dead body Ext. Ka-6 and Photonash Ext. Ka. 7. Thereafter, post mortem examination on the dead body of deceased Laxmi Bhurji was conducted by Dr. A.S. Khan PW-3 on 21.6.2004 at 4.15 P.M. The doctor found following four ante mortem injuries which are extracted herein below:

1. Firearm wound of entry 2.5 cm x 2 cm x cavity deep on the back of right side of chest 2 cm outer to the middle of chest. Blackening present in the area of 7 cm x 4 cm around the wound.

2. Firearm wound of entry 4 cm x 3 cm x cavity deep on the back of skull 10 cm behind the left ear with underlying bone fractured.

3. Fire arm wound of exit 1.5 cm x 1 cm x cavity deep 7 cm above the right nipple.

4. Abrasion 2 cm x 2 cm on the back of right elbow joint.

12. The duration from the time of death till conduction of post mortem examination was described one day. The cause of death was due to shock and haemorrhage as a result of firearm injuries. The post mortem examination report has been proved as Ext. Ka. 2 by Dr. A.S. Khan PW-3.

13. We further gather from records that the Investigating Officer, besides, recording various statement of a number of persons including witnesses, also prepared memo of simple and blood stained soil on 20.6.2004 and has proved the same as Ext. Ka. 9. He also prepared recovery memo of vest, 'Lota' and shoes of deceased which were lying on the spot on 20.6.2004. This recovery memo is Ext. Ka. 10.

14. On 26.6.2004, the investigation of this case was taken over by another I.O. Brajraj Singh, the then Incharge Inspector, Police Station Bindki. He recorded statement of the prosecution witness Somwati and arrested the appellant Daya Ram Kurmi @ Juraha Kurmi on 5.7.2004. He also recorded statement of another co-accused Puttan @ Pushpendra Kumar and several other persons. After completing the investigation, he filed charge sheet against the appellant which is Ext. Ka. 11 under the aforesaid section of I.P.C. at aforesaid crime number. Thereafter, the case was committed to the court of Sessions from where, it was made over for trial to the concerned Additional Sessions Judge, Court No. 7 Fatehpur.

15. The prosecution case was opened before the trial court by the public prosecutor by describing the charge brought against the accused persons and also by stating the evidence by which it proposed to prove the guilt. After hearing the accused and the prosecution, the trial court found prima facie case for framing charge against accused persons under section 302 I.P.C. Accordingly, the charge was framed and readover to the accused persons who denied the charge and opted for trial.

16. Consequently, the prosecution was asked to adduce its testimony. The prosecution produced five witnesses in all. Reference of the prosecution witnesses is being elaborated here for sake of convenience:- Satya Narayan, first informant PW-1, brother of deceased Laxmi Bhurji, is stated to be an eye witness of the incident. Similarly, PW-2 Jitendra is also an eye witness of the incident and is son of Satya Narayan. He has also described about the incident. Dr. A.S. Khan PW-3 has conducted the post mortem examination on the dead body of the deceased on 21.06.2004 and he has proved the same as Ext. Ka-2. S.I. Subhash Chand Shukla PW-4 has detailed various steps taken by him for completing the investigation. He has also proved the prosecution papers say Ext. Ka-3 to Ka-10. Subsequently, the investigation was taken over from him on 26.6.2004 by Inspector Brajraj Singh PW-5. He also took various steps for completing the investigation. He has filed charge sheet Ext. Ka. 11 against the accused persons under section 302 I.P.C. at aforesaid crime number.

17. Thereafter, the evidence for the prosecution was closed and the statement of the accused persons was recorded under section 313 I.P.C. In their statement, the accused persons termed their implication false and stated that they have been roped in, in this case on account of enmity. The appellant in the aforesaid criminal appeal claimed himself to be an old person and has not committed any offence. Though the accused persons wished to adduce evidence in defence but did not lead any testimony as such. The trial court after hearing both the sides on merit passed the aforesaid impugned judgment and order dated 09.04.2014 in Sessions Trial No.222 of 2005, State Vs. Daya Ram Kurmi and another, arising out of Case Crime No. 89 of 2004, under Section 302 I.P.C., Police Station Bindki, District Fatehpur, whereby aforesaid appellant was convicted and sentenced for commission of offence under Section 302 IPC while Puttan @ Pushpendra Kumar respondent in aforesaid government appeal was acquitted under Section 302 IPC.

18. Consequently, these two appeals one against order of conviction and one against acquittal order.

19. It has been vigorously argued on behalf of the accused persons that it is a case of blind murder and no one has seen the occurrence. Testimony of so called eye witnesses does not inspire confidence, for the reason that their presence on the spot, under the circumstance of the case, is rendered doubtful. The very foundation of entire prosecution case-written report Ext. Ka-1 has not been proved properly in the testimony of PW-1-Satya Narain- the first informant-who has categorically affirmed that he merely impressed his thumb impression on the report and he was unaware of the contents of this report.

20. Learned counsel has engaged our attention to certain parts of the cross examination (of PW-1) when he is not sure about the real contents of the FIR. Thus PW-1 appears to be improving on material points. His statement given in the trial court is contradictory to what he stated before the Investigating Officer under section 161 Cr.P.C. The statement of both the witnesses of fact namely PW-1 and PW-2 Satya Narayan and Jitendra, respectively, produced by the prosecution contradicts each other in material particular. It is surprising that one more person was said to be companion of the accused person Daya Ram Kurmi @ Juraha Kurmi at the time of commission of crime. It was stated in the first information report that this person can be identified as and when he appears before the first informant and this person is none other than next door neighbour i.e. to the adjoining house of first informant and the deceased. How can first informant claim that another unknown person can be identified by him as and when he appears before him when the said person is his next door neighbour. This shows hollowness of the claim of first informant and exposes his credibility as an eyewitness and first informant and thus creates doubt regarding his presence on the spot.

21. The another eye witness named in the first information report is Somwati, who was not produced in the trial court, for reasons best known to the prosecution. The evidence of PW-1 is sketchy, partisan and highly interested one, for the reason that he being brother of the deceased was inimical towards accused persons. PW-2 though claims to have passed his 8th class in 1994, did not

write first information report, but it was written by scribe Krishna Kumar son of Ram Pyare. This also creates doubt on the presence of PW-2 Jitendra on the spot. He is a chance witness.

22. Lot of emphasis has been made on the cross examination of PW-2 at page no. 28 of the paper book to the effect that as soon as PW-2 arrived on the spot, his father Satya Narayan and mother Somwati were not present on the spot. This specific piece of testimony is axiomatic and truth in itself and carries element of truth on point of presence of this witness at the place of occurrence and virtually proves fact that PW-2 was never present on the place of occurrence and he only arrived on the spot after a long gap of time when the incident had already occurred.

23. Lastly, it has been argued by learned counsel that PW- 2 Jitendra is highly inimical towards accused persons because he has been convicted in a case under section 307 I.P.C. for an offence relating to attempt to commit murder of Daya Ram Kurmi @ Juraha Kurmi (accused-appellant). This fact has been specifically admitted by him that he has been convicted in a case under section 307 I.P.C. for making an attempt on life of accused Daya Ram Kurmi @ Juraha Kurmi as appearing on page no. 28 of the paper book. PW-2 is highly interested in ensuring conviction for appellant.

24. Per contra learned A.G.A. while refuting aforesaid arguments submitted that it is incorrect to say that the contents of first information report have not been proved because thumb impression proved is that of PW-1 which invariably establishes the first information report lodged at the instance of Satya Narayan. The vivid and lively description of manner of incident has been proved by both the eye witnesses PW-1 and PW-2, respectively. Expectation of pictorial and parallel description matching identical description of one witness with the other witness but it is obvious that their respective testimony on the whole corroborates each other in material particulars, especially the manner and style of occurrence which cannot be doubted.

25. Learned AGA has further added that the presence of the two eyewitnesses on the spot, is natural and genuine. Their evidence is inspiring confidence and it is settled principle of criminal jurisprudence that testimony which corroborates each other in material particulars is to be believed and contradictions appearing in their testimony, if found to be of trivial nature, should be avoided. The prosecution has proved its case beyond reasonable doubt.

26. While refuting the aforesaid specific contention of learned AGA, in support of leave to appeal against the accused Puttan @ Pushpendra Kumar in Government Appeal No. 2915 of 2014, Shri Bholeshwar, learned counsel for Puttan @ Pushpendra Kumar engaged our attention to several points of testimony appearing in the deposition of the two eye witnesses and in the testimony of the Investigating Officer and also to specific parts of judgment of the trial court dated 09.04.2014 and tried to convince that the case of accused Puttan @ Pushpendra Kumar is highly doubtful and his participation in the incident has not been established even in the least.

27. It is stated that the incident took place on 20.6.2004 but the name of the accused Puttan @ Pushpendra Kumar surfaced in the statement of Satya Narayan and his wife Somwati on

21.10.2004 and investigation regarding unknown person was started by the Investigating Officer only on 15.9.2004 after inordinate delay for which no plausible explanation has been given by the prosecution. The aforesaid factual aspect of such belated investigation appears in examination in chief of Braj Raj Singh PW-5. How and why both the eye witnesses kept mum for such a long time has not been explained by the prosecution. The accused Puttan @ Pushpendra Kumar happens to be the very neighbour of the first informant and deceased, and reference about him in the first information report is clearly spelt as unknown person. It was done with deliberate intention to teach a lesson to the accused Puttan @ Pushpendra Kumar, for the reason that first informant was nursing grudge against him on account of several counts.

28. The trial court has adopted appreciable view regarding the circumstances and testimony of the prosecution witnesses and after correct appraisal of facts and law, has recorded just finding of acquittal against the accused Puttan @ Pushpendra Kumar which finding cannot be said to be not based on material on record. The abysmal silence of the first informant, while lodging FIR regarding non-mention of name of Puttan @ Pushpendra Kumar by itself is sufficient to render his implication false in this case. His complicity surfaced in the statement of first informant recorded at an ordinally delayed stage on 21.10.2004 i.e. after four months of the incident.

29. We have been further persuaded on behalf of the State-appellant (in Govt. Appeal No.2915 of 2014) to believe that the testimony against accused Puttan @ Pushpendra Kumar is clinching and consistent. However, the trial court without any rhyme or reason over looking the vital facts and circumstances of the case, acting on assumption and presumption unnecessarily recorded finding of acquittal which is erroneous and perverse. Both the eyewitnesses of occurrence namely PW-1 and PW-2 Satya Narayan and Jitendra have categorically stated about participation of accused Puttan @ Pushpendra Kumar in the incident in company with co-accused Daya Ram Kurmi @ Juraha Kurmi but the learned Trial Court, without heeding to the correct and actual facts and testimony, recorded finding of acquittal in favour of accused Puttan @ Pushpendra Kumar which is liable to be set aside, and he be convicted for offence under section 302 I.P.C.

30. We have also considered the above rival submissions and scrutinized the record of the case.

31. Core consideration in both the aforesaid appeals relates to fact whether the prosecution has been able to prove its charge against appellant Daya Ram Kurmi @ Juraha Kurmi and Puttan @ Pushpendra Kumar beyond reasonable doubt and testimony of the two eye witnesses namely PW-1 and PW-2 Satya Narayan and Jitendra, respectively, is clinching and inspiring confidence?

32. Further, whether finding of acquittal recorded against the aforesaid accused Puttan @ Pushpendra Kumar is perverse on the ground that it is not based on material on record and the view so taken by the trial court is not possible under the facts and circumstances of this case?

33. In so far as death of deceased Laxmi Bhurji is concerned, that is admitted to both the parties. Only question that engages our attention is confined to the fact whether the occurrence as

stated to have taken place on 20.6.2004 at about 2.00 P.M. was outcome of act of present accused-appellant Daya Ram Kurmi @ Juraha Kurmi and accused-respondent Puttan @ Pushpendra (in Govt. Appeal).

34. From perusal of the first information report, we gather that in this report, name of accused Daya Ram Kurmi @ Juraha Kurmi has been specifically described that he in company with one unknown person shot dead informant's brother Laxmi Bhurji at 2.00 P.M. on the spot. The doctor witness PW-3 has noted four ante mortem injuries on the dead body of Laxmi Bhurji. Two fire arm wound of entry and one fire arm exit wound have been noted on examination. Injury No.1 is in shape of firearm wound of entry 2.5 cm x 2 cm x cavity deep on the back of right side of chest 2 cm outer to the middle of chest. Blackening present in the area of 7 cm x 4 cm around the wound. Injury No.2 has been stated to be firearm wound of entry 4 cm x 3 cm x cavity deep on the back of skull 10 cm behind the left ear with underlying bone fractured. Injury No.3 is firearm wound of exit 1.5 cm x 1 cm x cavity deep 7 cm above the right nipple. In this way, injuries No. 1 and 3 may be treated result of one shot causing entry wound and exit wound, respectively. Injury no.4 is Abrasion in measurement of 2 cm x 2 cm on the back of right elbow joint. This may be caused, in the opinion of doctor, by fall of deceased on the ground. This post mortem examination report has been proved by PW-3 as Ext. Ka. 2. Autopsy was done on 21.6.2004 at 4.15 P.M. and duration from the time of death (of the deceased) till conduction of post mortem examination was described one day. Naturally, the doctor has opined cause of death due to shock and haemorrhage as a result of aforesaid ante mortem injuries. He has stated that these injuries were sufficient in ordinary course of nature to cause death. The death of the deceased might have taken place on 20.6.2004 around 2.00 P.M.

35. Now we may come to the meritorial aspect of the occurrence as described by the two eye witnesses of the incident. PW-1 Satya Narayan has stated that on the date of occurrence, he was coming from Bindki side along with his wife Somwati when his brother Laxmi Bhurji was returning after taking bath from tube-well. When he reached on Pakka road, accused persons Puttan @ Pushpendra Kumar and Daya Ram Kurmi @ Juraha Kurmi who laid in ambush behind bush appeared on the scene. Daya Ram Kurmi @ Juraha Kurmi fired from his country made pistol on Laxmi Bhurji who fell down and then Puttan @ Pushpendra Kumar fired on him. His son Jitendra also arrived on the spot and he also witnessed the incident. Alarm was raised by them whereupon the assailants fled away from the scene and disappeared behind bushes and a number of villagers arrived on the spot. Thereafter, the report was lodged by the first informant after it was written by scribe Krishna Kumar.

36. Similar is version of PW-2 Jitendra regarding the fact of occurrence. However, he differs from PW-1 on certain factual aspects. He testified that his father Satya Narayan and mother Somwati were going to Bindki from home and they saw the incident. At this stage, we may take note of the contents of first information report wherein presence of first informant and Somwati alone has been ascribed. There is no mention of presence of PW-2 Jitendra on the spot at the time of occurrence.

37. Obviously, Jitendra PW-2 who is son of first informant, is a literate person and has passed 8th class examination in the year 1994. Therefore, non mention of his name in the first information is sufficient fact for drawing conclusion that in all eventuality, Jitendra PW-2 was not present on the spot because his presence could not have gone unnoticed by the first informant while he had already named his wife to be present on the scene of occurrence in the contents of the FIR and who accompanied him and saw the incident. How Jitendra's name was left out is beyond comprehension of a man of ordinary prudence.

38. It is obvious that first informant's wife Somwati has not been produced as witness in the trial court. Now we may further draw some positive conclusion from testimony of PW-1 Satya Narayan, in so far as the description of manner of the incident is concerned. On page 17 of paper-book, it is reflected that this witness PW-1 has stated that his son Jitendra also arrived on the spot and he dictated the first information report to Krishna Kumar. However, in examination in chief, he has stated that this report was not read over and explained to him and only thumb impression was obtained on it. This piece of testimony regarding non-disclosure of contents of written report to the first informant by the scribe Krishna Kumar, might have been treated as an isolated piece of testimony in form of aberration, but in his cross examination, the fact was exposed particularly on page 22 of paper-book when this witness has been confronted with query that though he has stated that he got the report written but he has also stated that he did not dictate the report. The person who wrote the report was not his relative. He again said that after the report was written, it was not read over to him. Thereafter when he has been queried regarding veracity of his statement previously given before the trial court, then he has expressed doubt about his testimony on particular fact as to whether he dictated the report or he did not dictate the report. This cannot be said by him with certainty. He further stated that he did not receive any paper from the police station when he lodged his report.

39. Further, he has stated that he knew that the name of Puttan @ Pushpendra Kumar has figured in the first information report lodged at the police station. This piece of testimony so emerging in the cross examination virtually throws out the entire prosecution case, for specific reason that this witness is uttering blatant lie and is not aware about the contents of the first information report and he is not sure whether he himself dictated the contents so recorded in the written report Ext. Ka-1 or he did not dictate the contents of first information report. Non-mention of name of Puttan @ Pushpendra Kumar though he appears to be residing in his neighbourhood is a fact which throws doubt on credibility of this witness.

40. Obviously, the first informant appears to be highly interested, partisan and chance witness. It is settled law of criminal jurisprudence that the testimony of relative witness is to be read with caution and circumspection and in case it is found tainted with bias and with motive to be interested in conviction of the accused-appellant, the same should be discarded by the Court. Non mentioning of the name of Puttan @ Pushpendra Kumar in the first information report, instead mentioning of some unknown person who can be identified by the first informant, as and when, he appears before him is high degree concoction.

41. We gather from the record that son of first informant Jitendra PW-2 has been convicted in a case under section 307 IPC for an attempt to commit murder of accused-appellant Daya Ram Kurmi @ Juraha Kurmi. Once foundation of first information report is rendered dubious coupled with attendant facts and circumstances of the case then the entire edifice of prosecution case falls on the ground. In this case, the prosecution witnesses being relative and interested witnesses whose credibility is eroded on the point of their presence on the spot, therefore, the prosecution could not establish contents of the first information report. The first informant has tried to improve his testimony before the trial court, when he filed an affidavit and that affidavit was discovered to be not properly prepared whereby the name of Puttan @ Pushpendra Kumar was sought to be brought into light. He went on improving that after the occurrence, he was mentally perturbed and he could not mention the name of the assailants but he is stating truth on that moment (when he filed affidavit). His statement given to the Investigating Officer involves participation of three persons in the incident and he has been confronted for that statement by the defence. He could not assign any satisfactory reason for the same. On Page 25 of the paper-book, he has stated that when he saw his brother for the first time, he saw him lying on the ground with head downward.

42. Similarly, Jitendra PW-2 has stated in his cross examination in the last two lines on page 28 of paper-book that when he reached on the spot, his father Satya Narayan and mother Somwati were not present on the spot. He too has been confronted with the statement recorded under section 161 Cr.P.C. wherein he has also stated involvement of three persons in the incident whereupon he has denied such statement having been given by him and he could not assign any reason for the same. This specific piece of testimony emerging in the statement of both the aforesaid witnesses of fact generates genuine and reasonable doubt regarding presence of these two witnesses on the spot. It is obvious that the presence of Jitendra PW-2 is highly doubtful and presence of first informant on the spot can be placed a little after the incident had taken place, because he arrived on the spot and saw his brother first, then he saw him lying on the ground.

43. In this factual backdrop, it can hardly be believed that he saw the occurrence of firing which he claims to have taken place before him. Since contents of the first information report were neither dictated by him nor were read-over to him, whole first information report becomes handiwork of third person. In such circumstances, it would have been proper for the prosecution to have examined the scribe Krishna Kumar who could have elaborated on point of dictation of written report by the first informant. In the absence of non examination of the scribe, piecemeal testimony of Satya Narayan PW-1 on point of occurrence renders entire written report dubious and not believable.

44. At this juncture, we may observe that it is cardinal principle of criminal jurisprudence that it is solemn duty of the prosecution to prove its case and the charge on its own strength beyond reasonable doubt and in case charge is not proved beyond doubt coupled with the circumstances of the case, then concerned accused persons shall be entitled to benefit of doubt. In this case, the learned trial court, though rightly acquitted accused Puttan @ Pushpendra Kumar but took parochial and partial view of the incident and misread the testimony of PW-1 and PW-2 on the

point of occurrence and failed to appreciate the fact that the presence of prosecution witnesses as alleged on the spot, is highly doubtful.

45. The trial court has also failed to take note of fact that the contents of first information report were not sayings of first informant Satya Narayan PW-1. The first information report did not figure name of Puttan @ Pushpendra Kumar though he happens to be neighbour of first informant. PW-2 Jitendra has himself admitted in his cross examination that when he reached on the spot, he could not find (presence of) his father and mother namely Satya Narayan PW-1 and Somwati on the spot. The first informant Satya Narayan has stated that when he saw his brother for the first time, he was lying on the ground. These particular aspects of this case are substantial in nature and are sufficient to throw doubt on the veracity of the prosecution case. Certainly, the view taken by the trial court, while convicting the accused Daya Ram Kurmi @ Juraha Kurmi that he committed crime, is erroneous and perverse and is not sustainable in law. In so far as acquittal of accused-respondent Puttan @ Pushpendra Kumar is concerned, it can be specifically observed by us that the finding of acquittal is profusely supported by material on record and the view so taken by the trial court is justified which needs no interference by us at this stage.

46. These are the reasons upon which we set aside the impugned judgment and order of conviction dated 09.04.2014 passed by Additional Sessions Judge, Court No.7, Fatehpur, in Sessions Trial No.222 of 2005 arising out of Case Crime No. 89 of 2004, under Section 302 I.P.C., Police Station Bindki, District Fatehpur.

47. However, we direct that appellant will ensure compliance of provisions of Section 437 A Cr.P.C. by appearing before the concerned trial court at the earliest.

48. In the light of aforesaid observations on the factual as well as legal merit of the entire case, we are of firm opinion that Government Appeal No.2915 of 2014 in form of leave to appeal is refused as it is devoid of merit and without any force and is, accordingly, dismissed.

49. However, we provide that he will have to furnish bonds under Section 437A Cr.P.C. before the concerned trial court at the earliest.

50. Let a copy of this order be certified to the concerned trial court for information and necessary follow up action.

(2016) 8 ILRA 1059
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.08.2016

BEFORE

THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Criminal Revision No. - 2408 Of 2016

Sukhdev	...Revisionist
	Versus
State Of U.P. & Ors.	...Opposite Parties

Counsel for the Revisionist:
Prakash Narayan Dwivedi

Counsel for the Opposite Parties:
G.A

The revisionist has moved application under Section 156(3) CrPC for investigation and prosecution of opposite parties for offences under Section 420 ,406, 504, 506 IPC and 3(1)(vi) and 3(1)(x) of the Scheduled Castes or Schedule Tribes (Prevention and Atrocities) Act, 1989 (hereinafter referred to as SC/ST Act). This application was accepted as complaint case. After accepting evidences under Section 200 and 202 CrPC, trial court had dismissed the complaint under Section 203 CrPC. In this order, trial court had taken several grounds for disbelieving the complaint case, including the fact that offences under Section 420, 406, 504 IPC are not made out and the averment for Section 506 and 3(1)(vi) and 3(1)(x) SC/ST Act are doubtful and there is no ground for summoning the proposed accused persons. Aggrieved by this order dated 5.7.2016 of trial court, present revision has been preferred.

In present case the trial court had accepted the evidences under Chapter XV CrPC and after appreciating it, had given finding that no case is made out on the basis of those evidences. Such finding of fact requires re-appreciation of evidences already adduced. This Court is not expected to re-appreciate the evidences and finding of fact, especially on the ground that on the basis of those evidences, there may be possibility of reaching to another conclusion which is different from that of trial court.

Therefore, revision fails, and is hereby dismissed.

Held: Para-
Jagannath Chaudhary & ors vs. Ramayan Singh & another, AIR 2002 S.C. 2229,

Case Law discussed:

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. Heard learned counsel for the revisionist, learned AGA and perused the records.

2. The revisionist has moved application under Section 156(3) CrPC for investigation and prosecution of opposite parties for offences under Section 420, 406, 504, 506 IPC and 3(1)(vi) and 3(1)(x) of the Scheduled Castes or Schedule Tribes (Prevention and Atrocities) Act, 1989 (hereinafter referred to as SC/ST Act). This application was accepted as complaint case.

3. After accepting evidences under Section 200 and 202 CrPC, trial court had dismissed the complaint under Section 203 CrPC. In this order, trial court had taken several grounds for disbelieving the complaint case, including the fact that offences under Section 420, 406, 504 IPC are not made out and the averment for Section 506 and 3(1)(vi) and 3(1)(x) SC/ST Act are doubtful and there is no ground for summoning the proposed accused persons. Aggrieved by this order dated 5.7.2016 of trial court, present revision has been preferred.

4. In complaint, it is mentioned that for the work performed by revisionist, opposite parties had made part payment, but had not paid full amount; and when complainant requested the opposite parties for making full payment then they had misappropriated his remaining dues, beaten him and used foul words.

5. Learned counsel for the revisionist contended that there is specific averment that revisionist was beaten and threatened by opposite parties, but this fact was not considered by lower courts. This contention is found incorrect in view of contents of complaint case as well as statements of witnesses under Chapter XV CrPC. No averment is made in complaint or in statements that any injury was caused to revisionist.

6. Learned counsel for the revisionist also contended that revisionist belongs to scheduled caste community and foul words relating to his caste were uttered by opposite parties, therefore, they should be prosecuted under the provisions of SC/ST Act.

7. From perusal of the record, especially, complaint and statements of witnesses, it is found that alleged altercation between the parties arose not because of complainant being member of scheduled caste community but because of the alleged dispute on the point of non-payment of remaining labour charges and other dues. It is found that if prosecution case is taken to be true, even in that eventuality the cause of action for the alleged incident was non-payment of dues and not the complainant being member of scheduled caste community. The mere fact that the victim happened to be a person belonging to a Scheduled Caste does not attract the provisions of the Act. So argument regarding applicability of provisions of SC/ST Act are found unacceptable.

8. Apparently, this appears to be a dispute of civil nature where part payment has been made and revisionist's claim is that he was not fully paid for his work done. For determining the claim of revisionist in this regard would require assessment of work done by revisionist and amount paid as well as its rationality. Such matter cannot be adjudicated by criminal court.

9. In **Jagannath Choudhary & ors vs. Ramayan Singh & another**, AIR 2002 S.C. 2229, Apex Court had held that:

"Where the court concerned does not appear to have committed any illegality or material irregularity or impropriety in passing the impugned judgment and order, the revision cannot succeed. If the impugned order apparently is presentable, without any such infirmity which may render it completely perverse or unacceptable and when there is no failure of justice, interference cannot be had in exercise of revisional jurisdiction".

"It is not an appeal wherein scrutiny of evidence is possible, neither the revisional jurisdiction is open for being exercised simply by reason of the factum of another view being otherwise possible."

10. In present case the trial court had accepted the evidences under Chapter XV CrPC and after appreciating it, had given finding that no case is made out on the basis of those evidences. Such finding of fact requires re-appreciation of evidences already adduced. This Court is not expected to re-appreciate the evidences and finding of fact, especially on the ground that on the basis of those evidences, there may be possibility of reaching to another conclusion which is different from that of trial court.

11. A perusal of the impugned judgment reveals that learned Magistrate had appreciated the facts and evidences of the case and then after being satisfied about the facts relating to allegations, had passed the judgment. From a perusal of the records it appears that conclusions read by learned Magistrate are based on available evidences and logical conclusions. In these circumstances, it would be improper to quash the impugned order by substituting any other finding of the fact. There appears nothing on the basis of correctness, legality or propriety of impugned order which can be doubted. There appears no irregularity in procedure adopted by the trial court. So there is no justification for interference in the impugned order. Therefore, revision fails, and is hereby dismissed.

(2016) 8 ILRA 1062
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.08.2016

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Appeal No.- 3647 Of 2005
&
Connected With Other Cases

Mahesh

...Appellant

Versus

State Of U.P.

...Respondent

Counsel for the Appellant:

Ajit Kumar Singh Solanki, Anshu Chaudhary, J. S. Sengar, M. K. Upadhyay, Noor Mohammad, P C Mishra, Pramod Kumar Singh

Counsel for the Respondent:

Govt. Advocate

The aforesaid three appeals, the appellants have challenged the judgment and order of conviction dated 01.08.2005 passed by the Additional Sessions Judge, F.T.C. No.1, Hathras in Sessions Trial No.331 of 2001 arising out of Case Crime No.125 of 2001, (State Vs. Mohd. Alam and others), under Section 364-A IPC, Police Station Hasayan, District Hathras, whereby the appellants were sentenced to life imprisonment coupled with fine of Rs.1000/- each; default clause stipulates one month additional simple imprisonment to the concerned convict.

Facts of this case, as unfolded by the first information, appear to be that first informant Mahendra Pratap Singh son of Sri Hakim Singh resident of Nagla Danda Majra Jarera, Police Station Hasayan, District Hathras gave written report (Ext. Ka-1) at aforesaid police station on 10.6.2001 alleging commission of offence of kidnapping for ransom of his nephew Raja, to the effect that labourers used to come to his village for harvesting wheat and paddy crop from state of Bihar. One among them, Mohd. Alam son of Jahid resident of village-Bhagal, police station-Sontakhad, District Kishanganj, Bihar had come to his village one and half year ago and he used to stay at the house of informant. He also worked as labourer in the village. Due to this, little children of his house were familiar with him. He took advantage of his familiarity with children of the house and he in collusion with one Data Ram and his two sons Naresh and Mahesh, kidnapped his nephew Raja aged about three years on 07.06.2001. All the four persons are absconding from his village ever since.

In the result, the aforesaid appeals are partly allowed. The judgment and order of conviction dated 01.08.2005 passed by the Additional Sessions Judge, F.T.C. No.1, Hathras in Sessions Trial No.331 of 2001 arising out of Case Crime No.125 of 2001, (State Vs. Mohd. Alam and others), under Section 364-A IPC, Police Station Hasayan, District Hathras, is altered/modified from Section 364A IPC to Section 365 IPC.

In this case, appellant Mohd. Alam is in jail since 10.06.2001 and Naseem and Mahesh are in jail since 01.08.2005, therefore, Mohd. Alam has already spent over 15 years of incarceration, whereas, the other two appellants Naseem and Mahesh have already spent about more than 11 years of incarceration. Therefore, the respective period of imprisonment already undergone by the present appellants is justified, as the sentence provided for the offence under Section 365 IPC, which they have already suffered in surplus. A fine of Rs.1000/- each is also imposed on the appellants and in case of default in payment of fine the concerned convict shall have to undergo additional imprisonment for one month.

In so far as payment of the amount of fine is concerned, the appellants are given one month's time to deposit the same. In case the amount of fine is deposited by the appellants, they shall be released forthwith, if they are not wanted in connection with any other case.

Let a copy of this order be certified to the concerned trial court for its intimation and follow up action.

Held: Para-

Case Law discussed:

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.)

1. By way of the aforesaid three appeals, the appellants have challenged the judgment and order of conviction dated 01.08.2005 passed by the Additional Sessions Judge, F.T.C. No.1, Hathras in Sessions Trial No.331 of 2001 arising out of Case Crime No.125 of 2001, (State Vs. Mohd. Alam and others), under Section 364-A IPC, Police Station Hasayan, District Hathras, whereby the appellants were sentenced to life imprisonment coupled with fine of Rs.1000/- each; default clause stipulates one month additional simple imprisonment to the concerned convict.

2. Heard at length Sri N.I. Jafri assisted by Sri Noor Mohammad, Shahroze Khan and Sri S.P.S. Chauchan, learned counsels for the appellant and Sri Saghir Ahmad, Sri J. K. Upadhyay and Kumari Meena, learned AGAs for the state.

3. Facts of this case, as unfolded by the first information, appear to be that first informant Mahendra Pratap Singh son of Sri Hakim Singh resident of Nagla Danda Majra Jarera, Police Station Hasayan, District Hathras gave written report (Ext. Ka-1) at aforesaid police station on 10.6.2001 alleging commission of offence of kidnapping for ransom of his nephew Raja, to the effect that labourers used to come to his village for harvesting wheat and paddy crop from state of Bihar. One among them, Mohd. Alam son of Jahid resident of village-Bhagal, police station-Sontakhad, District Kishanganj, Bihar had come to his village one and half year ago and he used to stay at the house of informant. He also worked as labourer in the village. Due to this, little children of his house were familiar with him. He took advantage of his familiarity with children of the house and he in collusion with one Data Ram and his two sons Naresh and Mahesh, kidnapped his nephew Raja aged about three years on 07.06.2001. All the four persons are absconding from his village ever since.

4. On search being made, it was told by Sri Hari Prasad Sharma resident of Nagla Veer Sahai that Mohd. Alam and Mahesh son of Data Ram were seen by him on the canal bridge (culvert) and the child was in the lap of Mohd. Alam. Both were seen going away by bus towards Sikandrara. The first informant made hectic efforts for search of the child in and around Sikandrara, but in vain. Next day, Data Ram said to Pradeep Kumar (cousin brother of first informant- Mahendra Pratap Singh) that in case Rs.2 lacs are spent by them, then the victim child can be traced out. Pradeep Kumar agreed to the same and asked Data Ram that they will pay money but he should disclose the whereabouts of the child. At this, Data Ram said that he will arrange his talk with Naresh, whereupon, in the presence of several villagers, Naresh told that Mohd. Alam has told him that he will come at Panth Crossing in Sikandrara on 10.6.2001 at 2.00 p.m. Report be lodged and appropriate action be taken. Scribe of this report is Om Veer Singh Raghav. This report is Exhibit Ka-1.

5. Contents of this report were taken down in the Check FIR on 10.6.2001 at Crime No.125 of 2001, under Section 364A IPC at 8.45 a.m. at police station- Hasayan. Check FIR is Exhibit Ka-6 on record.

6. On the basis of entries made in Check FIR, a case was registered against the present appellants in the date and relevant general diary at aforesaid crime number at police station Hasayan at 8.45 a.m. on 10.6.2001 under Section 364A IPC, copy whereof is Exhibit Ka-7. The investigation of the case was entrusted to Mahendra Pratap Singh, SHO Hasayan who arrested appellant Mohd. Alam at the instance of first informant and he recovered victim Raja on the pointing out of the appellant Mohd. Alam from Naseem and Mahesh on 10.6.2001 at 7.00 p.m. The Investigating Officer prepared recovery memo of the victim on the spot, which is Exhibit Ka-2. Thereafter the victim was handed over to the custody of his father Naresh Pal Singh. This custody memo of the victim is Exhibit Ka-3. The site plan of the place of recovery of the child was also prepared by him, which is Exhibit Ka-4. The Investigating Officer recorded statements of various witnesses and after completing the investigation filed charge-sheet against the appellants which is Exhibit Ka-5.

7. Thereafter, the case of the appellants was committed to the court of sessions from where it was eventually made over for trial to the court of Additional Sessions Judge, F.T.C. 1, Hathras, where the appellants were heard on point of charge. The trial court framed charge under Section 364-A IPC against the present appellants. Charge was read over and explained to the accused, who denied the charge and opted for trial. Thereafter, the prosecution was asked to adduce its testimony. Prosecution in all has produced six witnesses. Brief reference of the same is as hereunder:-

8. Mahendra Pratap Singh P.W.1 is the first informant. He has proved written report Exhibit Ka-1. Pradeep Kumar P.W.2 is witness of fact as well as witness to the fact of recovery of the victim. Hari Prasad Sharma P.W.3 is also witness of fact and he has testified fact that he saw the victim in the company of appellants Mohd. Alam and Mahesh on the day of occurrence (7.6.2001). Vijay Pal Singh P.W.4 is also witness of fact as well as witness of extra-judicial confession allegedly made by appellant Mohd. Alam. He is also witness of recovery of victim. Mahendra

Pratap Singh, retired S.I. P.W.5 was the Investigating Officer. He has proved the entire investigation and recovery of the victim and has also proved charge-sheet Exhibit Ka-5. HCP Kalicharan P.W.6 is the Constable. He has proved Check FIR and the relevant GD entry.

9. Thereafter, evidence for the prosecution was closed and statement of the appellants were recorded under Section 313 Cr.P.C., wherein, they termed their implication false and submitted that they are innocent and no incident of kidnapping for ransom ever took place.

10. The accused Mahesh has stated that he has been falsely implicated in this case on account of conspiracy hatched up for expelling him from the village.

11. The accused Mohd. Alam has stated that informant side exploited him as bonded labour and they did not pay his wages due to him for about four years and when he demanded the same, he was falsely implicated in this case in collusion with the police.

12. The accused Naseem also stated on similar lines and he also asked for his wages due to him, which was refused and he was falsely implicated in this case in collusion with police.

13. Defence, in turn, has produced D.W.1 Kalyan Singh.

14. Learned trial court after hearing both the parties on merit passed the aforesaid judgment and order of conviction and sentence dated 01.08.2005 against the present appellants.

15. Consequently, this appeal.

16. We have been vehemently persuaded on behalf of the appellants that in this case, when the case was considered on merit by the trial court then on the same evidence, the two other co-accused Data Ram and Naresh were acquitted by the trial court by means of the same judgment holding that demand of ransom was not proved against them, whereas, the case of the present appellants stands on better footing than that of the aforesaid two accused Data Ram and Naresh. Testimony on point of demand for ransom by the appellants is altogether missing and finding of conviction, thus, has become perverse and erroneous.

17. PW-1 Mahendra Pratap Singh son of Hakim Singh is vacillating in his testimony and he has not been consistent; instead he appears to have been improving the prosecution version against the appellants. His testimony before trial court is in sheer contrast to his statement given to the Investigating Officer.

18. Similar is the testimony of other witnesses of fact. The entire story of recovery of victim Raja was planted by the first informant and the Investigating Officer of this case. No such incident of kidnapping for ransom ever took place. The testimony appearing against the present appellants at the most can be taken to be confined to the extent of kidnapping with an intent to confine the victim secretly and wrongfully. There is no iota of evidence against the present

appellants that they were directly involved in demanding any ransom for kidnapping, therefore, the case of the appellants is not covered under Section 364-A IPC. For the sake of argument it can be inferred that the appellants have committed offence under Section 365 IPC.

19. Cumulative reading of testimony of prosecution witnesses of fact will lead one, at the most, to the inference and conclusion that the case is covered under Section 365 IPC rather than under Section 364A IPC.

20. It has been claimed by learned counsel for the appellants that Mohd. Alam is in jail since 10.6.2001. Naseem and Mahesh are in jail since 1.8.2005. Even the first informant could not testify categorically against the appellants regarding demand for ransom by them.

21. Learned counsel for the appellants summed up that though the testimony of the prosecution witnesses of fact is shaky and inconsistent as a whole, but the same is altogether missing regarding fact of demand for ransom. Therefore, the case is not covered under Section 364A IPC.

22. Per contra, learned AGA has submitted that specific argument regarding the case being not covered under Section 364A IPC is without any substance. The entire testimony on record and its cumulative effect overwhelmingly covers the case of the appellants under Section 364A IPC.

23. The recovery of the child was made from the appellants and the Investigating Officer has proved the recovery. Apart from that, the prosecution witnesses have also proved recovery of the child from the present appellants. The learned trial court was justified in recording conviction under Section 364 A IPC and has recorded just conviction and sentence against the appellants.

24. Also considered the above submissions pros and cons. In view of the arguments advanced, particularly on behalf of the appellants, this appeal is confined to the point as to whether the appellants' case is covered under Section 365 IPC instead of Section 364A IPC (?), or they are entitled to acquittal against charge under Section 364A IPC?

25. Before we proceed further with the meritorial aspect of the case on the point under consideration, it would be appropriate to have a dip into the contents of first information report. It is reflected from written report (Exhibit Ka-1) that the nephew of the first informant was kidnapped on 07.06.2001. However, time of disappearance/kidnapping of the victim has not been mentioned in the first information report.

26. This incident of kidnapping took place on 07.06.2001 and on the very next day, one Hari Prasad Sharma (P.W.3) told the first informant that he saw the victim in the company of Mohd. Alam and Mahesh on canal bridge (culvert) and they were going by bus to Sikandararau. Though search was made for the victim but whereabouts of the victim was not known. Data Ram (acquitted co-accused) said to one Pradeep Kumar, (cousin brother of informant) that child will be returned if Rs.2 lacs are spent. As a sequel to it, the money was arranged and Data Ram was asked

to divulge the whereabouts of the child, whereupon, he facilitated their talk with co-accused Naresh, who, in presence of, the villagers told that Mohd. Alam will come on Panth Crossing at Sikandararau on 10.6.2001 at 2.00 p.m. and thereafter, recovery of the child was made on 10.6.2001 at 7.00 p.m. from Mahesh, Naseem and Mohd. Alam- the present appellants.

27. It is obvious that the first information report was lodged at 8.45 a.m. on 10.6.2001 and the recovery of the victim was made at 7 p.m. on 10.6.2001. We have also scanned carefully entire evidence of all the prosecution witnesses of fact and particularly, on point of demand for ransom, whether it was so made by the present appellants. We could neither discover any testimony on the point nor could we infer from attendant circumstances that it was so made by the appellants. Certainly, act of the appellants brings their case within purview of kidnapping with intent secretly and wrongfully to confine person. It is established by evidence that the victim was recovered from their possession on 10.6.2001 at 7.00 p.m.

28. The attention of this Court has been invited to the testimony of Hari Prasad Sharma P.W.3 as appearing in the last paragraph of his testimony in his cross-examination on page-31 of the paper book, wherein he has sated that Data Ram never indulged in any sort of talk concerning demand for ransom with Pradeep Kumar, Mahendra Pratap Singh etc.

29. In this view of the matter, testimony of P.W.3-Hari Prasad Sharma on point of demand for ransom by the present appellants or their indulgence for the same is not proved. However, the fact of recovery of the victim from possession of the appellants on the pointing out of appellant Mohd. Alam is very much proved by the testimony of prosecution witnesses and the recovery memo of victim Raja is very much proved, as Exhibit Ka-2.

30. At this stage it would be appropriate to discuss testimony of Mahendra Pratap Singh-retired S.I.-who was the Investigating Officer of this case. He has deposed that he arrested Mohd. Alam at the instance of informant and thereafter relevant information was extracted from Mohd. Alam which led to recovery of co-accused Naseem and Mahesh where recovery of victim Raja was also made. A recovery memo (Exhibit ka-2) was prepared on the spot. He has stated that he started for place of recovery from Panth Crossing around 6.00 P.M. and reached to the spot in 7-8 minutes, left behind his Jeep 20.25 steps before the spot of recovery.

31. Also, fact of recovery of victim has been testified by Vijay Pal Singh-P.W.4 when he sated that Raja was recovered at the pointing out of Mohd. Alam at that relevant point of time Raja was sitting in the lap of Naseem and accused Mahesh was giving Raja some eatable. Informant identified his son Raja. I.O. and the witnesses with the help of other persons surrounded the accused, arrested them and recovered Raja from their possession around 7.00 p.m. on 10.6.2001.

32. Thus testimony on record brings case of appellants within purview of Section 365 IPC. At this stage it would be relevant to extract Section 365 IPC:

"365. Kidnapping or abducting with intent secretly and wrongfully to confine person.--Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully con-fined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

33. Thus after careful scrutiny of facts and testimony on record we do not come across any specific piece of evidence, which may give any force or credence to the claim of the prosecution that the present appellants kidnapped Raja for ransom.

34. Here in the present case, the offence proved is one of kidnapping with intent to confine Raja secretly and wrongfully. The learned trial court, while appreciating testimony on record and its cumulative effect, failed to take integral view of the matter and has misread the evidence on the point of applicability of relevant section of IPC, convicted the appellants under Section 364A IPC and passed sentence against them- which under facts and circumstances of this case was not justified.

35. We have no hesitation in expressing at this stage that learned trial court has already acquitted the two other co-accused Naresh and Data Ram by the same judgment and order giving benefit of doubt against whom some reference of ransom erupts in prosecution testimony. To hold that the present appellants were directly involved in demanding ransom for release of victim (Raja) is not justified, under facts and circumstances of the case qua testimony of prosecution witnesses as a whole.

36. We are mindful of legal proposition that conviction under Section 364A IPC is primarily based on demand for ransom and there should be positive evidence regarding any such demand made by the accused person. Point under context takes us to careful scrutiny of the testimony of witnesses of fact particularly P.W.1, P.W.2, P.W.3 and P.W.4, these witnesses nowhere testify that any ransom was demanded by the present appellants. The incriminating circumstances against the appellants are very much confined to the recovery of the child from their possession on the pointing out of Mohd. Alam.

37. On the one hand our thoughtful consideration of the testimony on record takes us to fact that indulgence of the present appellants for any demand for ransom is found to be altogether missing and on this count, the prosecution has failed, out and out, to establish the essential ingredients of such demand as required under Section 364A IPC. Therefore, the essential ingredients of Section 364A IPC are not existing against the present appellants. On the other hand, the offence alleged and proved against the present appellants squarely falls within the ambit and purview of Section 365 IPC.

38. Accordingly, we are of the firm opinion that conviction of appellants recorded by the trial court under Section 364A IPC should be altered and modified to one under Section 365 IPC only. The conviction and sentence so awarded stands modified accordingly.

39. As per the dictum contained under Section 365 IPC, the offence is punishable with imprisonment of either description for a term which may extend to seven years, coupled with fine.

40. In the result, the aforesaid appeals are partly allowed. The judgment and order of conviction dated 01.08.2005 passed by the Additional Sessions Judge, F.T.C. No.1, Hathras in Sessions Trial No.331 of 2001 arising out of Case Crime No.125 of 2001, (State Vs. Mohd. Alam and others), under Section 364-A IPC, Police Station Hasayan, District Hathras, is altered/modified from Section 364A IPC to Section 365 IPC.

41. In this case, appellant Mohd. Alam is in jail since 10.06.2001 and Naseem and Mahesh are in jail since 01.08.2005, therefore, Mohd. Alam has already spent over 15 years of incarceration, whereas, the other two appellants Naseem and Mahesh have already spent about more than 11 years of incarceration. Therefore, the respective period of imprisonment already undergone by the present appellants is justified, as the sentence provided for the offence under Section 365 IPC, which they have already suffered in surplus. A fine of Rs.1000/- each is also imposed on the appellants and in case of default in payment of fine the concerned convict shall have to undergo additional imprisonment for one month.

42. In so far as payment of the amount of fine is concerned, the appellants are given one month's time to deposit the same. In case the amount of fine is deposited by the appellants, they shall be released forthwith, if they are not wanted in connection with any other case.

43. Let a copy of this order be certified to the concerned trial court for its intimation and follow up action.

BEFORE

Writ A / Civil Misc. Writ Petition No.- 16006 Of 2016

T.P. Singh (Senior Counsel), Siddharth Nandan

Ramesh Upadhyay (Chief Standing Counsel)

Held: Para- The Court held that so long as the order dated 30.07.2012 passed under Section 5(1)(c) of the U.P. Consolidation of Holdings Act treating the land as abadi remains in existence and has not been set aside, the respondents cannot treat the land as agricultural land and recover the amount as arrears of land revenue. Mere allegations of collusion or ante-dating of the order have not been proved. Even if excess amount was paid on account of wrong rate being offered by the respondents, the same cannot be recovered as arrears of land revenue. In case of any fraud, the only remedy available to the respondents is to file a suit for cancellation of the sale deed. At present, there is a concluded contract and a registered sale deed. The stipulation in

the sale deed for recovery of excess amount applies only in case of discrepancy in area, not in rate. The recovery proceedings and the impugned order dated 07.03.2016 are wholly illegal and without authority of law.

Case Law discussed:

(Delivered by Tarun Agarwala, J.)

1. This group of petitions involves a common question and, is accordingly, being decided together. For facility, the facts of Writ Petition No.16006 of 2016 is being taken into consideration.

2. A notification dated 7.10.2013 was issued under Section 4 of the Land Acquisition Act inviting applications from interested tenure holders who wanted to sell their land in pursuance of the "Green Field Project (Agra to Lucknow) Entry Control Express Way".

3. The petitioner considering the importance of the project, being in public interest, offered his land for sale on reasonable market rate.

4. Pursuant to the Government Order dated 2.9.2013 a Committee was constituted for consideration of the offers given by the tenure holders. The Committee in its meeting dated 15.12.2014 approved certain rates for the purpose of executing the sale deeds. The petitioner's land was declared as abadi in consolidation proceedings under Section 5(1)(c) of The Uttar Pradesh Consolidation of Holdings Act, 1953 (hereinafter referred to as the Act), based on which the Committee offered a rate of Rs.800/- per square metre, treating the petitioner land as abadi. The rate offered was accepted by the petitioner and a sale deed dated 30.12.2014 was executed.

5. Subsequently a recovery order dated 23.11.2015 was issued for recovery of the compensation paid to the petitioner. The petitioner, being aggrieved by the said recovery order, filed Writ Petition No.66527 of 2015, which was disposed of by an order dated 14.1.2016 treating the recovery order as a notice and directed the petitioner to file an objection to the said notice, which would be decided by the authority concerned before proceeding to recover any amount. Based on the said order, the petitioner filed a detailed objection contending that the sale consideration was offered by the respondents with open eyes, which was duly accepted by the respondents and that no fraud was placed either by the petitioner or by anyone else and, therefore, the amount cannot be recovered as arrears of land revenue. The said objection was rejected by the Collector by an order dated 7.3.2016 against which the present writ petition has been filed.

6. We have heard Sri T.P.Singh, the learned senior counsel assisted by Sri Siddharth Nandan for the petitioner and Sri Ramesh Upadhyay, the learned Chief Standing Counsel for the State.

7. The learned senior counsel for the petitioner contended that village Baccela Bachheli was under the consolidation proceedings in which an order dated 30.7.2012 was passed under

Section 5(1)(c) of the Act treating the land as abadi. The Committee that was constituted under the Government Order considered various aspects and evidence. A report dated 10.12.2014 was submitted by the Tehsildar and the Additional District Magistrate holding that the land is abadi. Such report was approved by the Chief Executive Officer on 20.12.2014. The respondents thereafter gave an offer, which was accepted by the petitioner, pursuant to which a sale deed was executed on 30.12.2014, which was duly registered before the Sub Registrar.

8. The learned senior counsel contended that once the rate offered was accepted and consideration was paid and a sale deed has been executed, no recovery of the consideration paid could be recovered as arrears of land revenue. It was further contended that even assuming that a fraud was played, the amount could not be recovered as arrears of land revenue.

9. On the other hand, the respondents contend that the sale-deeds were executed on the basis of the documents produced by the officers and employees of the Consolidation Department, but, when physical possession of the land was being taken, the respondents noticed the discrepancy and found that the land was not abadi but agricultural land. Accordingly, a three member inquiry committee was constituted, which found discrepancy in the nature of the land. According to the respondents the inquiry report reported that the officers and employees of the Consolidation Department were in collusion with the tenure holders and that an ante dated order dated 30.7.2012 was passed under Section 5(1)(c) of the Act after publication of the notification issued under Section 4 of the Land Acquisition Act, thereby causing loss to the Government. It was also asserted that since excess payment has been made, the petitioner was required to return the amount along with interest. It was also contended that a charge sheet has been issued against the erring officials and inquiry proceedings are going on. It was further contended that there is a stipulation in the sale deed that in the event any excess amount has been paid to the petitioner the same could be recovered as arrears of land revenue.

10. Having heard the learned counsel for the parties at some length, we find that the contention that the order dated 30.7.2012 passed under Section 5(1)(c) of the Act is ante dated has not as yet been proved. It is only an allegation nor has the said order dated 30.7.2012 been recalled by the authority concerned. Consequently, no recovery can be made on the basis of an allegation, which is yet to be proved. At the moment the land of the petitioner is abadi in view of an order passed under the Act. So long as the order treating the land of the petitioner as abadi stands, recovery cannot be made from the petitioner's treating the said land as an agricultural land.

11. Allegation of collusion by the petitioner or by other tenure holders with the officials of the Consolidation Department is yet to be proved. At the moment, on the basis of allegations of fraud recovery cannot be made.

12. It is alleged that there is a stipulation in the sale-deed for recovery of the amount as arrears of land revenue, in the event excess amount was paid to the petitioner. A copy of the said sale deed has been annexed to the writ petition. The recital contained in the sale-deed indicates that in case there is a discrepancy in the area of the land, on the basis of which if it was found that

excess amount had been paid, in that eventuality, the excess amount would be recovered as arrears of land revenue along with 12% interest. This clause in the sale-deed does not entitle the petitioner to recover any amount paid towards consideration of the land. The sole contention of the respondents is, that the rate offered by them to the petitioner was the rate for abadi land whereas rate for agriculture land should have been offered.

13. In our opinion, if a wrong rate has been offered by the respondents to the petitioner, the same cannot be recovered as arrears of land revenue, as per the recital contained therein. If a fraud has been played by the petitioners upon the respondents, the remedy available to the respondents is to file a suit for cancellation of the sale deed. At the moment, there is a concluded contract, namely, an offer made by the respondents with regard to the rate of land, which was duly accepted by the petitioner. A sale deed has been executed and the consideration has been paid to the petitioner. The amount can only be recovered after the sale deed is cancelled and not otherwise.

14. In the light of the aforesaid, the recovery notice against the petitioner is wholly illegally and without any authority of law. The recovery cannot be sustained and the impugned order is quashed.

15. The writ petition is allowed.

**(2016) 8 ILRA 1074
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.08.2016**

BEFORE

THE HON'BLE B. AMIT STHALEKAR, J.

Writ A No.- 17824 Of 2016

Irfan Ansari

...Petitioner

Versus

State Of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Shantanu Khare, Ashok Khare

Counsel for the Respondents:

C.S.C.

The petitioner, son of late Maqbool Ansari (Assistant Treasury Officer, Gorakhpur), applied for compassionate appointment after the death of his father on 30.12.2014. The petitioner is the son from the first wife Smt. Sarikunnisa, who was divorced from Maqbool Ansari in the year 2001 by order of the Family Court. Thereafter, Maqbool Ansari married Smt. Kahkasha Bano, who is already employed as Urdu Translator in the District Treasury, Gorakhpur. The petitioner's claim for compassionate appointment was rejected by the impugned orders dated 10.02.2016 and 16.03.2016 on the ground that the second wife Smt. Kahkasha Bano (spouse of the deceased) is already in government service, hence no appointment on compassionate ground can be given as per Rule 5 of the U.P. Recruitment of Dependents of Government Servants (Dying-in-Harness) Rules, 1974.

The petitioner contended that he is the son of the deceased and falls within the definition of family'. It was further submitted that Smt. Kahkasha Bano is not maintaining the petitioner or his family.

The writ petition lacks merit and is dismissed.

Held: Para-: Rule 5(1) of the U.P. Recruitment of Dependents of Government Servants (Dying-in-Harness) Rules, 1974 clearly provides that if the spouse of the deceased government servant is already employed in government service, then one member of his family who is not already employed shall be given compassionate appointment. Since the spouse (Smt. Kahkasha Bano) of the deceased was already in government service at the time of death of Maqbool Ansari, the petitioner is not entitled for compassionate appointment. Sub-rule (3) of Rule 5 has no application in the present case as Smt. Kahkasha Bano was not appointed on compassionate ground. The impugned orders do not suffer from any illegality or infirmity.

Case Law discussed:

(Delivered by Hon'ble B. Amit Sthalekar, J.)

1. Heard Sri Siddharth Khare, learned counsel for the petitioner and Sri Mata Prasad, learned Additional Chief Standing Counsel assisted by Sri S.K. Mishra, learned Standing Counsel for the respondents.

2. The petitioner is seeking quashing of the order dated 16.3.2016 whereby his representation seeking appointment on compassionate ground has been rejected. The other order under challenge dated 10.2.2016 also rejects the petitioner's representation dated 23.9.2015 seeking compassionate appointment.

3. Brief facts of the case are that the petitioner is the son of Maqbool Ansari and his first wife Sarikunnisa. Smt. Sarikunnisa has been divorced from Maqbool Ansari through regular divorce proceedings by order of the Family Court, Gorakhpur dated 11.5.2001 which is not disputed. Maqbool Ansari thereafter married one Kahkasha Bano, who is employed as Urdu Translator in the District Treasury, Gorakhpur. Kahkasha Bano also has a child through Maqbool Ansari. Maqbool Ansari, who was working as Assistant Treasury Officer, Gorakhpur died on 30.12.2014 while still in service. The petitioner applied for compassionate appointment on 6.1.2015 and when no order was being passed he filed Writ petition no.7921 of 2016 (Irfan Ansari Vs State of U.P. and others) which was disposed of by this Court by order dated 22.2.2016 with a direction to the respondents to consider the claim of the petitioner in accordance with law. Thereafter, the impugned orders have been passed rejecting the claim of the petitioner for appointment on compassionate grounds.

4. The reason given in the impugned order is that the petitioner's mother Smt. Sarikunnisa was divorced from Maqbool Ansari and thereafter, Maqbool Ansari married Kahkasha Bano, who is already in government service and therefore, compassionate appointment cannot be given to the petitioner as the petitioner is a part of the family of Kahkasha Bano. The respondents have made reference to the provisions of Rule 5 of the Uttar Pradesh Recruitment of Dependents of Government Servants (Dying-in-Harness) Rules, 1974 (hereinafter referred to as the Rules, 1974) which provides that in case a Government Servant dies in harness after the commencement of these rules and the spouse of the deceased Government Servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purposes, be given a suitable employment in Government service on a post except that which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of normal recruitment rules.

5. Rule 5 reads as under:-

"5. Recruitment of a member of the family of the deceased.-(i) In case a Government Servant dies in harness after the commencement of these rules and the spouse of the deceased Government Servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State

Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purposes, be given a suitable employment in Government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules if such person-

(i) fulfils the educational qualifications prescribed for the post,

(ii) is otherwise qualified for Government service, and

(iii) makes the application for employment within five years from the date of the death of the Government servant:

Provided that where the State Government is satisfied that the time limit fixed for making the application for employment causes undue hardship in any particular case, it may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner.

Provided further that for the purpose of the aforesaid proviso, the person concerned shall explain the reasons and give proper justification in writing regarding the delay caused in making the application for employment after the expiry of the time limit fixed for making the application for employment along with the necessary documents/proof in support of such delay and the Government shall, after taking into consideration all the facts leading to such delay take the appropriate decision.

(2) As far as possible, such an employment should be given in the same department in which the deceased Government servant was employed prior to his death.

(3) Every appointment made under sub-rule (1) shall be subject to the condition that the person appointed under sub-rule (1) shall maintain other members of the family of deceased Government servant, who were dependent on the deceased Government servant immediately before his death and are unable to maintain themselves.

(4) Where the person appointed under sub-rule (1) neglects or refuses to maintain a person to whom he is liable to maintain under sub-rule (3), his services may be terminated in accordance with the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999, as amended from time to time."

6. The submission of the learned standing counsel for the respondents is that since Smt. Sarikunnisa was divorced from late Maqbool Ansari therefore she can no longer be said to be the spouse and thereafter Maqbool Ansari married Kahkasha Bano who is the spouse and who is in government service prior to the death of Maqbool Ansari. It is on this ground that the claim of the

petitioner has been rejected that Kahkasha Bano is a spouse and is in government service, therefore, another member of the family cannot be given appointment on compassionate ground.

7. Sri Siddharth Khare, learned counsel for the petitioner then submitted that in terms of the provisions of Sub Rule (3) of Rule 5, appointment can be given under Sub Rule (1) of Rule 5 on the condition that the person so appointed shall maintain the family of the deceased government servant and under Sub Rule (4), if it is found that such a person so appointed neglects or refuses to maintain a person whom he is liable to maintain under Sub Rule 3, his services can be terminated. In para 11 of the writ petition, it is stated that Kahkasha Bano is not supporting the petitioner or his immediate family in any manner whatsoever.

8. The provisions of Sub Rule (3) of Rule 5 of the Rules, 1974, in my opinion have no application to the facts of the present case as Smt Kahkasha Bano was already in service of the State Government when late Maqbool Ansari expired and she was not given appointment on compassionate ground. Therefore, the specific condition laid down in Sub Rule (3) would have no application to her. It is not disputed that the petitioner is member of the family of late Maqbool Ansari though he in the strict sense of the word, may not be said to be the member of the family of Smt. Kahkasha Bano. Sri Siddharth Khare submits that the petitioner being a son, is nevertheless a member of the family of late Maqbool Ansari and falls within the definition of 'Family' as defined in Sub Rule (c) of Rule 2 of the Rules, 1974. The fact that the petitioner is the son of late Maqbool Ansari and therefore, a member of his family is not disputed even by the respondents but that alone would not entitle him to claim appointment on compassionate ground in view of the mandatory language of Rule 5 Sub Rule (1) of the Rules, 1974.

9. The import of Sub Rule (1) of Rule 5 is that if the spouse of deceased government servant is already in service then appointment on compassionate ground may not be given to another member of the family. Therefore, considering the matter in the light of the facts of the present case and the specific provisions of the Rules, 1974, in my opinion, there is no illegality or infirmity in the impugned orders.

10. The writ petition lacks merit and is accordingly, **dismissed**.

Application U/s 482 No.- 22930 Of 2016

Harjit Singh & Anr.

...Applicants Versus

State Of U.P. & Anr.

...Opposite parties

Counsel for the Applicants:

Sandeep Tripathi, Atul Pandey

Counsel for Opposite Parties:

G.A.

The applicants by means of this application under section 482 Cr.P.C. have prayed to quash the order dated 24.2.2016 passed by learned Additional Sessions Judge, Court No. 11, Saharanpur, in Criminal Revision No. 357 of 2014, confirming the order dated 21.5.2014 passed by the learned Special Judicial Magistrate, Court No. 28, Saharanpur, in Complaint Case No. 1913 of 2013, Hemant Kumar Vs. Narendra Singh, whereby, on the application moved by O.P. No. 2 under Section 319 Cr.P.C., the applicants have been summoned to face trial under Sections 504 and 506 I.P.C.

Learned counsel for the applicants has contended that O.P. No. 2 filed a false Complaint Case No. 1913 of 2013, under sections 420, 323, 504, 506, 120B I.P.C. against the applicants and their sons. After examining the witnesses under sections 200 and 202 Cr.P.C. the learned Magistrate vide its order dated 23.2.2013, summoned only their sons. However, during trial when the complainant was examined and she stated against the applicants too, they were summoned under section 319 Cr.P.C. by the learned trial court vide impugned order dated 21.5.2014 to face trial under sections 504 and 506 I.P.C. along with the other co-accused. Against the aforesaid order dated 21.5.2014, the applicants filed Criminal Revision No. 357 of 2014 before the learned Additional Sessions Judge, Saharanpur, but the lower revisional court too, without keeping in view the fact that the applicants were not summoned in the complaint even though the allegations made in the application under section 319 Cr.P.C. and in the statements recorded under sections 200 and 202 Cr.P.C., were almost the same, mechanically dismissed the revision by the impugned order dated 24.2.2016.

However, considering the submissions advanced by learned counsel for the applicants, it is directed that in case the applicants appear before the court concerned within thirty days from today and apply for bail, the same shall be heard and disposed of expeditiously by the courts below in view of the settled law laid by the Seven Judges' decision of this Court in the case of Amrawati and another Vs. State of U.P., 2005 Cr.L.J. 755 and affirmed by Hon'ble Apex Court in 2009 (3) ADJ 322 (SC) Lal Kamendra Pratap Singh Vs. State of U.P.

Accordingly, this application is dismissed.

Held: Para-

Case Law discussed: Mohd. Shafi vs. Mohd. Rafiq and another (2007) 14 SCC 544, Hardeep Singh vs. State of Punjab and others [2014 (1) JIC 539 (S C)], Rakesh vs. State of Haryana, 2001 (2) JIC 757 (SC) : AIR 2001 SC 2521; and Mohd. Shafi vs. Mohd. Rafiq & another, 2007 (2) JIC 490 (SC), Amrawati and another Vs. State of U.P., 2005 Cr.L.J. 755 and affirmed by Hon'ble Apex Court in 2009 (3) ADJ 322 (SC) Lal Kamendra Pratap Singh Vs. State of U.P.

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. The applicants by means of this application under section 482 Cr.P.C. have prayed to quash the order dated 24.2.2016 passed by learned Additional Sessions Judge, Court No. 11, Saharanpur, in Criminal Revision No. 357 of 2014, confirming the order dated 21.5.2014 passed by the learned Special Judicial Magistrate, Court No. 28, Saharanpur, in Complaint Case No. 1913 of 2013, Hemant Kumar Vs. Narendra Singh, whereby, on the application moved by O.P. No. 2 under Section 319 Cr.P.C., the applicants have been summoned to face trial under Sections 504 and 506 I.P.C.

2. Heard learned counsel for the applicants and learned A.G.A. Perused the record.

3. Learned counsel for the applicants has contended that O.P. No. 2 filed a false Complaint Case No. 1913 of 2013, under sections 420, 323, 504, 506, 120B I.P.C. against the applicants and their sons. After examining the witnesses under sections 200 and 202 Cr.P.C. the learned Magistrate vide its order dated 23.2.2013, summoned only their sons. However, during trial when the complainant was examined and she stated against the applicants too, they were summoned under section 319 Cr.P.C. by the learned trial court vide impugned order dated 21.5.2014 to face trial under sections 504 and 506 I.P.C. along with the other co-accused. Against the aforesaid order dated 21.5.2014, the applicants filed Criminal Revision No. 357 of 2014 before the learned Additional Sessions Judge, Saharanpur, but the lower revisional court too, without keeping in view the fact that the applicants were not summoned in the complaint even though the allegations made in the application under section 319 Cr.P.C. and in the statements recorded under sections 200 and 202 Cr.P.C., were almost the same, mechanically dismissed the revision by the impugned order dated 24.2.2016.

4. On the aforesaid grounds the learned counsel has prayed to quash both the orders passed by the courts below.

5. In support of his arguments, learned counsel for the applicants has placed reliance on the case of **Mohd. Shafi vs. Mohd. Rafiq and another (2007) 14 SCC 544** in which the Hon'ble Apex Court has held that before exercising its jurisdiction under Section 319 Cr.P.C., a Court must arrive at a satisfaction that there exists a possibility that the accused so summoned, in all likelihood would be convicted. Such satisfaction can be arrived at inter alia upon completion of the cross-examination of the said witness or the court concerned may also like to consider other evidence available before it.

6. Per contra learned AGA has opposed the prayer of the applicants by submitting that after the decision, rendered by Constitution Bench of Hon'ble Apex Court in Hardeep Singh's case, the aforesaid case of Mohd. Shafi is no longer a good law. This application is without any force and is liable to be dismissed. The learned A.G.A. has drawn the attention of this Court to the statements of the witnesses produced by the prosecution in this case and has contended that all the witnesses including the injured witnesses have named the applicants in their statements, therefore, the court below has not committed any mistake by summoning the applicants to face trial alongwith other co-accused persons.

7. Having heard learned counsel for the applicants and learned A.G.A. and keeping in view the facts and circumstances of the case, this Court is of the considered view that the instant application is liable to be dismissed for the following reasons:-

8. A Five Judges bench of Hon'ble Supreme Court in the case of **Hardeep Singh vs. State of Punjab and others [2014 (1)JIC 539 (S C)]** has set at rest the entire controversy with regard to the scope and extent of Section 319 Cr.P.C. which had arisen due to variety of views having been expressed by several High Courts and also by the Supreme Court. Noticing the conflicting views between the two judgments of the Hon'ble Supreme Court in the case of **Rakesh vs. State of Haryana, 2001 (2) JIC 757 (SC) : AIR 2001 SC 2521; and Mohd. Shafi vs. Mohd. Rafiq & another, 2007 (2) JIC 490 (SC)**, a doubt was expressed about the correctness of Mohd. Shafi's case (supra) which led to the framing of following five questions by Constitutional Bench in Hardeep Singh case:-

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

9. Question No. 2 and 4 are relevant for the present case.

10. Answering the aforesaid questions, the Hon'ble Constitutional Bench of Supreme Court expressed its clear view that neither cross-examination of witness is required before summoning an additional accused under section 319 Cr.P.C., nor any categorical finding to the affect that in all likelihood the person summoned may be convicted, is necessary before exercising such power. According to Hon'ble Apex Court:-

"What is required is not to have a mini-trial at this stage by having examination and cross-examination and thereafter rendering a decision on the overt act of such person sought to be added. In fact it is this mini-trial that would affect the right of the person sought to be arraigned as an accused rather than not having any cross-examination at all, for in light of sub section (4) of Section 319 Cr.P.C., the person would be entitled to a fresh trial where he would have all the rights including the right to cross-examine prosecution witnesses. Therefore, even on the basis of Examination-in-chief, the court can proceed against a person as long as the court is satisfied that the evidence appearing against such person prima facie necessitates bringing such person to face trial. In fact, Examination-in-Chief untested by cross-examination, undoubtedly in itself, is an evidence.

In view of the above, we hold that power under Section 319 Cr.P.C. can be exercised at the stage of completion of examination-in-chief and Court does not need to wait till the said evidence is tested on cross-examination.....There is no scope for the Court acting under Section 319 Cr.P.C. to form any opinion as to the guilt of the accused.....

Though under Section 319 (4) (b) Cr.P.C. the accused subsequently impleaded is to be treated as if he had been an accused when the Court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 Cr.P.C. would be the same as for framing a charge."

11. In wake of the above cited legal position, there appears no substance in the arguments advanced by learned counsel for the applicants that the applicants have been wrongly summoned without cross-examination of witnesses and without any express view by the court below that there is likelihood of their conviction.

12. Accordingly, this application is dismissed.

13. However, considering the submissions advanced by learned counsel for the applicants, it is directed that in case the applicants appear before the court concerned within thirty days from today and apply for bail, the same shall be heard and disposed of expeditiously by the courts below in view of the settled law laid by the Seven Judges' decision of this Court in the case of **Amrawati and another Vs. State of U.P., 2005 Cr.L.J. 755** and affirmed by Hon'ble Apex Court in **2009 (3) ADJ 322 (SC) Lal Kamendra Pratap Singh Vs. State of U.P.**

(2016) 8 ILRA 1082
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.08.2016

BEFORE

THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Application U/S 482 No.- 24116 Of 2016

Kamleshwar Kumar Tripathi	...Applicant
	Versus
State Of U.P. & Anr.	...Opposite Parties

Counsel for the Applicant:

Ramesh Kumar Mishra, Gyanendra Kumar Mishra

Counsel for the Opposite Parties:

G.A

This application under Section 482 Cr.P.C. has been filed for quashing the proceedings of Complaint Case No.1800/2008 (Brijbhan Singh Vs. Kamleshwar Kumar Tripathi) pending in the Court of Judicial Magistrate, Khaga, Fatehpur.

The complaint was filed by opposite party no.2 alleging that the cheque issued by the applicant in his favour was dishonoured and despite service of legal notice, the amount was not paid. The trial court took cognizance under Section 138 of the Negotiable Instruments Act and Sections 418, 420 IPC. Thereafter, the parties entered into a compromise outside the court. The complainant filed an application along with affidavit stating that he does not want to prosecute the case any further due to compromise. However, the trial court did not dispose of the said application and continued the proceedings, issuing non-bailable warrant against the applicant.

The Court observed that the trial court was erroneously continuing the proceedings under Sections 418 and 420 IPC along with Section 138 NI Act. In view of the compromise between the parties, there is no possibility of any evidence coming on record to prove the offence. The dispute is purely civil in nature and does not involve any heinous offence having societal impact.

The application u/s 482 Cr.P.C. is allowed.

Held: Para- Relying upon *G. Sagar Suri & another Vs. State of U.P. & others*, 2000 Cri.L.J. 824 (SC), the Court held that when the parties have compromised the matter, continuation of criminal proceedings would be an abuse of the process of law. The proceedings of Complaint Case No.1800/2008 under Sections 418, 420 IPC and Section 138 NI Act are hereby **quashed**.

Case Law discussed:

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. Heard learned counsel for the applicant, learned AGA and perused the records.

2. Complaint case no. 1800/2008 (Brijbhan Singh Vs. Kamleshwar Kumar Tripathi) was filed when cheque issued by accused Kamleshwar Kumar Tripathi in favour of complainant Brijbhan Singh was dishonoured and he had not paid amount of cheque after legal notice served on him. The cognizance for summoning the accused was taken by trial court for offences under section 138 N.I. Act and sections 418 and 420 IPC. Certified copies of documents produced before this Court show that parties had compromised the matter outside the court, and thereafter complainant Brijbhan Singh had moved application and affidavit before trial court with prayer that on the basis of compromise, he does not want to prosecute the case, which may be dismissed. But said application was not disposed of by trial court, the apparent reason for which appears that accused was absent in spite of non-bailable warrant issued against him. These proceedings are challenged by applicant, the accused of original case, through present application under section 482 CrPC.

3. In **2000 Cri. L.J. 824, G. Sagar Suri & another Vs. State of U.P. & others**, the Apex Court had held as under:-

"A criminal complaint under Section 138 of the negotiable Instrument Act is already pending against the appellants and other accused. They would suffer the consequences if offence under Section 138 is proved against them. In any case there is no occasion for the complainant to prosecute the appellants under Sections 406/420 I.P.C. and in his doing so it is clearly an abuse of the process of law and prosecution against the appellants for those offences is liable to be quashed, which we do."

4. Thus, it appears that trial court was erroneously prosecuting the applicant accused for offence under sections 418, 420 IPC and matter should have been prosecuted only for offence under section 138 N.I. Act. The trial for this offence under section 138 N.I. Act is carried out as summons trial, in which in absence of complainant or by not pressing the complaint by him, the prosecution should be put to an end. But trial court is carrying out proceedings for ensuring attendance of applicant-accused.

5. This matter neither involves any offence of heinous nature having any societal impact, and dispute has come to an end under amicable settlement, which is not forbidden by law, and there is no possibility of any evidence would be forthcoming to nail the applicant; therefore it appears appropriate that exercising inherent jurisdiction of this Court, such legal proceedings should be put to an end.

6. Accordingly, this application is allowed, and the proceedings of Complaint Case No. 1800/2008 (Brijbhan Singh Vs. Kamleshwar Kumar Tripathi), under Sections 418, 420 IPC and section 138 N.I. Act, P.S. Khaga, District Fatehpur pending in the Court of Judicial Magistrate, Khaga, Fatehpur, are hereby quashed.

**(2016) 8 ILRA 1084
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.08.2016**

BEFORE

THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Application U/s 482 No.- 24451 Of 2016

Ashraf Ali	...Applicant
	Versus
State Of U.P. & Anr.	...Opposite Parties

Counsel for the Applicant:
Shri Krishna Mishra

Counsel for the Opposite Parties:
G.A.

This application under Section 482 Cr.P.C. has been filed seeking a direction to the court below to consider and dispose of the bail application of the applicant on the same day in Case No.611/IX/2015 (State Vs. Santosh Kumar and others) arising out of Case Crime No.136 of 2013 under Section 3/7 Essential Commodities Act, Police Station Barsana, District Mathura, pending before the Judicial Magistrate, Chhata.

As per the FIR, on 17.10.2013 the Supply Inspector intercepted a vehicle carrying approximately 1600 litres of kerosene oil. The driver disclosed that the kerosene oil was procured from the applicant Ashraf Ali and co-accused Santosh Kumar, who are wholesale dealers. It was alleged that they were selling kerosene oil in the black market. After investigation, charge sheet was submitted against the applicant and others under Section 3/7 E.C. Act. Cognizance was taken on 20.04.2015.

The Court observed that looking to the facts and circumstances of the case and the nature of offence, no good ground is made out to interfere in the matter or to issue any direction for disposal of the bail application on the same day.

Held: Para-

Case Law discussed:

(Delivered by Hon'ble Prabhat Chandra Tripathi, J.)

1. Heard Sri Shri Krishna Mishra, learned counsel for the applicant and learned A.G.A. for the State.

2. This application under Section 482 Cr.P.C. has been filed for a direction to the Court below to consider and dispose of the bail application of the applicant on the same day in Case No. 611/IX/2015 (State Vs. Santosh Kumar and others) arising out of Case Crime No. 136 of 2013, under Section 3/7 E.C. Act, Police Station Barsana, District Mathura, pending before the Judicial Magistrate, Chhata.

3. As per F.I.R. version, on 17.10.2013 at about 5.30 P.M., the Supply Inspector, Chhata along with other officials of the office of the District Supply Officer, Mathura accompanied with the police force intercepted the vehicle bearing registration No. UP85Z 9758 at the outskirts of village Sahar on Goverdhan Chhata Road and enquired about 8 drums in which approximately 1600 litres kerosene oil were filled up and transported. The driver of the vehicle on enquiry disclosed his name as Pappu and informed that he has procured it from Santosh Kumar and Ashraf Ali of village Sahar, who were whole-sale dealers of kerosene oil, situated at Mathura. He has also informed that he has procured kerosene oil from Santosh and Ashraf Ali of the quantity of 950 litres and 900 litres from M/s Brij Oil Company, Mathura respectively. He and Santosh Kumar, the seller, on enquiry could not give satisfactory reply and eloped from the scene. So it is clear that Santosh Kumar and Ashraf Ali are involved in selling kerosene oil of the quantity of 250 litres on higher price in the black-market. The F.I.R. was lodged under Section 3/7 E.C. Act, 1955 and after investigation, charge sheet was submitted in Crime No. 136 of 2013, under Section 3/7 E.C. Act, 1955, Police Station Barsana, District Mathura against the accused persons Santosh Kumar, Ashraf Ali and driver Pappu.

4. Learned counsel for the applicant has vehemently argued that the vehicle and kerosene oil have been released under Section 6A E.C. Act, 1955 by the learned Additional District Magistrate (Law and Order), Mathura.

5. Learned A.G.A. has opposed the prayer of the learned counsel for the applicant and has drawn the attention of the Court towards several order sheets of pending trial case mainly of the date 18.5.2016, where bailable warrants of the amount of Rs. 10,000/- have been issued against the accused persons fixing 16.7.2016 as a date of appearance. Learned A.G.A. has also pointed out that the trial has commenced.

6. The applicant is in the knowledge of the criminal case pending against him but instead of abiding by the process issued by the lower Court for his appearance, he is evading it. Albeit, cognizance has been taken on 20.4.2015 by the learned Judicial Magistrate, Chhata.

7. Looking to the facts and circumstances of the case and nature of the offence, I do not find any good ground to interfere in the matter. The application is liable to be dismissed.

8. The application is dismissed.

BEFORE

Writ C No.- 36097 Of 2016

The Court held that in view of the huge outstanding liability of Rs.23,33,16,216.01/- and the complete absence of stock/security, the objections raised by the petitioners are unsustainable both in law and in equity. The apprehension of the Bank that the stock has been surreptitiously removed appears to be well founded.

Held: Para- The writ petition is not maintainable at this stage as no action under Section 13(4) of the SARFAESI Act has been taken and the petitioners have an effective alternative remedy under Section 17 of the Act. The writ petition is accordingly dismissed. No order as to costs.

Case Law discussed:

Mardia Chemicals Ltd. V. Union of India, AIR 2004 SC 2371

United Bank of India v. Satyawati Tondon, (2010) 8 SCC

GM Sri Siddeshwara Co-op. Bank v. Sri Iktal, (2013) 10 SCC 83

Devi Ispat Ltd. V. State Bank of India, (2014) 5 SCC 762

(Delivered by Hon'ble Vipin Sinha, J.)

1. Heard learned counsel for the parties.
2. The present writ petition has been filed by the petitioners praying for quashing of the initial notice dated 30.05.2016 issued under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred as 'the Act, 2002') and have also sought quashing of the order dated 31.03.2016 by means of which the petitioners' account has been classified as NPA (Non Performing Asset) and a further relief has also been sought for quashing of the order dated 25.07.2016 by means of which objections filed by the petitioners under Section 13 (3A) of the Act, 2002 has been rejected.
3. The contention of the learned counsel for the petitioners, at the very outset, is that the accounts of the petitioners have been wrongly classified as NPA and that the classification has been done in violation of the guidelines of the Reserve Bank of India.
4. Further contention is that on the relevant date on which the account of the petitioners was classified as NPA as well as even on the date the F.I.R. was lodged, there was sufficient stock available as security towards the financial aid provided by the bank and thus, their account has been wrongly classified as NPA and moreover the second notice under Section 13(2) of the Act, 2002 is not maintainable.
5. Learned counsel for the respondent on the other hand submits that the present writ petition is not maintainable in view of the fact that admittedly no action till date has been initiated under Section 13(4) of the Act, 2002 and thus, in case the petitioners have any grievance with regard to the classification of the account as NPA or with regard to the quantum of liability towards the bank, petitioners have an effective and efficacious alternative remedy of filing an appeal/objection under Section 17 of the Act, 2002 as and when any measures under Section 13(4) of the Act, 2002 are initiated against the petitioners.

6. A perusal of notice under Section 13(2) of the Act, 2002 shows that the notice itself makes it crystal clear that:

"Due to non deposit of interest of FITL for the month of March 2016, non-submission of stock reports in time and not getting stocks checked despite various reminders and personal visits, bank has decided to recall the entire outstanding."

7. It further shows that as on 31.03.2016, the petitioners had a liability of Rs. 21,66,18,571.01/- with further interest till the date of actual payment.

8. In response to the said notice dated 25.04.2016 as well as notice dated 30.05.2016, the petitioners had filed a reply/objection under Section 13(3A) of the Act, 2002 dated 12.07.2016, copy of which has been annexed as Annexure-5 to the writ petition, in which a number of objections were taken with regard to the classification of the account as NPA as well as the crystallized liability/debt.

9. Learned counsel for the bank has drawn the attention of the Court to the conclusion/reply of the said representation dated 12.07.2016, given under Section 13(3A) of the Act, 2002, which was given by the bank vide letter dated 25.07.2016 in response to the objection filed by the petitioners.

10. A perusal of the said reply shows that it is a very elaborate and speaking reply and in fact the very basis of classifying the petitioners' account as NPA has been duly disclosed in the said reply.

11. A perusal of the said reply also shows that in spite of repeated opportunities being given to the petitioners for verification of stock, keeping in view the fact that the drawing power of borrower is based on the available hypothecated stock, the petitioners did not appear before the bank officials to verify the stock. The relevant extract of the said reply is being quoted herein below:

"Further merely submission of stock statement is not sufficient, it also require to be checked by the bank's officials but your client did not allow the bank officials to check the stock during last six months despite various request made verbally, during meeting with the partners and letters dated 02.02.2016, 03.02.2016, 04.02.2016, 11.02.2016, 25.02.2016, 02.03.2016, 04.03.2016, 08.03.2016 and 10.03.2016, which was violation of the terms & conditions of the sanction and indication that stock was not available. Which is further confirmed when the senior bank's officials were allowed the access in factory premises on 14.06.2016 and no stock was found there."

"Stock audit was also not got conducted despite three visits by stock auditor and our various telephonic request, personal request during meeting and out letters dated 25.02.2016, 02.03.2016, 04.03.2016, 08.03.2016 and 10.03.2016 which is also in contravention of the accepted terms & conditions of the sanction. Further, it is pertinent to mention that the stock reduced from Rs. 26.07 Crores in August 2015 to Rs. 20.67 crores in the stock statement for the month of

Sep'2015 to Dec'2015 submitted on 14.01.2016 for which no justification was given despite of several reminders from out office."

12. The bank has further noted that:

"The housing loan accounts in the name of Smt. Manju Agarwal & Sri Udit Mohan Agarwal and Shri Suman Kumar & Sri Udit Mohan Agarwal availed from our Retail Asset Branch, Civil Lines, Moradabad were sanctioned on the same immovable properties which are already mortgaged with our branch to secure the exposure of M/s Aroma Chemicals Moradabad as collateral security. These loan accounts are also classified as NPA on 31.03.2016 due to non deposit of E.M.I."

13. The order also makes it clear that when even after prior intimation of checking, the bank officials were not allowed to verify the stock. The bank was under a grave apprehension that the stocks have been surreptitiously removed and in fact the bank has been cheated of its valuable security and thus the bank had also lodged an F.I.R. in this regard.

14. In the said order, it is also mentioned that there is no bar under the law for issuing a revised notice under Section 13(2) of the Act, 2002 with regard to the same account with certain addition of security and liabilities, which were left to be included in the previous notice.

15. It is also clear from the said order that the amount due against the petitioners, at the relevant time, is Rs. 23,33,16,216.01/-.

16. The position, which emerges apparently is that at present neither the stock nor the sale proceeds are available.

17. Thus, the apprehension of the bank that it has been cheated and that the valuable security has been removed by the petitioners with the intention of depriving the bank of its 'valuable security' seems to be well founded and thus, no illegality can be attributed to the bank in its initiating steps for recovery of its dues.

18. Keeping in view the insistence of the petitioners that on the relevant date when the account was classified as NPA and an F.I.R. was lodged subsequently, there was substantial stock available, by way of abundant caution, this Court raised a query as to what exactly is the status of the stocks as on date. A supplementary affidavit has been filed by the petitioner admitting that there is no stocks available as on date.

19. Thus, keeping in view the heavy liability of Rs. 23,33,16,216.01/- and the fact that as on date there is no stock available, this Court finds that the objections, if any, taken by the petitioners are unsustainable in law as well as in equity.

20. Further, it has been contended by learned counsel for the Bank that even otherwise if the petitioners have any grievance whatsoever, the petitioners have an effective and efficacious remedy of filing appeal/objection under Section 17 of the Act, 2002 and this Court should be reluctant to interfere keeping in view of the huge liability and the fact that the stock has been removed in a surreptitious manner with the sole intention of depriving the bank of its valuable security.

21. Keeping in view the aforesaid facts and circumstances of the case, if we examine the legal position as has been laid down by the Apex Court in a plethora of cases (though only a few are referred to herein below), the position which crystallizes is herein as under.

22. In the case of **Mardia Chemicals Ltd. Etc. Etc Vs. U.O.I. & Ors. Etc. Etc; AIR 2004 SC 2371**, the Apex Court has clearly held as under:

"44. Nonetheless dues or disputes regarding classification of NPAs should be considered and resolved by some internal mechanism. In our view, the above position suggests the safeguards for a borrower, before a secured asset is classified as NPA. If there is any difficulty or any objection pointed out by the borrower by means of some appropriate internal mechanism it must be expeditiously resolved.

45. In the background we have indicated above, we may consider as to what forums or remedies are available to the borrower to ventilate his grievance. The purpose of serving a notice upon the borrower under sub-section (2) of Section 13 of the Act is, that a reply may be submitted by the borrower explaining the reasons as to why measures may or may not be taken under sub-section (4) of Section 13 in case of non-compliance of notice within 60 days. The creditor must apply its mind to the objections raised in reply to such notice and an internal mechanism must be particularly evolved to consider such objections raised in the reply to the notice. There may be some meaningful consideration of the objections raised rather than to ritually reject them and proceed to take drastic measures under sub-section (4) of Section 13 of the Act. Once such a duty is envisaged on the part of the creditor it would only be conducive to the principles of fairness on the part of the banks and financial institutions in dealing with their borrowers to apprise them of the reason for not accepting the objections or points raised in reply to the notice served upon them before proceeding to take measures under sub-section (4) of Section 13. Such reasons, overruling the objections of the borrower, must also be communicated to the borrower by the secured creditor. It will only be in fulfillment of a requirement of reasonableness and fairness in the dealings of institutional financing which is so important from the point of view of the economy of the country and would serve the purpose in the growth of a healthy economy. It would certainly provide guidance to the secured debtors in general in conducting the affairs in a manner that they may not be found defaulting and being made liable for the unsavoury steps contained under sub-section (4) of Section 13. At the same time, more importantly we must make it clear unequivocally that communication of the reasons not accepting the objections taken by the secured borrower may not be taken to give an occasion to resort to such proceedings which are not permissible under the provisions of the Act. But communication of reasons not to accept the

objections of the borrower, would certainly be for the purpose of his knowledge which would be a step forward towards his right to know as to why his objections have not been accepted by the secured creditor who intends to resort to harsh steps of taking over the management/business of viz. secured assets without intervention of the court. Such a person in respect of whom steps under Section 13(4) of the Act are likely to be taken cannot be denied the right to know the reason of non-acceptance and of his objections. It is true, as per the provisions under the Act, he may not be entitled to challenge the reasons communicated or the likely action of the secured creditor at that point of time unless his right to approach the Debt Recovery Tribunal as provided under Section 17 of the Act matures on any measure having been taken under sub-section (4) of Section 13 of the Act.

46. We are holding that it is necessary to communicate the reasons for not accepting the objections raised by the borrower in reply to notice under Section 13(2) of the Act more particularly for the reason that normally in the event of non-compliance with notice, the party giving notice approaches the court to seek redressal but in the present case, in view of Section 13 (1) of the Act the creditor is empowered to enforce the security himself without intervention of the Court. Therefore, it goes with logic and reason that he may be checked to communicate the reason for not accepting the objections, if raised and before he takes the measures like taking over possession of the secured assets etc.

68. The remedy of appeal available under the Act as contained in Section 17 can be availed only after measures have already been taken by the secured creditor under sub-section (4) of Section 13 of the Act.

23. Thus, it is clear that at the stage of 13(3A) no remedy is available to the borrower and it is only when measures have been initiated under Section 13(4) that remedy under Section 17 of the act lies.

24. It has also been observed in the said judgement that as far as the question of declaring the account as NPA is concerned, it should be considered and resolved by the some internal mechanism and that in case the grievance of the borrower is that his account has been wrongly classified as NPA in violation of guidelines of Reserve Bank of India, he can file objection, which the Bank can look into.

25. In the present case, the objection was filed with regard to the account being classified as NPA in pursuance of the notice under Section 13 (2) of the Act, 2002 and the said objection has been duly considered by means of an elaborate order, which has been passed while deciding the said objections.

26. The Apex Court while concluding the case of **Mardia Chemicals** (Supra) has categorically held as under:

"80., we find what emerges from different provisions of the Act, is as follows :-

1. Under sub-section (2) of Section 13 it is incumbent upon the secured creditor to serve 60 days notice before proceeding to take any of the measures as provided under sub-section (4) of Section 13 of the Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. In connection with this conclusion we have already held a discussion in the earlier part of the judgment. The reasons so communicated shall only be for the purposes of the information/knowledge of the borrower without giving rise to any right to approach the Debt Recovery Tribunal under Section 17 of the Act, at that stage.

2. As already discussed earlier, on measures having been taken under sub-section (4) of Section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal (petition) under Section 17 of the Act before the Debt Recovery Tribunal.

3.

4.

5."

27. Another important judgement of the Apex Court was rendered in the case of **United Bank of India Vs. Satyawati Tondon & Ors; 2010 (8) SCC**. The relevant extract of the said judgement is quoted herein below:

"3. Sub-section (3-A) of Section 13 lays down that the borrower may make a representation in response to the notice issued under Section 13(2) and challenge the classification of his account as non-performing asset as also the quantum of amount specified in the notice. If the bank or financial institution comes to the conclusion that the representation/objection of the borrower is not acceptable, then reasons for non-acceptance are required to be communicated within one week.

4. Section 17 speaks of the remedies available to any person including borrower who may have grievance against the action taken by the secured creditor under sub-section (4) of Section 13. Such an aggrieved person can make an application to the Tribunal within 45 days from the date on which action is taken under that sub-section. By way of abundant caution, an Explanation has been added to Section 17(1) and it has been clarified that the communication of reasons to the borrower in terms of Section 13(3-A) shall not constitute a ground for filing application under Section 17(1).

Sub-section (5) of Section 17 prescribes the time-limit of sixty days within which an application made under Section 17 is required to be disposed of. The proviso to this sub-section envisages extension of time, but the outer limit for adjudication of an application is four months."

28. In the said case, the apex Court while concluding had observed as under:

"27. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."

29. Similar is the position as has been laid down by the Apex Court in the case of **GM Sri Siddeshwara Co-op. Bank Vs. Sri Ikbal & Ors.; 2013 (10) SCC 83** and also in the case of **Devi Ispat Ltd. & Anr. Vs. State Bank of India & Ors.; 2014 (5) SCC 762**.

30. It may also be appreciated that apart from the aforesaid legal position, we find that in order to judge the bonafide of the petitioners, this Court had inquired from the counsel as to what exactly is the status of the stock as on date in response to which a supplementary affidavit dated 05.08.2016 has been filed, which has been taken on record. The affidavit is of Udit Mohan Agarwal and in paragraph no. 3 of the said supplementary affidavit, it has been specifically stated herein as under:

"That in reply to the said query of this Hon'ble Court, it is submitted that as on 05th August, 2016 there is no Stock available in the premises of factory of the petitioner No. 1/firm. It is pertinent to mention here that the Respondent Bank has classified the account of the petitioner No. 1/firm as NPA on 31.03.2016 on the basis of the stock statements (September 2015 - December 2015) submitted by the Petitioner No. 1/firm before the Respondent bank on 14.01.2016."

31. Thus, it is apparent that the stock, which was in the nature of valuable security of the Bank has been eroded and the same has been surreptitiously removed by the petitioners. At present neither there is any stock nor sale proceeds have been deposited with the bank and thus, apprehension of the bank that the bank has been cheated of its valuable security, which was in the form of ready stock and which has now been removed even without informing the bank is justified and thus in this view of the matter also neither in law nor in equity is the petitioners entitled to grant of any indulgence whatsoever.

32. It may also be appreciated that admittedly till date no action under Section 13(4) has been initiated by the respondent-bank and thus, the writ petition, at this stage, is totally misconceived.

33. The fact remains that as per the established law, the petitioners have a more effective and efficacious remedy available to them under Section 17 of the Act, 2002 and writ petition nowhere states as to how and in what manner, the said remedy is not effective or efficacious.

34. Thus, keeping in view the aforesaid facts and circumstances of the case and law as established by a long line of cases, the petitioners are not entitled to grant of any indulgence whatsoever by this Court in exercise of its equitable jurisdiction under Article 226 of the Constitution of India.

35. The writ petition is accordingly dismissed.

36. No order as to costs.

**(2016) 8 ILRA 1095
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.08.2016**

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 37294 Of 2015

Ajay Kumar Sharma

...Applicant

Versus

State Of U.P.

...Opposite party

Counsel for the Applicant:

Deepak Kumar Pandey, K.K. Pandey

Counsel for the Opposite party:

G.A., B. P. Verma, Jitendra Singha

The applicant was elected Secretary of "Life Insurance Corporation Employees Salary Earners Cooperative Society Ltd., Mathura" from 1998 to 2012. An FIR dated 01.04.2015 was lodged by the President of the Society (Yogendra Singh) alleging that during his tenure as Secretary, the applicant had embezzled an amount of Rs.40,04,500/- by making forged entries in the ledger and other records of the Society and failed to hand over the records to the subsequent Secretary. An audit report prepared by Senior Auditor Mahesh Chandra Soni supported the allegation of embezzlement. After investigation, charge-sheet No.33 of 2015 dated 19.09.2015 was submitted only against the applicant under Sections 420, 406, 504, 506, 467, 468, 471 and 408 IPC. Cognizance was taken on 22.09.2015. The applicant is in jail since 07.09.2015.

The Court observed that the nature of arguments and the intricate aspects of accounting involved in the case require thorough appreciation of evidence which can only be done during full-fledged trial. The Court refrained from giving any finding on guilt or innocence or credibility of evidence at this stage so as not to prejudice either party.

However, considering the overall facts, period of detention, assurance given by the applicant to deposit the substantial amount, and absence of material showing possibility of tampering with evidence, the Court found it a fit case for grant of bail with stringent conditions.

Held: Para-

Case Law discussed:

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. Heard Sri Rajul Bhargav, learned Senior Counsel for applicant assisted by Sri Deepak Kumar Pandey and Sri. B.P. Verma, learned Counsel for informant and the learned A.G.A.

2. Brief facts as they emerge from record are that there is a registered society known as "Life Insurance Corporation Employees Salary Earners Cooperative Society Ltd. Mathura", whereof all the employees of Life Insurance Corporation are members, who deposit their savings as fixed deposits. The informant Yogendra Singh, who himself is said to be the President of said society, lodged a First Information Report, dated 1.4.2015 under the instructions / order dated 04.02.2015 issued by the Assistant Commissioner / Assistant Registrar, Cooperative, Mathura with allegations that the accused applicant Ajay Kumar Sharma was elected Secretary of said society and had continued as Secretary from the year 1998 up to 2012, during which period amounts were being deposited by the members of the society as Fixed Deposits through accused applicant, for which relevant particulars of receipt of amounts so deposited and amount of cash of the society was not being entered into relevant ledger for several years and a large amount of money has been embezzled and even after issuing of notice to accused applicant, he did not handover records to the society and hence, the members of society were suffering pecuniary loss and when the demand of record was made to the accused applicant, he extended threat of dire consequences.

3. After lodging of first information report, investigation was carried out, during which an audit report was also provided to the investigating officer, which was prepared by Senior auditor Sri Mahesh Chandra Soni, wherein it was mentioned that the audit of society's record revealed difference in Work-sheet and actual dues and the accused applicant has embezzled an amount of Rs. 40,04,500/- by committing forgery in the record of the society and has thus caused loss to the society. After investigation, charge sheet no. 33 of 2015 dated 19.09.2015 has been submitted only against accused applicant, on which cognizance has been taken by the court below on 22.09.2015.

4. Submission of the counsel for applicant is that the accused applicant was nominated as secretary of the society by the general assembly of elected directors on the basis of his honesty and integrity for the period 1998-2012 and during said period, the account of the society was audited from 2006 to 2011 every year and these yearly audits were being conducted by different auditors, wherein no irregularity was ever pointed out and the work of the accused applicant as secretary was found up-to-date with full satisfaction of the auditors. Further submission is that the applicant relinquished the charge of secretary on 12.12.2012 giving it to one Neeraj Mittal and also handed over all the record pertaining to the society to him who continued as Secretary upto 18.09.2013 and till this date too, no dissatisfaction surfaced about the functioning of applicant for the period 1998 to 2012 relating to his working. It is contended that when said Neeraj Mittal relinquished the charge as secretary, the present secretary Vijaypal Singh, who is close friend of informant of present case, took over the charge as Secretary he started creating occasions to harass the accused applicant resulting into lodging of one earlier first information report dated 28.08.2014 registered as Case Crime No. 716 of 2014 under section 406, 504 and 506 of IPC, Police Station Kotwali, which ultimately resulted into submission of final report with conclusion that all allegations against applicant were incorrect. The main reason for animosity of said Vijaypal Singh with the accused applicant was that he could not be nominated as secretary of society throughout the tenure of accused applicant despite being desperately ambitious to hold the post. Submission is that the said Vijaypal Singh got the audit conducted for the year 2013-14 and surprisingly during the said audit, the concerned auditor, who was in hand and gloves with said Vijaypal Singh, re-audited previous

financial years too without any prior permission of the Assistant Commissioner / Assistant Registrar, Cooperative, Mathura and by adopting such anomalous mode, an allegation of embezzlement of about 40 lacs was framed against the applicant in the audit report. Further submission is that the said auditor for the year 2013-14 was same Mr. Mahendra Kumar Soni, who himself had audited the accounts of the society in the financial year 08-09, 09-10, during which no short coming or irregularity was pointed out in the accounts of the society. Submission is that on the basis of said audit report pertaining to the year 2013-14, an enquiry was managed by the informant and said Vijaypal Singh by obtaining order from Assistant Commissioner / Assistant Registrar, Cooperative, Mathura, which was allegedly conducted within two (2) days, and it is claimed in the inquiry report that seven (7) year's record has been scrutinized. Submission is that in fact the alleged two (2) days inquiry was just an eyewash. It has also been contended that the controversy relates to the accounting of pecuniary receipts and withdrawals of the society in question and the perusal of entire material collected by the investigating officer during the course of investigation does not reveal as to when, how and in what manner the alleged embezzlement has taken place or the alleged forgery of record has been committed. Further submission is that the applicant is absolutely innocent and in fact, he is being victimized due to inimical attitude of the informant and present president and he is languishing in jail since 7.9.2015 and there is no likelihood of early conclusion of trial.

5. In the last it has been additionally submitted by the applicant's counsel that as the applicant has never had any dishonest intention to either embezzle the money or to misappropriate the same and has been dealing with the cash and property of the society with scrupulous honesty, he has his conscience clean and has full faith in judiciary and also has confidence that the prosecution shall miserably fail to prove his guilt as there is abundant material available on record on the basis of which the applicant shall succeed to prove his innocence in the trial. Submission is that the applicant is a regular employee of Life Insurance Corporation and there is no question of his fleeing away from court's verdict and he shall be always available in the court to face the trial and accept the judicial verdict. It has been stated at the bar that in order to demonstrate his honest intention the applicant with the help of his family is also prepared to deposit the substantial principal amount alleged to have been embezzled by him. It has also been submitted by the counsel that the charge sheet in the case has already been submitted and if he is released on bail there is no question for him to meddle or interfere in the investigation which is already complete. It has also been submitted that the applicant is prepared to accept any condition which may be imposed upon him for making himself available to face trial faithfully. Counsel has tried to contend that the primary object of releasing the applicant on bail is to ensure his availability in the trial and the provision of bail should not be used as punitive provision in order to punish the accused which can more appropriately be done by the trial court only after his guilt is proved beyond all reasonable doubts.

6. Learned counsel for the complainant and learned A.G.A have opposed the submissions made on behalf of the applicant and have jointly submitted that the society in question is an autonomous body and functions thereof are regulated according to bye laws. The said society was established for benefits of the employees of Life Insurance Corporation and for this purpose, the members of the society, who are employees of L I C, deposit respective amount of their hard earned

money into the society and in lieu of it, receive interest along with the original amount of deposit after a fix period and in cases of urgency, the members of the society also take loans from the society itself. For all these functions, the Secretary of the Society is the sole In-charge according to bye laws of the Society. It has been submitted that the Secretary of the Society receives respective amount of money deposited by the members and issues F.D.R (Fixed Deposit Receipts) in lieu of the same to the members and makes all necessary entries in the relevant registers/Account Books/ Statement of Accounts/ Ledger Books. Submission is that being in-charge of such procedure the crux of the allegations against the applicant is that while performing function as Secretary of the Society, during the period from the year 1998 to 2012, the applicant embezzled a total amount of more than Rs.40,000,00/- by endorsing wrong figures in the ledger book and has caused financial loss to the Society and beside this embezzlement, the applicant also did not handover necessary records of the Society to the incoming Secretary at the time of leaving the post of Secretary. Submission is that the financial loss of the Society could have been revealed only in the year 2013-2014 for the reasons that prior to this period, the applicant himself was secretary of the Society and the yearly audits of the account of the society for the financial year 2006 to 2012 were conducted on the basis of records furnished by the applicant being Secretary. It has been submitted that the F.I.R of the present criminal case was lodged under the orders of Asstt. Commissioner/ Asstt. Registrar of Cooperative Society Mathura after full-fledged inquiry at his own level, wherein a team of officers had inspected the records of the society and had concluded that the erstwhile Secretary Mr. Ajai Kumar Sharma (the present applicant) could not give any satisfactory reply/ material in respect of discrepancies of the account indicating an embezzlement to the tune of Rs.40,15,500/- committed by the present applicant. Further submission is that the protest petition had been filed against final report in earlier criminal case which is still pending for disposal.

7. Learned counsel for the complainant in addition to the above noted submissions has drawn the attention of the court to various enclosures of counter affidavit filed on his behalf in order to demonstrate the manner in which the entries regarding the amounts in the various account books of members were entered from time to time and were according to him dishonestly increased or tampered with without any plausible or justifiable reason. It has also been contended by the counsel for the complainant that the society in question is suffering from a dead lock in its function due to loss so occurred and also due to the liability of interest accrued thereupon with the passage of time and in fact the real sufferers of crime in question are the members of the society and hence , considering the nature of offence and amount of loss suffered by the society, the bail application of the present applicant is liable to be rejected.

8. Perused the record of bail application as well as case diary produced by learned A.G.A. and considered the same in the light of submissions made by rival sides.

9. The nature of arguments raised and the intricate aspects of accounting involved in this case are such which would require a thorough appreciation of evidence which can be done only by a full fledged trial after giving full opportunity to prosecution to adduce all evidence which if can in order to prove the charge and also after giving full opportunity to the accused to defend himself. This court would prefer not give any findings on the point of guilt or innocence of the accused, nor

any final opinion on the reliability or credibility or the acceptability of prosecution evidence that has been collected so far, lest the same may go to cause any prejudice to either side this way or that way or may go to impair the prospects of an impassionate judicial verdict of trial court. But after taking into account the entire record and also keeping in view the over all facts and circumstances of the case, the nature of evidence and the absence of any such material which may indicate the possibility of tampering with the evidence by the accused, keeping in view the period of his detention which he has undergone so far and also keeping in perspective the assurance given on behalf of the accused to deposit the substantial amount involved in the case, this court is of the view that the applicant Ajay Kumar Sharma involved in case Crime No. 368 of 2015 under sections 420, 406, 504, 506, 467, 468, 471 and 408 IPC P.S. Kotwali District Mathura may be released on bail on his furnishing personal bond with two sureties each of the like amount to the satisfaction of court concerned on the following conditions:-

1. The applicant shall not tamper with the prosecution evidence;
2. The applicant shall not pressurize the prosecution witnesses;
3. The applicant shall personally appear on the dates fixed by the trial court.
4. The applicant shall deposit his passport, if he has any, with the trial court and shall not leave the country without prior permission of this Court;
5. `In addition to the above, the applicant shall deposit Rs.40,00,000/- (Rupees forty lacks only), which is roughly the principal amount said to have been embezzled, by way of a draft in the name of the trial court within four weeks from the date of his release. The amount so deposited shall be invested in fixed deposit scheme in a nationalized bank and shall be renewed from time to time till the termination of the trial. The deposit so made, shall be subject to the final decision of the trial and shall abide by the terms and conditions of the trial courts final verdict in this regard.
10. In case of default of compliance with condition no.5 enumerated above, the order granting bail shall stand cancelled automatically and the court concerned shall issue non bailable warrant in order to get the applicant arrested and lodge him in jail.
11. In case of breach of any other conditions the court concerned shall have the liberty to initiate process of cancellation of applicants' bail.
12. This bail application stands allowed on the aforesaid terms.

**(2016) 8 ILRA 1100
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.08.2016**

BEFORE

THE HON'BLE RAN VIJAI SINGH, J.

Writ C No.- 37546 Of 2016

Sri Prakash Chandra Tripathi

...Petitioner

Versus

State Of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Arvind Kumar Mishra

Counsel for the Respondents:

C.S.C., Vijay Prakash Mishra

This writ petition has been filed for quashing the order dated 08.07.2016 passed by the Additional Commissioner, Allahabad Division, Allahabad in Appeal No.C2016020000470 to the extent it relates to disposal of the stay application.

The petitioner was a fair price shop licensee of Village Nyayipur, Vikas Khand Holagarh, Tehsil Soraon, District Allahabad. His agreement was cancelled by the Sub-Divisional Officer vide order dated 29.04.2016. Against the said cancellation order, the petitioner filed an appeal along with a stay application. The appellate authority by the impugned order dated 08.07.2016 admitted the appeal for hearing on merits but instead of granting or refusing stay, passed an order that in case a new shop has been allotted on the place of the cancelled shop, the said allotment shall be subject to the final outcome of the appeal.

The Court held that when a statute provides a power to be exercised in a particular manner, it has to be exercised in that manner only. The appellate authority was required either to stay the implementation of the cancellation order or to refuse the stay by giving reasons. Passing an order that any fresh allotment shall be subject to the final decision of the appeal amounts to non-disposal of the stay application and is not in consonance with Order 28(5) of the Distribution Order, 2004.

The writ petition is disposed of with the aforesaid directions.

Held: Para- The impugned order dated 08.07.2016 is set aside to the extent of disposal of the stay application. The appellate authority is directed to pass a fresh order on the stay application of the petitioner strictly in accordance with Order 28(5) of the U.P. Scheduled Commodities Distribution Order, 2004 within two months from the date of receipt of certified copy of this order. The Principal Secretary, Food and Civil Supply, U.P. is also directed to issue a circular directing all appellate authorities to dispose of stay applications under Order 28(5) either by granting stay or by refusing the same with reasons and not to deviate from the statutory provision.

Case Law discussed:

**Taylor Vs. Taylor (1876) 1 Ch.D. 426,
Nazir Ahmed Vs. King Emperor AIR 1936 PC 253,
Deep Chand Vs. State of Rajasthan AIR 1961 SC 1527,**

(Delivered by Hon'ble Ran Vijai Singh, J.)

1. Heard Sri Arvind Kumar Mishra, learned counsel for the petitioner, learned standing counsel for the State-respondents and Sri Vijay Prakash Mishra, learned counsel for the respondent no. 7.

2. Through this writ petition, prayer has been made to issue a writ of certiorari quashing the order dated 8.7.2016 passed by the Additional Commissioner Allahabad Division Allahabad in Appeal No. C2016020000470 (Sri Prakash Chandra Tripathi Vs. State of U.P. and another) to the extent of the order relating to disposal of the stay application.

3. In the submission of learned counsel for the petitioner, the appellate authority, in fact, has not disposed of the stay application filed by the petitioner in the light of the prayer made in the application which precisely contains the prayer with respect to the stay/implementation of the order dated 29.4.2016 cancelling the agreement of the petitioner to run fair price shop till the disposal of the appeal.

4. The facts of this case, in brief, are that the petitioner happened to be fair price shop agent of Village Nyayipur, Vikas Khand Holagarh Tehsil Soraon, District Allahabad. His agreement to run fair price shop was cancelled by the Sub-Divisional Officer on 29.4.2016.

5. Aggrieved by the order of cancellation of his agreement, the petitioner, herein, has filed aforesaid appeal.

6. Along with the appeal, the petitioner has also filed an application for interim protection. The appellate authority has taken up the matter on 8.7.2016 and passed the impugned order, which reads as under :-

दिनांक: 08.07.2016

उभयपक्ष के विद्वान अधिवक्ता को सुना गया। अपील ग्राह्य की जाती है। एलसी पत्रावली तलब हो। अपील में गुण दोष पर सुनवाई हेतु पत्रावली 27.7.16 को प्रस्तुत हो। यदि निरस्त दुकान के स्थान पर नयी दुकान नियुक्त हुई है तो उक्त नियुक्ति इस अपील के अंतिम निर्णय के अधीन होगी।

7. Sri Mishra, who appears for the complainant, submitted that after the order of cancellation dated 29.4.2016, the shop has been allotted to one Sri Kallu Ram Patel, therefore the writ petition should be dismissed.

8. I have heard learned counsel for the parties and considered their submissions.

9. It is not in dispute that the appeal has been filed under Order 28 (3) of U.P.Scheduled Commodities Distribution Order, 2004 (in short 'Distribution Order, 2004').

10. The Sub-Order 5 of Order 28 of the Distribution Order, 2004 reads as under :-

(5) Pending the disposal of an appeal the Appellate Authority may direct that the order under appeal shall not take effect until the appeal is disposed of.

11. From bare reading of the aforesaid provision, it transpires that the appellate authority has been empowered to direct that an order under appeal shall not be given effect to until the appeal is disposed of.

12. Learned counsel for the petitioner vehemently contended that once the statute has conferred power upon the authority may be the appellate authority then the power has to be exercised in a manner as provided under the statute itself. Here the power conferred upon the appellate authority is to the extent to direct that an order under appeal shall not be given effect to until the appeal is disposed of but the appellate authority, instead of passing an order directing not to give effect to the order passed under appeal or to refuse grant stay order, has passed separate category of order to the effect that in case, any third party right created that shall be subject to final order passed in appeal.

13. The submissions made by the learned counsel for the petitioner carries weight as it is well settled that if the statute provides to do a thing in a particular manner, then that thing has to be done in that very manner. Reference may be had to the judgments of the Apex in **Taylor Vs. Taylor, (1876) 1 Ch.D. 426; Nazir Ahmed Vs. King Emperor, AIR 1936 PC 253; Deep Chand Vs. State of Rajasthan, AIR 1961 SC 1527; Haresh Dayaram Thakur Vs. State of Maharashtra & Ors., (2000) 6 SCC 179; Dhanajaya Reddy Vs. State of Karnataka etc. etc., (2001) 4 SCC 9; Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala & Ors., (2002) 1 SCC 633 as well as this Court in Atar Singh Vs. State of U.P. And others, 2013(1)ADJ43, Bankey Lal and another Vs. Deputy Director of Consolidation and others, 2013(5)ADJ51, Phoolpati Vs. State of U.P. And others, 2014 2 AWC1291All, Paras and another Vs. and others, 2013(8)ADJ253, Ram Pratap vs. Deputy Director of Consolidation and others 2013 (6)ADJ 457, Rambali and others vs. State of U.P. and Others 2013 (2) ADJ 91.**

14. Here as has been noticed, herein above, under Order 28 (5) of the Distribution Order, 2004 the power has been conferred upon the appellate authority to consider the stay application to the extent either to restrain the implementation of order impugned in appeal or to refuse to grant interim protection. The provisions contained under Order (5) is purposive keeping in mind the other provisions which is to commence after the execution of agreement. Under the various government orders (need not to be referred), it has been mandated that an order of attachment of shop after cancellation of the agreement will not be allowed to continue beyond the period of two months, therefore the natural consequence of cancellation of an agreement would be the allotment of the shop to someone else pending appeal/any other judicial proceeding as a Full Bench of this Court in

the case of **Smt. Urmila Devi vs. State of U.P., 2015 (2) ADJ 368 (FB)** has overruled the earlier decision on the point that pending appeal, no third party right can be created, in other words, an order restraining the State authorities not to create any third party right cannot be passed, therefore also the order passed by the appellate authority is meaningless order and it amounts non-disposal of the stay application filed by the petitioner.

15. In view of foregoing discussions, the appellate authority is directed to pass fresh order on the stay application of the petitioner in consonance with the provisions contained under Order 28 (5) of the Distribution order, 2004.

16. The Principal Secretary Food and Civil Supply, Uttar Pradesh is directed to issue a circular in this regard requiring the authorities that whenever any stay application is filed under Sub-Order 5 of Order 28 of the Distribution Order, 2004 in that eventuality the appellate authority shall dispose of the stay application in consonance with the provisions contained under Order 28 (5) of the Distribution Order, 2004 and not to deviate from that. The appellate authority in a given circumstance shall either to stay the operation/implementation of the order under appeal or to refuse the same by giving reasons for the same.

17. In the present case, required exercise is to be done within two months from the date of receipt of certified copy of the order of this Court.

18. With the aforesaid observation/direction, this writ petition is disposed of.

(2016) 8 ILRA 1104
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.08.2016

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.

Writ C No.- 38380 Of 2016

Smt. Jadawati

...Petitioner

Versus

The Up Zila Adhikari, Sadar, Jaunpur & Anr.

...Respondents

Counsel for the Petitioner:

Suresh Chandra Tripathi

Counsel for the Respondents:

C.S.C.

This writ petition has been filed by the petitioner seeking a writ of prohibition, The dispute in the writ petition pertains to plot no. 30 area 0.287 hectares situated in Village Sorani, District Jaunpur. The petitioner is recorded over this plot, having purchased the same by means of a registered sale deed dated 20.01.1997, executed by one Dhannu.

On 12.04.2016, a complaint was made by the second respondent, alleging therein, that the sale deed in favour of the petitioner, had been executed by one Dhannu, who belonged to the scheduled caste, without obtaining the prior permission of the Collector contemplated in Section 157A of the U.P. Zamindari Abolition and Land Reforms Act. The notice has been issued to the petitioner on this miscellaneous application.

The submission of learned counsel for the petitioner is that the village is under consolidation operations. The question of any violation of Section 157A of the U.P. Zamindari Abolition and Land Reforms Act can only be determined by the consolidation courts. The A.D.M. Sadar, Jaunpur, the first respondent, has no jurisdiction to go into the question especially when the unit is under consolidation operations. Hence this writ of prohibition.

These are purely factual aspects and do not require or entail any declaration, in view of Section 166 of the Act. In case, the petitioner is not able to establish that the sale deed in her favour had been executed after obtaining permission contemplated by Section 157-A of the Act, the sale transaction would be deemed to be void in view of Section 166 of the Act and the consequences of such a deemed void transfer, as enumerated in Section 167, shall necessarily follow, without requiring any declaration. For the same reason, the petitioner cannot derive any benefit from the judgment in the case of Khageshwar (supra) nor of the interim order dated 24.08.2015 in writ petition no. 43570 of 2015. This writ petition was entertained on the ground that a mutation case under Section 34 of the U.P. Land Revenue Act cannot be proceeded with during the currency of consolidation operations. Besides, this order has no application in the facts and circumstances of the case for the reasons given above.

The writ petition is accordingly dismissed.

Held: Para-

Case Law discussed:

Maqsooda Khatun Vs. State, 1994 RD 7,

Badal Vs. Deputy Director of Consolidation 1970 RD 240, Khageshwar Vs. Hoshram AIR 1966 Allahabad 191,

(Delivered by Hon'ble Anjani Kumar Mishra, J.)

1. Heard Shri S.C. Tripathi, learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

2. This writ petition has been filed by the petitioner seeking a writ of prohibition, prohibiting the opposite party no. 1 from proceeding any further with a miscellaneous application dated 12.04.2016 filed by the second respondent.

3. The dispute in the writ petition pertains to plot no. 30 area 0.287 hectares situated in Village Sonari, District Jaunpur. The petitioner is recorded over this plot, having purchased the same by means of a registered sale deed dated 20.01.1997, executed by one Dhannu.

4. On 12.04.2016, a complaint was made by the second respondent, alleging therein, that the sale deed in favour of the petitioner, had been executed by one Dhannu, who belonged to the scheduled caste, without obtaining the prior permission of the Collector contemplated in Section 157A of the U.P. Zamindari Abolition and Land Reforms Act. The notice has been issued to the petitioner on this miscellaneous application.

5. The submission of learned counsel for the petitioner is that the village is under consolidation operations. The question of any violation of Section 157A of the U.P. Zamindari Abolition and Land Reforms Act can only be determined by the consolidation courts. The A.D.M. Sadar, Jaunpur, the first respondent, has no jurisdiction to go into the question especially when the unit is under consolidation operations. Hence this writ of prohibition.

6. Learned counsel for the respondent has placed reliance upon the following three judgments in support of his contention.

7. **Maqsooda Khatun Vs. State, 1994 RD 7.** In this case it has been held by the Board of Revenue that the question of violation of Section 157A of the U.P. Zamindari Abolition and Land Reforms Act involves adjudication of rights and correction of papers and, therefore, only the consolidation courts will have jurisdiction during the currency of consolidation operations and that such proceedings shall abate under Section 5 (2) of the U.P. Consolidation of Holdings Act.

8. Reliance has also been placed upon **Badal Vs. Deputy Director of Consolidation 1970 RD 240**, which is a full Bench decision. It has been held therein that in case limitation to file a suit under Section 209 of the Zamindari Abolition Act is present on the date, notification under Section 4 of the U.P. Consolidation of Holdings Act is issued, relief can be granted by the consolidation courts.

9. Reliance has also been placed upon the case of **Khageshwar Vs. Hoshram AIR 1966 Allahabad 191**, wherein it has been held that where an order is without jurisdiction, a writ of prohibition must be issued.

10. I have considered the submissions made and have perused the record as also the judgments cited.

11. In so far as the judgment of the Board of Revenue is concerned, it no doubt holds that proceedings under Section 157-A and Section 167 of the U.P. Zamindari Abolition and Land Reforms Act shall abate on the start of consolidation operations but, it is not clear from this judgment, as to the point in time, when this issue arose. This is relevant because Section 166 of the U.P. Zamindari Abolition and Land Reforms Act provides, that every transfer made in contravention of the provision of this Act, shall be void. This section 166 was substituted by U.P. Act No. 20 of 1982 with effect from 03.06.1981. Section 167 was also newly substituted by the same amending Act.

12. The aforesaid sections were entirely different prior to the amendment aforesaid. The connotations of these two sections have changed completely post this amendment. Till such time it is established that the order of the Board of Revenue pertained to the amended sections, the petitioner cannot, as a matter of right, claim any benefit of the said judgment.

13. Prior to this amendment in 1982, the old Section 167 read as follows:-

"167. Where a sirdar or asami has made any transfer in contravention of the provision of this Act, the transferee and every other person, who may have thus obtained possession of the whole or part of the holding shall be liable ejectment on the suit of the Gaon Sabha or the tenure holder, as the case may be."

This section was replaced by a new section 167 by the amending Act of 1982 and the substituted section reads as follows.

"Section 167. (1) *The following consequences shall ensure in respect of every transfer which is void by virtue of Section 166, namely-*

(a) the subject-matter of transfer shall with effect from the date of transfer, be deemed to have vested in the State Government free from all encumbrances;

(b) the trees, crops and wells existing on the land on the date of transfer shall, with effect from the said date, be deemed to have vested in the State Government free from all encumbrances; and

(c) the transferee may remove other moveable property or the materials of any immovable property existing on such land on the date of transfer within such time as may be prescribed.

(2) Where any land or other property has vested in the State Government under sub-section (1), it shall be lawful for the Collector to take over possession over such land or other property and to direct that any person occupying such land or property be evicted therefrom. For the purposes of taking over such possession or evicting such unauthorised occupants, the Collector may use or cause to be used such force as may be necessary."

14. The following extract from the Prefactory Note No. 1 - Extract from Statement of Objects and Reasons attached to the Bill which became Act no. 20 of 1983, with effect from 03.06.1981, reads as follows:-

"Under the existing provisions the transfer made in contravention of the provision of the said Act are declared void after following the given procedure. It has been considered necessary to provide that such proceedings shall be deemed to be void and no declaration shall be necessary therefor."

15. A conjoint reading of the pre-factory note above and Section 166 of the U.P. Zamindari Abolition and Land Reforms Act, makes it clear that once Section 157-A of the Act, is violated, a transfer shall be deemed to be void and no declaration in this regard is necessary. It, therefore, necessarily follows that no adjudication of any right title or interest is involved when it is required to be considered as to whether Section 157-A of the Act has been violated. It is also clear that the authorities can, even without affording opportunity of hearing to the parties, hold in case there is material to support the same, that Section 157-A of the Act has been violated and thereafter it is open for the Collector to enter into possession over the property which is subject matter of a sale executed in violation of Section 157-A. He is also entitled to use such force as is necessary for the said purpose.

16. Section 166 therefore creates a legal fiction whereunder any transfer made, also in violation of Section 157-A of the Act, is void. The only question, therefore, to be examined is as to whether or not there has been any violation of a provision of the U.P. Zamindari Abolition and Land Reforms Act and the same does not entail any adjudication or declaration regarding rights and title of the parties, in view of the legal fiction created by Section 166.

17. I therefore do not agree with the submission of learned counsel for the petitioner that a declaration of title is inherent in the proceedings initiated by the notice dated 12.04.2016, issued by the first respondent to the petitioner.

18. For the same reason, it cannot be held that the first respondent has no jurisdiction to issue the notice and that the issue involved can be decided only by the consolidation courts during currency of consolidation operations. Hence, no writ of prohibition can be issued.

19. In pursuance of the notice issued to the petitioner, the only point to be examined is whether or not the vendor of the petitioner belonged to the scheduled caste and whether or not he had obtained prior permission contemplated by Section 157-A, to execute the sale deed in favour of the petitioner.

20. These are purely factual aspects and do not require or entail any declaration, in view of Section 166 of the Act. In case, the petitioner is not able to establish that the sale deed in her favour had been executed after obtaining permission contemplated by Section 157-A of the Act, the sale transaction would be deemed to be void in view of Section 166 of the Act and the consequences of such a deemed void transfer, as enumerated in Section 167, shall necessarily follow, without requiring any declaration.

21. For the same reason, the petitioner cannot derive any benefit from the judgment in the case of Khageshwar (supra) nor of the interim order dated 24.08.2015 in writ petition no. 43570 of 2015. This writ petition was entertained on the ground that a mutation case under Section 34 of the U.P. Land Revenue Act cannot be proceeded with during the currency of consolidation operations. Besides, this order has no application in the facts and circumstances of the case for the reasons given above.

22. In view of the above discussion, no ground for issuing a writ of prohibition exists.

23. The writ petition is accordingly dismissed.

(2016) 8 ILRA 1109
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.08.2016

BEFORE

THE HON'BLE MRS. VIJAY LAXMI, J.

Criminal Appeal No.- 121 Of 1982

Babu Singh

...Appellant

Versus

State Of U.P.

...Respondent

Counsels for the Appellant:

Shri Kameshwar Prasad, Shri A.K. Awasthi, Shri Manish Tiwari, Shri V.C. Tewari

Counsel for the Respondent:

A.G.A.

Held –

Introduction and Status of the Appeal

This criminal appeal is directed against the judgment and order dated December 22, 1981, passed by the XII Additional Sessions Judge, Kanpur, convicting the accused under Sections 148 and 307 read with 149 of the Indian Penal Code (I.P.C.).

The appeal was originally filed by three convicts, but two of them (Babu Singh and Narain Singh) died during its pendency, causing the appeal to abate against them in 2012 and 2016 respectively.

Vijay Singh is the sole surviving appellant. The trial court sentenced him to three years of rigorous imprisonment under Section 307/149 I.P.C. and eighteen months of rigorous imprisonment under Section 148 I.P.C., to run concurrently.

The Prosecution Narrative

The First Information Report (FIR) was registered by Deshraj Kapoor (PW2), stating that on February 17, 1974, accused Babu Singh threatened his servant, Ramdas, over a dispute regarding cutting grass from a field boundary (*medh*).

On October 19, 1974, eyewitnesses informed PW2 that Ramdas had been mercilessly beaten near a canal culvert; PW2 rushed to the spot, found Ramdas severely injured, and moved him to the hospital.

The victim, Ramdas, stated that he was surrounded by Babu Singh (armed with a gun), Narain Singh and Vijay Singh (both armed with spears), two other unnamed sons of Babu Singh, and 6 to 7 unidentified persons who assaulted him on Babu Singh's exhortation.

Medical Evidence and Trial Proceedings

The medical examination conducted by Dr. R.K. Mehrotra (PW1) revealed six major injuries on Ramdas, including three deep stab wounds with clean-cut margins on his chest, alongside lacerations and contused abrasions.

The Investigating Officer (I.O.) completed the investigation and submitted a charge sheet; the Sessions Court subsequently framed charges under Sections 148 and 307/149 I.P.C., to which the appellant pleaded not guilty.

The prosecution examined six witnesses: the doctor (PW1), the informant (PW2), the injured victim (PW3), and three police personnel (PW4 to PW6).

In his defense statement, the appellant claimed innocence, arguing that the land boundaries were adjacent and that PW2 falsely implicated his family under police pressure to grab their land.

The trial court found the prosecution's evidence reliable and convicted the accused.

Grounds of Appeal by the Appellant

The defense argued that conviction relied solely on interested witnesses (PW2 and PW3) while independent locality witnesses and crucial eyewitnesses named in the FIR were withheld.

The defense contended that the alleged motive was weak and dated eight months prior to the incident, and that PW2's statement was mere hearsay since he was not present during the assault.

The defense pointed out contradictions in the victim's statements regarding his state of consciousness and questioned the crime scene because the I.O. failed to collect blood-stained earth or produce stained clothes.

The defense raised doubts regarding the doctor's failure to register the case in the Medico-Legal Register and portrayed the victim as a notorious character with multiple enemies.

The Hon'ble High Court's Evaluation of Evidence

The High Court limited its examination to the role of the surviving appellant, Vijay Singh, noting that medical records confirmed stab wounds consistent with an assault involving a sharp weapon like a spear.

The court observed that the injured victim (PW3) explicitly placed the appellant at the scene armed with a spear, and that his testimony remained consistent and credible despite grueling cross-examination.

Invoking settled Supreme Court jurisprudence, the court reiterated that the evidence of an injured victim occupies a higher pedestal of credibility, as an injured person is unlikely to shield real culprits to falsely frame an innocent party.

The court dismissed systemic lapses by the I.O. (failure to collect blood-stained earth or clothes), ruling that investigative negligence cannot defeat a credible prosecution case.

Application of Vicarious Liability (Section 149 I.P.C.)

Addressing the defense plea that the victim could not identify exactly who stabbed his back, the court highlighted that the appellant was charged under Section 307 read with Section 149 I.P.C.

Section 149 establishes vicarious liability, making every member of an unlawful assembly accountable for acts committed in furtherance of their common object.

Because the prosecution established the appellant's armed presence at the scene, specific mapping of individual strikes was unnecessary, particularly since victims cannot realistically memorize specific blows during a multi-person assault.

Conclusion and Modification of Sentence

The High Court upheld the conviction of Vijay Singh under Sections 148 and 307/149 I.P.C., finding no illegality in the trial court's determination of guilt.

However, noting that the incident occurred in 1974 (over 42 years prior), the appeal remained pending since 1982, and the appellant had aged beyond 60 years without any subsequent criminal record, the court deemed a return to prison overly harsh.

The appeal was partly allowed: the conviction was confirmed, but the sentences were reduced to the period of imprisonment already undergone by the appellant. The bail bonds were cancelled and sureties discharged.

List of Citations

Kunjumon Vs. State of Kerala, (2012) 13 SCC 750

Mohd. Ishaque Vs. State of W.B., (2013) 14 SCC 581

Mano Dutt Vs. State of U.P., (2012) 4 SCC 79

State of Rajasthan Vs. Major Singh, AIR 1999 SC 1073 (Note: typed as "AIR 199" in the text)

error)

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. This appeal is preferred against the judgment and order dated 22.12.1981 passed by the XII Additional Sessions Judge, Kanpur, in S.T. No. 43/M of 1978, State Vs. Babu Singh and others, arising out of Case Crime No. 717 of 1974, under sections 148, 147, 307 read with 149 I.P.C. P.S. Juhi, District Kanpur Nagar.

2. At the very outset it may be mentioned that this appeal had been filed by three convicts/appellants. Out of the three, two appellants namely Babu Singh and Narain Singh died during pendency of the appeal and the appeal against the appellant Babu Singh was abated vide order dated 3.9.2012 of this court and it abated against appellant Narain Singh vide order dated 21.4.2016 of this court. Now the only surviving appellant is Vijay Singh, who has been convicted and sentenced for rigorous imprisonments for a term of three years under section 307 read with Section 149 I.P.C. and rigorous imprisonment for eighteen months under section 148 I.P.C. Both the sentences were directed to run concurrently.

3. Heard learned counsel for the surviving appellant Vijay Singh and learned AGA for the State. Perused the record.

4. The prosecution story in brief is that an FIR was lodged by one Deshraj Kapoor (PW2) against five persons to the effect that on 17.2.1974 the accused Babu Singh was cutting grass from the medh of his (complainant's) field. When his servant Ramdas prohibited him from doing so, a fight ensued between them and accused Babu Singh left the field threatening the informant's servant to see him in future. On 19.10.1974 at 9.00 A.M. his servant Ramdas had left for his farm along with his cows as per his daily routine, when the witnesses Tekchand and Murli came running to his house and informed that six or seven persons had injured Ramdas by assaulting him mercilessly and his condition is serious. The informant immediately rushed to the spot and saw Ramdas lying on the ground facing downward in a badly injured condition. The informant took him to the hospital and got him admitted there. When enquired, Ramdas told him that when he was about to reach the culvert of canal, suddenly Babu Singh armed with gun, Narain Singh and Vijay Singh (appellant), both sons of Babu Singh, armed with spears and two other sons of Babu Singh, whose names he did not know, one of whom was armed with spear and the other was armed with lathi along 6 or 7 more persons, reached there and surrounded him from all sides. Babu Singh exhorted with the words "इस रामदास को जान से खत्म कर दो जाने न पाये" and thereafter all of them attacked on him from all sides causing grievous injuries to him. Ramdas was medically examined and the doctor found the following injuries on his body:

1. Stab wound measurement 1¼" x 1/3" X depth under observation, on the back of right chest.

2. Two stab wounds with clean cut margins on the back of left chest ranging 1¼" x 1/3" X depth under observation and 1½" x 1/3" X depth under observation.

3. Lacerated wound 1/2" x 1/10" x scalp deep 3½" above the left ear root.

4. Contused abrasion in an area 6½" x 3/4" on the right side scapular region extending up to right shoulder.

5. Contused abrasion in an area of 2" x 1¼" on the left upper part of scapular region.

6. Contused abrasion in an area of 1½" x 3/4" on the left shoulder region.

5. The I.O. recorded the statements of witnesses including the injured and the doctor, inspected the spot, prepared the site plan and after concluding the investigation, submitted charge sheet against all the three appellants. The case being exclusively triable by the court of Sessions, it was committed to the Sessions Court where the charges under sections 148 and 307 read with 149 I.P.C. were framed against the appellant from which he denied and claimed trial.

6. The prosecution in order to prove its case produced six witnesses in all, out of which two are witnesses of fact and the remaining are of formal nature. The first informant Deshraj Kapoor has been produced as PW2, the injured Ramdas is PW3 and the doctor, who has examined the injured Ramdas has been examined as PW1. PW4 to PW6 are police personnel. After conclusion of prosecution evidence the statement of the appellant was recorded in which he stated that his fields are adjacent to the fields of Deshraj Kapoor. Deshraj Kapoor intended to grab their fields, hence he lodged a false FIR against them. The appellant has also stated that Deshraj Kapoor beign an influential person, the police has filed charge-sheet under his pressure.

7. The learned trial court after considering the evidence, found the prosecution story reliable and trustworthy and convicted the appellant as aforesaid.

8. The legality and correctness of the impugned judgment has been questioned and assailed by the learned counsel for the appellant mainly on the following grounds:

1. The appellants have been convicted on the sole testimony of two highly interested witnesses PW2 and PW3 and there is no independent witness of the locality.

2. The FIR, which is the foundation stone of any criminal case, is based in this case on the information given to the first informant by four eyewitnesses but none of them was examined by the prosecution. Though, out of these four eyewitnesses, one Tekchand had died, but the remaining three eyewitnesses namely Murli, Ram Chandra and Maiku Lal were available. However, they were not examined. Hence on the ground that the prosecution has withheld the material witnesses, adverse inference should have been drawn by the learned trial court against the

prosecution but the court below without considering this aspect, wrongly relied upon the prosecution story.

2. The learned trial court has not considered that there was no motive with the appellants to commit the crime. The motive shown by the prosecution is very weak. Moreover, the alleged occurrence shown as motive behind the occurrence had taken place eight months ago, which cannot be said to be the motive of such heinous assault.

3. The statement of Deshraj Kapoor, PW2, is only a hearsay statement as admittedly he was not present on the spot.

4. The statement of the injured Ramdas also suffers from material contradictions. Ramdas, in his very first statement given to police has disclosed that he became unconscious immediately after the assault and then he regained his consciousness in the hospital but in the witness box, he improved his earlier statement in wake of the statement of PW2 Deshraj, who has stated that Ramdas had told him about the occurrence while being taken to the hospital.

5. The place of occurrence is doubtful as the I.O. has not collected any blood stained earth from the place of occurrence.

6. The statement of Dr. R. K. Mehrotra (PW1) also raises serious doubts in the prosecution story since he could not explain as to why the injuries were entered in the Accident Register and not in the Medico Legal Register or in Private Medico Legal cases. The doctor could not explain as to why in the injury report prepared by him (Ext Ka1) he did not mention the nature of certain injuries about which he has deposed in the court as of grave nature.

7. Blood stained clothes were not produced in the court.

8. It was a case where truth and falsehood appeared to be inextricably mixed, as such the prosecution case must have been discarded by the trial court.

9. The learned trial court has ignored to consider an important fact that the complainant Deshraj Kapoor was a very influential person of the locality and the police officers were on visiting term with him. Deshraj Kapoor was interested in grabbing the land of others. He also had a greedy eye on the land of the appellants and therefore, he has falsely entangled the appellant in the present case.

10. Learned trial court has also ignored to consider an important fact which is apparent on the face of record that the victim Ramdas was a man of notorious character and had several enemies in the locality and he was admittedly warned by his employer not to indulge in marpeet with others.

9. The submission of learned counsel for the appellant is that the trial court, without considering the aforesaid facts has convicted the appellants by the impugned judgment, hence the impugned judgment be set aside and the appeal be allowed.

10. Per contra learned AGA has contended that learned trial court has rightly relied on the evidence produced by the prosecution in this case; there was no reason to disbelieve the testimony of the injured witness; the injuries mentioned in the injury report fully corroborated the statement of the injured witness PW3, whose testimony alone is sufficient to convict the appellants. On the aforesaid grounds learned AGA has submitted that the appeal being devoid of merit, be dismissed.

11. Considered the rival submissions of the learned counsels for the parties and perused the original record.

12. As out of the three appellants, two have expired and the appeal has abated against those two appellants, the appreciation of evidence in this appeal is to be kept limited only to the role of the sole surviving appellant, Vijay Singh.

13. According the FIR Babu Singh along with his four sons, (two named and two unnamed in the FIR) and 6 or 7 persons, made attack on the injured Ramdas with deadly weapons. The present appellant is said to be armed with spear at the time of the occurrence. The injury report shows that the doctor has found three stab wounds with clean cut margins, one on the back of right chest and two on the back of his left chest apart from some other lacerated wounds and abraded contusions.

14. According to the statement of the injured (PW3) he had seen the appellant at the time of incident, who was armed with a spear. Although he has stated that he could not see who inflicted injury from spear on his back, but he has categorically stated that Vijay (appellant) had spear in his hand. The injured (PW3) has also disclosed about the motive behind the occurrence by stating that as he was serving for Deshraj Kapoor (PW2) since last 25 years and had resisted the encroachment by the appellants family on the fields of his master, they assaulted him. He has corroborated the FIR version by stating that when he fell down after sustaining spear injury in semi conscious state, his master PW2 Deshraj Kapoor took him to the hospital. PW3 has faced grueling cross-examination by the defence counsel but he is throughout cogent and consistent during his testimony. There appears no reason as to why such a badly injured person would falsely implicate an innocent, exonerating the real culprit? The injury report shows that the injured has sustained three stab wounds on his back, which are not possible unless some sharp edged weapon like spear is inflicted on the back of a person with force. The doctor has stated that those stab wounds must be deep because stitches on those wounds were found in layers. Thus the statement of PW3 as a whole inspire confidence.

15. The Apex Court in the case of **Kunjumon Vs. State of Kerela, (2012) 13 SCC 750** has held that

"Evidence of a victim of a crime must be placed on a somewhat higher pedestal in terms of credibility attached to it, than evidence of any other witness."

16. In **Mohd. Ishaque Vs. State of W.B., (2013) 14 SCC 581** the Apex Court observed that

"It is unlikely that an injured witness would spare the real culprit and implicate an innocent person whether witnesses are interested persons and whether they had deposed out of some motive cannot be sole criterion for judging credibility of a witness. Main criteria would be whether their physical presence at the place of occurrence was possible and probable."

17. In **Mano Dutt Vs. State of U.P., (2012) 4 SCC 79** the Apex Court has held as under:

"Ordinarily an injured witness would enjoy greater credibility because he is the sufferer himself and thus there will be no occasion for such a person to state an incorrect version of the occurrence or to involve anybody falsely and in bargain protect real culprit.

.....

Convincing evidence is required to discredit an injured witness"

18. The place of occurrence and the manner of occurrence as stated by PW3 finds full corroboration with the site plan. Only due to the reason that the I.O. failed to collect blood stained earth from spot and failed to produce the blood stained clothes in the court, the whole prosecution case cannot be discarded in view of the well settled legal position that the laches and lacunae on the part of the I.O. will not give any benefit to the accused.

19. Now the question is whether the appellant, who was armed with spear, was the author of any of the injuries sustained by the injured on his back as admittedly the injured could no see the assailants causing injury on his back.

20. The learned counsel for the appellant has vehemently contended that when several accused persons were present on the spot, it cannot be said as to who was the author of the stab injuries. He has contended that as per FIR version one more person was also armed with spear at the time of occurrence. Learned counsel has pointed out towards the statement of PW2, Deshraj Kapoor, who has stated that Vijay Singh, Narain Singh and one more person had spear with them. It has also been submitted that the injured himself had not seen as to who had inflicted spear (Ballam) on his back. On the aforesaid grounds learned counsel for the applicant has submitted that in the absence of any cogent and reliable evidence, it cannot be said that the appellant was the person, who was the author of the stab wounds, inflicted on the back of chest of the injured.

21. I do not find any substance in any of the arguments of the learned counsel for the appellant in view of the fact that the appellant has been charged under section 307 I.P.C. read with section 149 I.P.C. and section 149 I.P.C. provides for vicarious liability of a person for the acts committed by other persons in prosecution of common object of unlawful assembly. Section 149 I.P.C. is reproduced here as under:-

"149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.--If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

22. The prosecution in this case has successfully proved the presence of the appellant on the spot with several other accused persons. This fact has also been found proved that the appellant was armed with a spear at the time of occurrence. Three stab injuries have been found on the back of chest of injured. Hence it does not made any difference as to who had caused those injuries. Moreover, it cannot be expected from such a badly injured witness like PW3 in this case, to exactly notice, who was causing injury on his back.

23. In ***State of Rajasthan Vs. Major Singh, AIR 199 SC 1073*** the Apex Court has held as under:-

"It would be practically impossible for any injured witness to exactly notice and memorise, which accused was assaulting by the blunt side of the weapon and which was causing injuries by a sharp edged weapon. Even if such a statement is made, it may amount to an exaggeration because when a number of assailants are there, injuries are not inflicted in a manner, which could exactly be noted by the witness, specially when the witness herself was receiving injuries."

24. In view of the aforesaid discussions, there does not appear any good ground to interfere in the impugned judgment, in so far as conviction of the appellant under section 148 I.P.C. and Section 307 read with section 149 I.P.C. is concerned.

25. However, so far as the sentence awarded by the trial court to the appellant is concerned, considering the fact that this appeal is pending in this court since the year 1982, the occurrence is said to have taken place in the year 1974, thus more than 42 years have elapsed since the date of occurrence, two appellants have already expired during the pendency of this appeal and the present appellant has also become an old person of more than 60 years of age, against whom there is no allegation to have ever repeated any such incident during this period, it would be harsh to send him back to jail for three years as awarded by the learned trial court.

26. The incident in the instant appeal has taken place on 17.2.1974. The appellant has already spent prime years of his life in facing trial and thereafter in prosecuting this appeal continuously for such a long period.

27. Considering all these facts and taking a lenient view in the matter due to the reasons mentioned in the preceding paragraphs, it appears that the ends of justice would be met if the sentence of three years R.I. as awarded by the trial court for conviction of appellant under section 307 read with 149 I.P.C. and eighteen months' R.I. for his conviction under section 148 I.P.C. be reduced for the period already undergone.

28. Accordingly, this appeal is partly allowed by confirming the conviction of the appellant under section 148 and section 307/149 I.P.C. but reducing the sentence to the period already under gone by the appellant. The appellant is on bail. His bail bonds are cancelled and his sureties are discharged.

29. Let a copy of this judgment along with lower court's record be sent back to the court concerned.

(2016) 8 ILRA 1117
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.08.2016

BEFORE

THE HON'BLE ARVIND KUMAR TRIPATHI, J.
THE HON'BLE MUKHTAR AHMAD, J.

Criminal Appeal No.- 151 Of 1983

Shiv Lal & Anr.

...Appellants
Versus

State Of U.P.

...Respondent

Counsels for the Appellants:

Shri S.C. Dwivedi, Shri Apul Mishra, Shri J.S. Sengar, Shri Yagvalkya Pandey

Counsel for the Respondent:

A.G.A.

Held –

Para 1: This criminal appeal challenges the conviction and sentence dated January 22, 1983, passed by the IV Additional Session Judge, Allahabad, against Shiv Lal and others under Section 302/34 IPC.

Para 2: The appeal was admitted by the High Court, and the appellants' bail prayer was granted on January 24, 1983.

Para 3: Advocate Rahul Mishra represented the appellants, while AGA Mahendra Singh Yadav represented the State of Uttar Pradesh.

Para 4: The trial court convicted and sentenced appellants Shiv Lal and Sukh Lal to life imprisonment, while co-accused Shankar Dayal was acquitted.

Para 5: Both counsels informed the Court that they had no information regarding any Government appeal challenging the acquittal of Shankar Dayal.

Para 6: The FIR was lodged on February 16, 1981, by Smt. Dasiya, stating that on the evening of February 15, 1981, the appellants took her son Annu to watch a dance show. He never returned, and his dead body was found the next day in a field. Sub-Inspector Jata Shanker Pandey took over the investigation and prepared the inquest report on February 17, 1981.

Para 7: Dr. S.K. Sinha conducted the post-mortem on February 18, 1981, finding four lacerated skull wounds caused by a blunt object and abrasions. The stomach and small intestine were empty; the time since death was estimated to be over 48 hours.

Para 8: Co-accused Shankar Dayal was arrested on March 18, 1981, and identified by one witness, though the informant failed to identify him. The police submitted a charge-sheet on July 5, 1981, and the accused

pleaded not guilty before the Sessions Court.

Para 9: The prosecution examined six witnesses (including the informant, family members, the investigating officer, and the doctor) and two court witnesses (including a Deputy Collector).

Para 10: The Court notes that this is a case of circumstantial evidence; no motive was initially mentioned in the FIR, but a motive was later introduced through a brother's statement.

Para 11: The appellants' counsel argued that the conviction relies solely on weak "last seen" evidence. Since the deceased's stomach was empty, death likely occurred 8–10 hours after his meal (around 3–4 A.M.), and there is no evidence establishing the appellants' presence with him at that time. He argued the FIR was antedated and relied on Supreme Court precedent.

Para 12: The appellants' counsel further argued that the FIR was manufactured under police direction after the body was found. He pointed out that the inquest report lacked essential details, a weak motive regarding a woman was introduced as an afterthought, and the witnesses were non-independent family members whose stories contained material contradictions.

Para 13: The learned AGA opposed the appeal, arguing that three witnesses consistently established the "last seen" theory, the accused failed to provide a specific denial in their Section 313 Cr.P.C. statements, and minor discrepancies should not invalidate the conviction.

Para 14: The Court observed that apart from the initial departure, no one saw the deceased alive with the appellants. Furthermore, the informant's testimony reveals that the police reached the spot before any FIR existed, and the report was written entirely under the Sub-Inspector's direction.

Para 15: Material contradictions exist between the police and the family regarding the timing of events. While the informant stated the police arrived in the afternoon, the IO claimed he arrived at 10 P.M. Additionally, evidence suggests appellant Sukh Lal was himself abducted and injured around the time of the incident, which complicates the timeline.

Para 16: The Court highlighted that motive is crucial in circumstantial evidence cases, yet it was absent in the FIR and only weakly introduced later as an improvement by the deceased's brother.

Para 17: The testimonies contained major improvements; weapons (farsa and lathi) were introduced by later witnesses but omitted in the FIR. Furthermore, the empty stomach findings medically contradict the family's narrative of the timeline, and no independent witness saw the group at or returning from the dance show.

Para 18: Witness Sukhdeo, who claimed to have heard the deceased, had failing eyesight and could only identify him by voice in the dark. The Court observed that all witnesses to the "last seen" circumstance were interested family members, lacking any independent corroboration.

Para 19: The Court reaffirmed that the FIR lacks credibility because it was drafted on the spot under the instructions of the Sub-Inspector after he had already arrived, indicating that consultation took place before formal registration.

Para 20: The Court analyzed the cited Inderjit Singh case, noting that the Supreme Court established that a chain of circumstantial evidence must be fully complete and independent to prove guilt beyond reasonable doubt. Jointly leaving a house in a friendly manner is insufficient for conviction.

Para 21: The Court concluded that the prosecution's case relies on a weak motive introduced via subsequent improvements and an uncorroborated "last seen" theory from interested witnesses. Finding the evidence unsafe and insufficient to sustain a conviction, the Court set aside the 1983 trial court judgment.

Para 22: The criminal appeal is allowed. The appellants are acquitted, their bail bonds and sureties are discharged, and instructions are issued to communicate the order to the lower court.

List of Citations

1. Inderjit Singh and Another Vs. State of Punjab, 1991 Cri. L.J. 2191 (Supreme Court of India).

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

1. The instant criminal appeal has been preferred against the impugned judgment and order of conviction and sentence dated 22.1.1983 passed by IV Additional Session Judge, Allahabad in Session Trial No. 75 of 1982, State Vs. Shiv Lal and Two others, arising out of Case Crime No. 24 of 1981, under Section 302/34 IPC, P.S. Paschim Sarira, District Allahabad (now Kaushambi).

2. The appeal was admitted. Prayer for bail was allowed vide order dated 24.1.1983.

3. Mr. Rahul Mishra, learned Advocate appeared on behalf of the appellants. Mr. Mahendra Singh Yadav, learned AGA appeared on behalf of the State of U.P.

4. By the impugned judgment, appellants Shiv Lal and Sukh Lal were convicted and sentenced to undergo imprisonment for life, however, co-accused Shankar Dayal was acquitted.

5. Learned counsel for the appellants and learned AGA informed that they have no instruction or information regarding Government Appeal against the acquittal of Shankar Dayal.

6. Brief facts of the case is that the F.I.R. was lodged by Smt. Dasiya, wife of Suraj, mother of the deceased Annu. According to F.I.R. version, which was written by one Shiv Charan S/o Shiv Nath, village Baruwa. Informant Smt. Dasiya W/o Suraj ('Pasi' by caste) was resident of Laugawan. Her son Annu was also living along with her. In the evening of 15.2.1981 at the time of sunset, Shiv Lal and Sukh Lal, who were 'Kori' by caste, both of the same village, along with two other persons resident of village Tikri, who were relative of Shiv Lal, came at her door, asked her son Annu to accompany them for watching dance in a dance show. Annu said that firstly, he would take his meal and then he would accompany them. After taking meal, he went along with those persons though informant (her mother) asked Annu not to go but he did not stop and went along with them. The accused persons told her not to worry and her son would return after sometime. Annu did not come back for the whole night. Informant started making enquiry and searching him but he was not traceable. On 16.2.1982 at about 4 P.M., she was informed by one Pandey and some other persons of the same village that a dead body was lying in the field of Garg, near Kumhiyawan Kothi. Informant Smt. Dasiya went to the said field, saw the dead body of her son Annu. It was further mentioned in the F.I.R. that Shiv Lal and Sukh Lal and two other persons of village Tikri, took her

son and killed him. Along with her second son Piyare, she went to the police station for lodging of the F.I.R.(Ex. Ka-1), which was written by Shiv Charan and the same was lodged and registered on 16.2.1981 at 17.30 hrs (5.30 P.M.). The distance of the police station from the place of incident was about ten kilometers towards south. F.I.R. was registered as Case Crime No. 24/81, under Section 302 IPC against Shiv Lal, Sukh Lal and two other unknown persons. G.D.entry was made at Report No. 21. The investigation was handed over to S.I. Jata Shanker Pandey P.W.-5, who recorded the statement of Smt. Dasiya and Piyare at the police station. Then he proceeded to the place of occurrence. Panchayatnama could not be prepared on the same day due to darkness. Thereafter, in the morning on 17.2.1981 panchayatnama (inquest report) was prepared. Blood stained and plain mud and pieces of bones, were collected from the place of incident. The dead body was sent for post mortem examination through Constable Aik Ram Tiwari and Girja Shankar. The I.O. recorded the statement of Bachchi Lal, prepared the site plan (Ex. Ka-8). The statement of other persons were also recorded on the same day.

7. The post mortem on the dead body of deceased Annu was conducted by Dr. S.K.Sinha (P.W.-6) on 18.2.1981 at 2 P.M. and he found the following anti-mortem injuries:-

i. Lacerated wound just above the right ear extending from right cheek to the area just behind the right ear 4 ½" long, 2" in width and 3" deep. Brain material was protruding out.

ii. Lacerated wound present ½" above injury no. 1, 1 ½" x 1" x 3" brain deep. Edges were lacerated.

iii. Lacerated wound 1" behind injury no. 2, 3" x 1" x 3", 2 ½" behind right ear.

iv. Lacerated wound in the back of scalp 1" x 1" x 1".

v. Abrasion all over the body.

On internal examination, the brain material was protruding out through injuries no. 1, 2 and 3. Stomach and small intestine were found empty. Cause of death was due to grievous injuries. The time since death was noted more than 48 hours. As per information, injuries had been caused by some blunt object.

8. Co-accused Shankar Dayal was arrested and lodged in jail on 18.3.1981. He was put to identification in jail on 22.4.1981 along with another person Ajmer. Shankar Dayal was identified by Jiya Lal only, Smt. Dasiya could not identify either Shankar Dayal or Ajmer. After completing the formalities, concluding the investigation, I.O. submitted the charge-sheet (Ex. Ka-11) on 5.7.1981. The case was committed to the court of Sessions on 24.2.1982 by the C.J.M. Allahabad. Thereafter, the charges were framed. The accused-appellants and co-accused denied the charges and pleaded to be tried.

9. The prosecution to prove its case examined as many as six witnesses. P.W.-1 Smt. Dasiya, informant and mother of the deceased Annu. P.W.-2 Bachchi Lal, brother of the deceased. P.W.-3 Sukhdeo of the same village, subsequently, who stated that in relation Annu was his grandson. P.W.-4 Ram Sagar. P.W.-5 Jata Shanker Pandey, S.I. who submitted the charge-sheet. P.W.-6 Dr. S.K.Sinha who conducted the post mortem examination. Two court witnesses were examined. C.W.-1 Jiya Lal, brother of the deceased and C.W.-2 S.N. Ojha, Deputy Collector Etah before whom the identification parade was conducted.

10. It is a case of circumstantial evidence. No motive was mentioned in the F.I.R. and in the statement of informant P.W.-1. Subsequently, motive was introduced in the statement of P.W.-2.

11. Learned counsel for the appellants submitted that on the basis of same evidence in identification parade, co-accused Shankar Lal was identified by one of the witness Jiya Lal C.W.-1, but he was acquitted and appellants Shiv Lal and Sukh Lal were convicted who are real brothers. There is no direct evidence, hence, motive was also important. According to witnesses, deceased Annu went along with the appellants and co-accused for watching dance program but he did not return and next day, his dead body was recovered. According to medical report and opinion of Doctor since stomach and small intestine were found empty, the death might have taken place after about 8-10 hours from the time when he took meal. The deceased went at the time of sunset in the month of February. Specific evidence is that after taking meals, he went along with the appellants, hence, if he had taken meals at about 6 P.M. then the murder might have taken place after 3-4 A.M. Whether during this period, he was along with the appellants or not there is no evidence, merely there is presumption that he was present with the appellants till his death. Considering the proximity of time of death merely on the basis of last seen evidence, conviction of the appellants is not justified. He further contended that even considering the statement of witnesses, contradictions and improvement, the prosecution story appears to be doubtful. The F.I.R. appears to be anti-time, written and lodged after recovery of the dead body with consultation. There is no independent witness of last seen evidence, merely the family members or those who are closed and related, alleged to have seen the deceased Annu in the company of appellants at different places. At the door of the house of Annu, near grove of Gram Pradhan, near the grove of Durjania. He relied the judgment of the Apex Court reported in 1991 Cri. L.J. 2191 Inderjit Singh and Another Vs. State of Punjab. He further submitted that in that case also, there was no direct evidence and only on the basis of sole circumstance of last seen evidence, Hon'ble Apex Court found that the evidence was not sufficient to convict.

12. Learned counsel for the appellants further submitted that the sanctity of the F.I.R. is doubtful, which is anti-time and written on direction of the police, hence, real story was suppressed. F.I.R. is not a first information because in view of the circumstances and statement of witness, it appears that after first information, police reached on the spot, thereafter, another report was got written on direction of the police on behalf of Smt. Dasiya, mother of the deceased who was examined as P.W.-1. Even in the prosecution papers, in panchayatnama, no detail has been mentioned regarding the case crime number, time when inquest report started and concluded only date 16.2.1981 and time 10 A.M. was mentioned. According to P.W.-2 Bachchi Lal, brother of the

deceased, there was no enmity of Shiv Lal with him and with Annu. His mother advanced a sum of Rs. 2,500/- to Chhangu, brother of Shiv Lal and had there been enmity why the money has been advanced. Subsequently on suggestion and question, it was stated that Annu was seen talking with wife of Jiya Lal (brother of Shiv Lal). But subsequently there was no dispute. They started visiting house of each other. He also stated in the cross-examination that due to darkness, he could not identify the other two persons when they met near the grove land. He contended that in view of the circumstances, the prosecution story is not reliable, the conviction merely on the basis of the alleged last seen evidence of the deceased in the company of the appellants and co-accused Shankar Dayal, is against the evidence on record and the same is liable to be set aside.

13. Learned AGA vehemently opposed the arguments of learned counsel for the appellants and submitted that all the three witnesses supported the story of last seen. P.W.-1 clearly stated that the deceased Annu, her son went in the company of the appellants and two other persons. Subsequently, name of Shankar Dayal was disclosed though giving the benefit of doubt, trial court acquitted him. In statement u/s 313 Cr.P.C., regarding the last seen evidence, there is no specific denial and there is no specific defence case why they were falsely implicated. After deceased was seen in the company of appellants and co-accused, he was not seen alive rather next day, his dead body was recovered and from the statement, it is clear that enmity was also with the deceased, hence, there was reason to commit his murder. Hence, merely on the basis of minor discrepancies and contradictions, prosecution story has not to be disbelieved. The trial court rightly found that the prosecution has proved the case beyond doubt and rightly convicted and sentenced the appellants. Hence, the appeal is liable to be dismissed.

14. Considered the submissions of learned counsel for the parties. It is a case of circumstantial evidence. Apart from last seen evidence, there is no evidence to the effect that the deceased was seen alive in the company of appellants either watching the dance show or returning from there. According to P.W.-1, appellants Shiv Lal and Sukh Lal came at her house. They asked Annu to accompany them to watch dance show and after taking meal, he went along with them though she raised objection not to go but she has not stated that there was any enmity or suspicion so she asked him not to go along with appellants and others. According to the F.I.R., the statement of P.W.-1 and the prosecution case, he went along with the accused-appellants in the evening of 15.2.1981. Next day, the dead body was recovered. She could not identify the other two accused who were not named on the day when the dead body was recovered. Sub Inspector came in the noon and he got the dead body identified by her and she informed Sub Inspector that the body was of her son Annu, her husband was not present in the village. Sub Inspector asked her who will get the report lodged, then she said that she would get it lodged. Thereafter, Sub Inspector called Shiv Charan and at the place where the dead body was lying, he got the report written by Shiv Charan and get her thumb impression on the written report. After she put her thumb impression, she did not met the Sub Inspector (I.O.). From these circumstances, it appears that when Sub Inspector (I.O.) reached at the place where the dead body was lying there was no F.I.R. and on direction of the Sub Inspector, F.I.R. was written by Shiv Charan. She further stated in cross-examination that till the report was written, her other sons Jiya Lal and Bachchi Lal were not aware how the murder of Annu took place and who killed him. When her son Annu was missing, there was search of accused

Sukh Lal also in the village but he was not available. The question was put to her that when her son was missing after three days, Sukh Lal was found in injured condition. She replied that when Sukh Lal assaulted her son, her son might have assaulted him. In cross-examination, the I.O. (P.W.-5) stated that Sukh Lal was arrested on 19.2.1981 at 7.30 A.M. in injured condition, however, no medical aid was provided. He was sent to jail.

15. A report was lodged at the police station regarding missing and abduction of Sukh Lal and attack upon him. The matter was investigated by him. The incident of abduction might be of the evening of 16.1.1981 so when there was a suggestion and question in the cross-examination from side of the defence, the I.O. admitted that there was a report regarding abduction of Sukh Lal whom injuries were caused and when he was apprehended on 19.2.1981, he was found injured. Further, according to P.W.-1, he reached in the noon of 16.2.1981 at the place where the dead body of Annu was lying but according to I.O., at the place of incident, he reached at 10 P.M. on 16.2.1981. The dead body was not taken to police station. He did not visit the place of incident during day time because he has no information which is contradictory to the statement of P.W.-1 and P.W.-2. According to P.W.-2 from where the dead body was lying, it was lifted by the public and brought at the road by 'Ikka'. He also went along with dead body to the police station and reached at about 5 P.M. The dead body was sent to Allahabad at 7-8 P.M. When the dead body was recovered, next day, Sub Inspector came to the village and at the place where the dead body was lying, panchayatnama was prepared and signature of witnesses were obtained. If the statement of witness is correct then panchayatnama was prepared and signed by the witness in absence of the dead body as it has already been sent. According to witness, it was sent to police station but according to I.O., it was directly sent from the place of incident where the dead body was lying on 17.2.1981 at 10 A.M., though according to the Doctor, dead body was received at 10 A.M. on 17.2.1981 and papers were received on 18.2.1981 in the hospital.

16. It is clear that no motive was mentioned in the F.I.R. and the statement of P.W.-1 and subsequently, after there was suggestion a weak motive was mentioned in the statement of P.W.-2 Bachchi Lal, brother of the deceased. Though the motive is also important in the cases of circumstantial evidence.

17. Further according to statement of Bachchi Lal, P.W.-2, in cross-examination, when he saw his brother going to watch dance show, next day, at about two and half O' clock, when Sub Inspector came at that time, he along with his mother and brother were present near the dead body, the dead body was recovered from sugarcane field but at that time sugarcane from that area was harvested and crops of sugarcane was not found standing as per site plan. According to him after recovery of the dead body, he informed his mother that his brother Annu was seen in the company of the appellants in the grove land. But this fact was not mentioned in the F.I.R. According to P.W.-2, first time in the statement of P.W.-3, it was mentioned that when he saw Annu along with the accused-appellants and other co-accused, Shiv Lal was having farsa in his hand and other persons were having lathi but these facts are also missing in the F.I.R. It was an improvement, subsequently, arms were also introduced. This fact has also not been stated in the statement of C.W.-1 Jiya Lal, another brother of deceased Annu when he was summoned. According to him, he

was playing near the house of Sukh Lal, when he saw the two accused persons Shiv Lal and Sukh Lal and two others who were not known to him along with Annu. Annu was talking with them. Thereafter, Annu purchased 'Bidi' from the shop of one Vijmat Ali, went to the house of Shiv Lal, gave it for smoking to Shiv Lal, Sukh Lal and two other persons. Thereafter, Annu went to the house. Again he came after taking meals and went to the house of Shiv Lal. Thereafter, they decided to go to watch the dance show. He heard their conversation. They went towards east at some distance, he followed them, however, since Shiv Lal scolded and asked to return and as such he returned. He identified in jail Shankar Dayal and also pointed out in the court towards him. He also stated that on the date of incident, 'Dal', 'Roti' and 'Chawal' were prepared in the evening, and Annu took meals and went along with the appellants. But according to medical report, stomach of the deceased Annu as well as small intestine were found empty. Hence, incident took place after about 8-10 hours and till then Annu was alive but any independent person has not been examined to prove that deceased was seen in the company of accused-appellants either in the way while they were going to watch dance show or when they were watching the dance show or while they were returning from there.

18. From perusal of the statement of P.W.-1 as well as C.W.-1 Jiya Lal, brother of the deceased Annu, there is no whisper that the accused-appellants were armed with farsa & lathi. As far as P.W.-3, Sukhdeo is concerned, he is also resident of the same village. Subsequently, he informed that in relation Annu was his grandson. He identified Annu only on the basis of his voice because his eye-sight was very weak. He was returning from Kumhiyawan Bazaar though on that date there was no Bazaar but why he went, has not been mentioned in the statement. However, when he proceeded from Kumhiyawan Bazaar, the lights were enlightened and the distance from Kumhiyawan and the grove where he met Annu and accused-appellants and co-accused was at a distance of about half mile. He was returning on foot, hence, when he reached, it was dark and that is why he could not recognise Annu by face who was well known to him then how he could recognise accused-appellants when he give statement that he saw Annu in the company of accused-appellants. Further, he did not mention the date, however, in the statement under Section 161 Cr.P.C., the date was mentioned. P.W.-4 Ram Sagar is the witness who saw dead body and informed P.W.-1, mother of the deceased Annu. Hence, in view of the fact, it is clear that there are no independent witnesses who saw the deceased Annu in the company of accused-appellants.

19. It has not been mentioned in the F.I.R. or in the statement of P.W.-1 and C.W.-1 that accused-appellants were having farsa and lathi. The F.I.R. was written after Sub Inspector came at the place of incident where the dead body was lying and on his direction, F.I.R. was written by Shiv Charan and thumb impression was put by Smt. Dasiya, wife of Suraj Pasi, mother of the deceased Annu. This also shows that before F.I.R. was lodged, information had already been given to the Sub Inspector/I.O., P.W.-5 and after he reached on the spot, thereafter, the F.I.R. was written. The argument of learned counsel for the appellants was also that the F.I.R. was anti-time, subsequently, after consultation and on direction of the Sub Inspector, F.I.R. was written, lodged, registered at the police station Paschim Sarira at 5.30 P.M. on 16.2.1981. No missing report was lodged before that.

20. In case of Inderjit Singh and Another (supra) relied by learned counsel for the appellants, the appellants had taken away the deceased from his house and thereafter, he was never seen alive. The dead body of the deceased was found on the bank of canal which was identified as that of the deceased. There was denial of the appellants that they had ever taken the deceased and further the suggestion in that case was that the appellants had falsely been implicated in the case. The observation of the Apex Court was that considering the circumstances, those circumstances were not sufficient to establish guilt of the accused. It was observed by the Hon'ble Apex Court that in a case pending on circumstantial evidence, the prosecution must establish all the circumstances by independent evidence and the circumstances so established must form a complete chain in proof of guilt of the accused beyond all reasonable doubts. The circumstances so proved must also be consistent only with the guilt of the accused. It was held that the circumstances relied upon by the prosecution were hardly sufficient to establish the guilt of the accused. The circumstance, i.e., the absence of enmity between the accused and the deceased and the witness would also show that the accused also had no enmity against the deceased. There was recovery of the gun also in that case in which the High Court has acquitted of that charge and the only circumstances were pointed out that the accused-appellants and the deceased left the house together in a friendly manner for bird shooting. It was held that no conviction could be caused on that shown circumstances. Conviction and sentence awarded by the court below were set aside.

21. In view of the aforesaid discussion, there was no motive and subsequently by improvement in the prosecution case motive was suggested which was very weak except the last seen evidence supported by only family members with some contradiction, there is no evidence to show the involvement of the appellants in murder of Annu, deceased. The conviction merely on the basis of last seen evidence which is not supported by any reliable and independent evidence to prove the guilt, is not safe, justified, and is not sufficient to establish the guilt of the accused-appellants. Hence, the impugned judgment and order of conviction and sentence dated 22.1.1983 passed in Session Trial No. 75 of 1982 State Vs. Shiv Lal and Two others, arising out of Case Crime No. 24 of 1981, under Section 302/34 IPC, P.S. Paschim Sarira, District Allahabad, is hereby set aside.

22. Accordingly, the present appeal is hereby allowed. The appellants are on bail. Sureties stand discharged. Let this order be communicated to the court concerned.

(2016) 8 ILRA 1126
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.08.2016

BEFORE

THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE DR. VIJAY LAXMI, J.

Special Appeal No.- 315 Of 2016

Bankers Institute of Rural Development , Lucknow (6610 M/S 10)
Versus

...Appellant

Rashtriya Krishi Evam Bankers Gram Vikas Sansthan Karmchari

...Respondent

Counsel for the Appellant:

Shri Vijyant Nigam

Counsel for the Respondent:

A.S.G., Shri Virendra Misra

Held –

Introduction & Scope of Appeal: This Special Appeal challenges a Single Judge's judgment dated July 5, 2016. The underlying dispute arose from a February 12, 2009 order by the Ministry of Labour (Government of India), which had refused to refer an industrial dispute—concerning the allegedly illegal termination of workers represented by the respondent Union—to adjudication.

The Government's Refusal Order: The Ministry of Labour had declined the reference on the grounds that the management held a Certificate of Registration under the Contract Labour (Regulation & Abolition) Act, 1970, and that the Union had failed to establish a direct employer-employee relationship, rendering the dispute unmaintainable.

Arguments of the Appellant: Counsel for the appellant argued that the Union's original complaint admitted the workers were contracted via an intermediary, proving no direct employment existed. They further contended that the 1970 Act operates as a complete code that ousts the jurisdiction of the Industrial Disputes Act, 1947, meaning these contract laborers did not qualify as "workmen." Thus, they argued the Ministry was fully justified in applying its mind and refusing a meritless reference.

Arguments of the Respondents: Counsel for the respondents countered that the Ministry exceeded its administrative jurisdiction by actively adjudicating the complex question of an employer-employee relationship rather than merely forming a prima facie (at first sight) opinion on whether an industrial dispute simply existed or was apprehended.

Court's Analysis & Precedents: The High Court observed that while the government has the administrative power to form an opinion on whether a dispute exists, it cannot step into the shoes of a tribunal and decide the merits of the case. Citing settled Supreme Court precedents, the Court noted that deciding whether a worker is an employee or a contract laborer is a matter for judicial adjudication, not administrative dismissal.

Final Decision: The High Court held that the Ministry's abrupt conclusion—that a registration certificate under the 1970 Act automatically erased an employer-employee relationship—constituted an impermissible adjudication on merits. Finding no error in the Single Judge's directive for the government to reconsider the matter afresh, the High Court rejected the Special Appeal.

List of Case Law Citations

1. The following judicial precedents were cited within the judgment text:

2. Ram Shiromani Yadav v. Conciliation Officer and others, 2012 (4) ADJ 347

3. Bombay Union of Journalists v. The State of Bombay and others, AIR 1964 SC 1617

4. Steel Authority of India Limited and others etc. etc. v. National Union Water Front Workers and others etc. etc., 2002 UPLBEC (2) 228

5. Telco Convoy Drivers Mazdoor Sangh and another v. State of Bihar and others, (1989) 3 SCC 271

6. Sankari Cement Alai Thozhilalar Munnetra Sangam v. Government of Tamil Nadu, (1983) 1 SCC 304 : 1983 SCC (L&S) 139 : (1983) 1 Lab LJ 460

7. Ram Avtar Sharma v. State of Haryana, (1985) 3 SCC 189 : 1985 SCC (L&S) 623 : (1985) 3 SCR 686

8. M.P. Irrigation Karamchhari Sangh v. State of M.P., (1985) 2 SCC 103 : 1985 SCC (L&S) 409 : (1985) 2 SCR 1019

9. Nirmal Singh v. State of Punjab, 1984 Supp SCC 407 : 1985 SCC (L&S) 38 : (1984) 2 Lab LJ 396

10. Dhanbad Colliery Karamchhari Sangh v. Union of India and others, 1991 Supp (2) SCC 10

(Delivered by Hon'ble Amreshwar Pratap Shahi, J.

&

Hon'ble Dr. Vijay Laxmi, J.)

1. Heard Dr. Ashok Nigam, learned Senior Counsel for the appellant, Sri Ajai Kumar Singh, learned Counsel for the respondent No.1 and Sri Virendra Misra, learned Counsel for the respondent No.2.

2. This Special Appeal questions the correctness of the judgment of the learned Single Judge dated 5.7.2016 arising out of the order passed on 12.2.2009 by the Government of India, Ministry of Labour, whereby it has refused to refer a dispute as raised by the first respondent. In order to understand the controversy, the order passed by the Government of India is extracted hereunder:-

"NO - L-12011/115/2008 - IR (B-II)
Government of India//Bharat Sarkar
Ministry of Labour/Shram Mantralaya

New Delhi, Dated: 12/02/2009

To,

1. The Chief General Manager
NBSC
Sector - 'H', LDA Colony, Kanpur Road
Lucknow

2. The President

NBARD Sansthan Karmachari Sabha, 25/26
Union Bhavan Arya Nagar
Lucknow

Subject: I.D. between the management of NABARD/NBSC/BIRD and President, National Bank for Agriculture & Rural Development Sansthan Karmachari Sabha, Lucknow over the issue in illegal termination of services by the management - reg.

Sir,

I am directed to refer to the Failure of Conciliation Report No.K 7(9)/2008-E.1 dated 18.8.2008 from the RLC (Kanpur (U.P.)) received in this Ministry on 28/08/2008 on the above mentioned subject and to say that, prima facie, this Ministry does not consider this dispute fit for adjudication for the following reasons:

"The management has taken certificate of Registration under sub-section 2 of the Contract Labour (Regulation & Abolition) Act, 1970 and the Contract Labour (R&A) Central Rules, 1971. The Union failed to provide employer-employee relationship between the management and the workman. Hence, the dispute raised is not maintainable."

Yours faithfully

(Rajinder Kumar)
DESK OFFICER
T.No. - 23001147
Email - irb2@lisd.delhi.nic.in

Copy to:

1. Regional Labour Commissioner (Central), Kanpur (U.P.)
2. Assistant Labour Commissioner (Central), Kanpur (U.P.)"

3. The aforesaid order had been passed on the complaint dated 6.4.2005, copy whereof is at page - 126 of the paper book. The relevant paragraph of the said complaint is extracted hereunder:-

"उक्त प्रतिष्ठान पर ठेका श्रम (उत्सादन एवं विनियमन) अधिनियम 1970 लागू होता है । सेवायोजकों द्वारा नियमित प्रकृति के कार्य को ठेकेदार के माध्यम से नियोजित कर्मचारियों से कराया जा रहा है, परन्तु उन्हें निर्धारित वेतन तथा अन्य सुविधाएं जो सीधे सेवा से नियोजित कर्मचारी है, उनके समतुल्य नहीं दे रहे हैं, बल्कि जो वेतन दिया जा रहा है वह बहुत कम दिया जाता है । यही तक कि केन्द्र और प्रदेश सरकार द्वारा निर्धारित असंगठित क्षेत्र के श्रमिकों को देय वेतन और मंहगाई भत्ता भी नहीं दिया जाता है। इनका पीओएफ0 नहीं काटा जाता, मेडिकल नहीं दिया जाता है । त्योहारी, वार्षिक और आकस्मिक किसी प्रकार की छुट्टी नहीं दी जाती है ।"

4. Learned Counsel for the appellant has vehemently urged that the nature of the complaint itself clearly amounts to an admission of the fact that the workers were contract labourers of the

Contractor and there was admittedly no employer-employee relationship so as to construe an industrial dispute and therefore the conclusion drawn by the authority was correct. This aspect of the matter has been overlooked by the learned Single Judge and therefore, the order is vitiated.

5. The next argument of the learned Counsel for the appellant is that the Contract Labour (Regulation & Abolition) Act, 1970 is itself a complete Code where any such relief can be claimed and therefore, the jurisdiction of the Industrial Court under the Industrial Disputes Act, 1947 is clearly ousted.

6. The third contention is that in view of the definition of the word '**workman**' contained in the 1947 Act and compared to that of the 1970 Act, it is clear that the contract labourers represented by the first respondent were not workmen as per the said definition. It is therefore submitted that in view of all these submissions, the conclusion drawn by the Central Government is correct for which reliance is placed on the same judgments that have been referred to by the learned Single Judge in the impugned judgment dated 5.7.2016.

7. Sri Nigam has relied on the observations in Para 10 of the learned Single Judge in the case of **Ram Shiromani Yadav vs. Conciliation Officer and others [2012 (4) ADJ 347]** as well as the apex Court decisions referred to therein particularly the case of **Bombay Union of Journalists v. The State of Bombay and others [AIR 1964 SC 1617]**. It has further been added that in view of the decision in the case of **Steel Authority of India Limited and others etc. v. National Union Water Front Workers and others etc. etc. [2002 UPLBEC (2) 228 paragraph 121]**, it is clear that the members of the respondent No.1/Union were neither workmen nor there was any employer-employee relationship and therefore this issue having been prima facie looked into by the competent authority, it was absolutely justified in refusing to make a reference. The contention therefore is that the authority is not a mere post office for making a reference and having the power to prima facie apply its mind has rightly passed the order which has been not viewed by the learned Single Judge in correct perspective.

8. Learned counsel for the respondents submits that what the authority has done is an adjudication of the very issue of the existence of employer-employee relationship so as to deny the reference. In such a situation, it cannot be said that the order that was impugned before the learned Single Judge was an order not without jurisdiction. To the contrary, the authority has acted in excess of jurisdiction by adjudicating the issue of employer-employee relationship and the argument of the learned counsel for the appellants that there was an admission in this regard is absolutely incorrect. It is urged that the issue with regard to the claim which existed and was also apprehended ought to have been sent for adjudication.

9. Having considered the submissions raised, what we find is that the learned Single Judge appears to have rightly relied on the judgment in the case of **Ram Shiromani Yadav v. Conciliation Officer and others [2012 (4) ADJ 347]**, inasmuch as the said judgment in turn relied on the judgment in the case of **Telco Convoy Drivers Mazdoor Sangh and another v. State of Bihar and others [(1989) 3 SCC 271]**. Paragraph - 13 of the judgment in **Ram Shiromani's** case (supra) is

extracted hereunder:-

"13. Again in *Telco Convey Drivers Mazdoor Sangh and another v. State of Bihar and others*, (1989) 3 SCC 271, the Apex Court observed that while considering the question of making a reference under Section 10 (1) the Government is entitled to form an opinion as to whether as industrial dispute "exists or is apprehended" but it is not entitled to adjudicate the dispute itself on merit. **The formation of opinion as to whether industrial dispute exists or apprehended is not the same thing as to adjudicate the dispute itself on its merits.** It was further observed that when Government refusal to make reference is to be found unjustified, Court can direct the Government to make a reference to appropriate tribunal. The pertinent observation made by the Apex Court in this regard contained in paras 11, 15 and 16 of the decision are extracted as under:

11. It is true that in considering the question of making a reference under Section 10 (1), the Government is entitled to form an opinion as to whether an industrial dispute "exists or is apprehended", as urged by Mr. Shanti Bhusan. The formation of opinion as to whether an industrial dispute "exists or is apprehended" is not the same thing as to adjudicate the dispute itself on its merits. In the instant case, as already stated, the dispute is as to whether the convoy drivers are employees or workmen of TELCO, that is to say, whether there is relationship of employer and employees between TELCO and the convoy drivers. In considering the question whether a refer, should be made or not, the Deputy Labour Commissioner and/or the Government have held that the convoy drivers are not workmen and, accordingly, no reference can be made. Thus, the dispute has been decided by the Government which is undoubtedly, not permissible.

15. We are, therefore, of the view that the State Government, which is the appropriate Government, was not justified in adjudicating the dispute, namely, whether the convoy drivers are workmen or employees of TELCO or not and, accordingly, the impugned orders of the Deputy Labour Commissioner acting on behalf of the Government and that of the Government itself cannot be sustained.

*16.In several instances this Court had to direct the Government to make a reference under Section 10 (1) when the Government had declined to make such a reference and this Court was of the view that such a reference should have been made. See *Sankari Cement Alai Thozhilalar Munnetra Sangam v. Government of Tamil Nadu*, (1983) 1 SCC 304; 1983 SCC (L&S) 139; (1983) a Lab LJ 460; *Ram Avtar Sharma v. State of Haryana*, (1985) 3 SCC 189; 1985 SCC (L&S) 623; (1985) 3 SCR 686; *M.P. Irrigation Karamchhari Sangh v. State of M.P.*, (1985) 2 SCC 103; 1985 SCC (L&S) 409; (1985) 2 SCR 1019; *Nirmal Singh v. State of Punjab*, 1984 Supp SCC 407; 1985 SCC (L&S) 38; (1984) 2 Lab LJ 396."*

10. Not only this, the said judgment further goes on to reiterate the position of law as held by the Hon'ble Supreme Court in the case of ***Dhanbad Colliery Karamchhari Sangh v. Union of India and others [1991 Supp (2) SCC 10]***. The concluding part of the judgment clearly spells out the ratio of the aforesaid decisions that where the authority itself has decided the dispute in relation

to this legal question of existence of employer-employee relationship based on merits, then this would amount to deciding the dispute and not merely refusing to refer the reference on a prima facie opinion. The aforesaid conclusion, in our opinion, is founded on the correct position of law, inasmuch as here the complaint as extracted here-in-above had raised a dispute which can be said to be existing or apprehended.

11.The authority that passed the order, did not look into these aspects of the matter but simply concluded that since the contractor is registered under the 1970 Act therefore there is no employer-employee relationship. This snap decision and abrupt conclusion therefore was not founded on any prima facie consideration as required under the judgments referred to here-in-above. The learned Single Judge was therefore right in calling upon the authority to proceed to re-consider the entire matter afresh under the impugned judgment dated 5.7.2016. We therefore do not find any merit in the appeal.

12. ***Rejected*** with the aforesaid observations.

(2016) 8 ILRA 1132
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2016

BEFORE

THE HON'BLE ARUN TANDON, J.
THE HON'BLE MRS. SUNITA AGARWAL, J.

Special Appeal Defective No.- 471 Of 2016

Shashi Prabha Dwivedi

...Appellant

Versus

State Of U.P. & Ors.

...Respondents

Counsel for the Appellant:

Shri Shri Rishikesh Tripathi

Counsel for the Respondents:

C.S.C., Shri Ashok Kumar

Held –

Paragraph 1: Nature of the Challenge

This special appeal was filed by Shashi Prabha Dwivedi (the petitioner-appellant) challenging a Single Judge order dated April 29, 2016. The Single Judge had denied her the academic "session benefit," which would have allowed her to continue teaching until the end of the newly modified academic session on March 31, 2016.

Paragraph 2–3: Factual Matrix and Statutory Framework

The appellant, born on May 1, 1951, served as an Assistant Teacher in a primary school regulated by the U.P. Basic Education Teacher Service Rules, 1981. Under Rule 29 of these statutory rules, teachers normally retire on the last day of the month they turn 62. However, a specific proviso explicitly dictates that if a teacher's retirement falls within an academic session, defined in the text as "July 1 to June 30," their employment is automatically extended via a legal fiction until June 30 to prevent mid-session classroom disruption.

Paragraph 4–5: Impact of the National Award and the Policy Shift

Because the appellant received the prestigious President's National Award, she was granted a special two-year service extension, moving her superannuation age to 64. She reached this age on April 30, 2015. In the meantime, the State Government issued an executive order shifting the academic calendar for 2015–16 to run from April 1, 2015, to March 31, 2016. The appellant argued that since her retirement fell inside this fresh April–March calendar, she should stay until March 31, 2016, making her involuntary retirement on June 30, 2015, illegal.

Paragraph 6: The Single Judge's Rejection

The learned Single Judge dismissed her writ petition, holding that because the appellant had already enjoyed a distinct two-year extension of service courtesy of her President's National Award, she could not simultaneously claim an overlapping end-of-session rollover benefit up to March 31, 2016.

Paragraph 7–8: Reliance on a Conflicting Division Bench Precedent

To overturn the Single Judge's ruling, the appellant relied on a previous Division Bench judgment, *State of U.P. v. Ramesh Chandra Tiwari* (2015). In that case, the Bench ruled that if the State exercises its power to shift the academic session, the "session benefit" principle in Rule 29 automatically applies to the new dates. That Bench declared that any executive orders halting session extensions on March 31 must be overridden by the mandatory statutory fiction of Rule 29, requiring the State to update its text as a mere formality.

Paragraph 9–10: Divergence on Subordinate Legislation and Statutory Text

The current Division Bench strongly disagreed with the *Ramesh Chandra Tiwari* ruling. It emphasized two foundational legal principles: first, a subordinate statutory rule cannot be altered, amended, or overridden by mere executive orders; second, when the language of a statute is clear and plain, courts must apply a literal interpretation without adding or subtracting words.

Paragraph 11: Application of Supreme Court Precedents on Interpretation

To support this view, the Court cited the Supreme Court's ruling in *Bhavnagar University v. Palitana Sugar Mill Pvt. Ltd.* (2003). The apex court established that statutory language must be construed exactly as written according to its plain, literal meaning. Courts cannot expand the legislature's intent or modify plain wording unless the existing text is entirely unworkable, absurd, or internally irreconcilable.

Paragraph 12–13: Examining the Plain Meaning of the Proviso

Applying a literal interpretation, the Court observed that the proviso to Rule 29 specifically writes out the dates "July 1 to June 30" directly onto the statute book. The main rule caps retirement at the end of the birth month, and the proviso acts as a strict, singular exception. Because the rule explicitly ties the extension to "June 30" following the retirement date, no teacher can leverage executive policy shifts to demand a retention period stretching beyond that statutory boundary.

Paragraph 14–15: Finding Flaws in the Prior Bench's Reasonings

The Court highlighted a contradiction in the *Ramesh Chandra Tiwari* ruling: that bench acknowledged that executive orders cannot override statutory rules, yet it effectively allowed an executive policy shift to change the statutory dates in the proviso. Furthermore, the previous bench completely overlooked Paragraph 3 of the State's December 9, 2014 order, which explicitly declared a conscious administrative policy choice not to amend Rule 29, mandating that teachers continue to retire on June 30 despite the altered school year.

Paragraph 16–17: State Sovereignty Over Policy and Final Disagreement

The Court affirmed that while the State has the authority to adjust school terms, it holds an equal right to limit the boundaries of post-retirement extensions. Teachers possess no inherent, enforceable right to remain in service past superannuation contrary to clear statutory text. Consequently, the Bench officially recorded its formal disagreement with the law laid down in the *Ramesh Chandra Tiwari* case.

Paragraph 18–19: Reference to a Larger Bench

Finding a direct conflict between coordinate benches, the Court formulated three substantial questions of law

regarding the correctness of the Ramesh Chandra Tiwari case, the absolute boundaries of Rule 29's extensions, and the validity of the State's conscious decision to retain the June 30 retirement date. The Bench directed the case file to be placed before the Hon'ble Chief Justice to constitute a Larger Bench (Full Bench) to definitively resolve these questions.

List of Case Law Citations

- 1. State of U.P. and others Vs. Ramesh Chandra Tiwari and others, 2015 (4) UPLBEC 2900.**
- 2. Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd and others, 2003 (2) SCC 111.**

(Delivered by Hon'ble Arun Tandon, J.
&
Hon'ble Mrs. Sunita Agarwal, J.)

1. This special appeal has been filed by Shashi Prabha Dwivedi, the petitioner against the order of the learned Single Judge dated 29.4.2016 whereby the benefit of continuing in service till the end of the academic session i.e. up to 31.3.2016 has been denied to the petitioner.

2. The facts in short relevant for deciding the controversy are as under:-

3. That the date of birth of the appellant is 01.05.1951, she was working as Assistant Teacher in a primary institution, the service condition whereof are regulated by Uttar Pradesh Basic Education Teacher Service Rules, 1981 (herein after referred as Rules, 1981). These rules have been framed under Section 19 of the U.P. Basic Education Act, 1972 and, therefore, the Rules answer the description of the subordinate legislation.

4. Rule 29 of the Rules, 1981, provides for the age of retirement of the teachers and reads as follows:-

***“29. Age of superannuation-**Every teacher shall retire from service in the afternoon of the last day of the month in which he attains the age of 62 years.*

Provided that a teacher who retires during an academic session (July 1 to June 30) shall continue to work till the end of the academic session that is, June 30 and such period of service will be deemed as extended period of employment.”

5. The petitioner should have normally retired on attaining the age of 62 years as per Rule 29 of 1981 Rules but since she was awarded Presidents National Award, two years extension in service was given to her and, therefore, her age of retirement stood extended upto 64 years. The petitioner attained the age of superannuation i.e. age of 64 years on 30.4.2015.

6. According to the petitioner, the academic session for the year 2015-16 under the Government order dated 9.12.2014 was directed to commence from 1.4.2015 and to end on 31.3.2016. It was her case that since her date of retirement falls in the midst of the said academic session 2015-16, she was entitled to extension in service till 31.3.2016 and she had wrongly been

retired on 30.6.2015.

7. Learned Single Judge has held that since the petitioner had taken benefit of extension in the service of two years she was not entitled for session benefit i.e. till 31.3.2016.

8. Learned counsel for the petitioner has relied upon the Division Bench judgment in the case of **State of U.P. and others Vs. Ramesh Chandra Tiwari and others reported in 2015 (4) UPLBEC 2900** wherein the Division Bench has held as under:-

“The State Government can certainly alter an academic session, as it has, to 1 April-31 March. The consequence, however, of a change in the academic session as provided under Rule 29 cannot be altered so long as the proviso to Rule 29 continues to hold the field. What the proviso enacts is that a teacher who retires during an academic session will continue to work until the end of the academic session on the basis of a deeming fiction, as we have noted above. Once the academic session has been changed, the principle which has been enunciated in the proviso to Rule 29 will apply to the newly altered academic session. All that really remains now is for the State to make a consequential change in the date of the new academic session under the proviso to Rule 29 but that part is merely clarification of the decision which has already been taken of the dates of commencement and conclusion of the academic session.”

9 Thereafter, the Division Bench has gone on to hold that all those teachers whose age of retirement falls between the academic session 2015-16 i.e. (1.4.2015 to 31.3.2016) and who have not taken benefit of extension of service under proviso to Rule 29 of Rules, 1981, earlier would retire on 31.3.2016. The Division Bench has held that the Government orders issued on 9.12.2014 and 29.6.2015 have to be necessarily brought in line of the mandatory requirement of the Proviso to Rule 29 of the Rules, 1981. The power to alter the academic session undoubtedly vests with the State Government and once the academic session has been altered, the consequence of it envisaged under the Proviso to Rule 29 of Rules, 1981, must ensue.

10. We find it difficult to accept the legal proposition as laid down in the said judgment. It is settled law that subordinate legislation framed in exercise of the statutory powers cannot be altered by the executive orders of the State. For any alteration in the subordinate legislation, the procedure for amendment in the rules is to be followed which is the same as in the case of framing of the rules itself.

11. It is also settled law that if the words of statute admit of one meaning on simple reading then no interpretation is required, the Court has to give literal and simple meaning without any further addition or subtraction.

12. The legal position in this regard has already been settled by the Apex Court and this Court in various pronouncements. One of which is **2003 (2) SCC 111 (Bhav Nagar University Vs. Palitana Sugar Mill Pvt. Ltd and others)** paragraphs 23, 24 and 25 from the aforesaid judgment are quoted as under:-

23. *It is the basic principle of construction of statute that the same should be read as a whole, then chapter by chapter, section by section and words by words. Recourse to construction or interpretation of statute is necessary when there is ambiguity, obscurity, or inconsistency therein and not otherwise. An effort must be made to give effect to all parts of the statute and unless absolutely necessary, no part thereof shall be rendered surplusage or redundant.*

24. *True meaning of a provision of law has to be determined on the basis of what it provides by its clear language, with due regard to the scheme of law.*

25. *Scope of the legislation on the intention of the legislature cannot be enlarged when the language of the provision is plain and unambiguous. In other words statutory enactments must ordinarily be construed according to its plain meaning and no words shall be added, altered or modified unless it is plainly necessary to do so to prevent a provision from being unintelligible, absurd, unreasonable, unworkable or totally irreconcilable with the rest of the statute.*

13. From a simple reading of the proviso to Rule 29, of the Rules, 1981, it is apparently clear that it contemplates that the academic session for the purpose of retirement of the teachers would be 1st July to the 30th June of the succeeding year. So long as the proviso to Rule 29 stands as it is, no teacher can claim benefit of the extension of service beyond what has been provided under the said proviso.

14. We may record that the proviso is only an exception to the main Section. The main Section i.e. Rule 29 provides for the age of retirement as 62 years, the actual day on which the teacher would demit the office is the end of the month in which he/she attains the age of superannuation. It is only under the proviso that a teacher gets the benefit of extension of service till the end of the academic session. The proviso further specifically states that academic session shall be from 1st July to 30th June of the succeeding year such extension of the academic session would only be up to 30th June, following the date of superannuation and nothing beyond it.

15. We may further notice that the Division bench itself has recorded in paragraph 10 of the judgment that the State Government cannot by a Government order override the proviso to Rule 29 of Rules, 1981, which is the nature of subordinate legislation.

16. We are, therefore, of the opinion that either the proviso which provides for the academic session from 1st July to 30th June has become redundant because of the change of the academic session by the State Government vide Government order dated 9.12.2014 i.e. from 1st July to 30th June of the succeeding year as 1st April to 31st June of the succeeding year or else the benefit of extension of service to teacher under the proviso would continue to be governed by the dates i.e. the academic session as contained in the proviso itself i.e. upto 30th June following the date of superannuation and nothing beyond that.

17. We find that the Division bench of this Court in the case of **State of U.P. Vs. Ram Chandra Tiwari (supra)** has failed to take note of paragraph 3 of the Government order dated

9.12.2014 wherein a conscious decision has been taken by the State Government not to make any amendment in the proviso to Rule 29 of Rules, 1981. It has been specifically stated therein that the teacher of the academic institutions shall retire on 30th June in terms of the proviso to Rule 29 of Rules, 1981 even after alteration of the academic year.

18. We are of the view that as the State Government has a right to determine the academic session, simultaneously it also has the right to decide as to what period of extension of service after retirement is to be provided to the teacher. No teacher can claim a right to continue beyond the age of superannuation contrary to the wisdom of the State as contemplated by the statutory provisions.

19. We, therefore, find it difficult to agree with the legal proposition as laid down in the case of **State of U.P. Vs. Ramesh Chandra Tiwari (supra)**.

20. We are of the opinion that following questions need to be answered by a Larger Bench to be constituted for the purpose:-

(a) Whether the law as laid down by the Division bench of this Court in the case of **State of U.P. and others Vs. Ramesh Chandra Tiwari** is the correct law or not.

(b) Whether the proviso to Rule 29 of Rules, 1981, as it stands on the statute book as on date, admits of extension of service of the teacher of retirement beyond 30th June following the date of retirement or not.

(c) Whether the conscious decision of the State Government in terms of the Government order dated 9.12.2014 providing that the teachers would still retire on 30th June, following the date of retirement can be said to be bad or arbitrary in any manner so as to require issuance of a mandate to the State Government to make the amendments in proviso to Rule 29 of Rules 1981 merely because it has altered the academic session from 1st April of the year to 31st March of the succeeding year.

21. Let this order be placed before Hon'ble the Chief Justice for consideration for constituting of a Larger Bench to answer the above issues.

(2016) 8 ILRA 1138
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.08.2016

BEFORE

THE HON'BLE BHARAT BHUSHAN, J.
THE HON'BLE ALOK KUMAR MUKHERJEE, J.

Criminal Appeal No.- 1497 Of 1983

Prem Lal	...Appellant
	Versus
State Of U.P.	...Respondent

Counsels for the Appellant:

Shri S.B. Johari, Shri G.C. Saxena, Shri Mohit Singh

Counsel for the Respondent:

D G.A.

Held –

Paragraphs 1–3 (Introduction & Prosecution Case): The appellants challenged their conviction under Section 302 IPC and life sentences passed on 07.06.1983 by the 5th Additional Sessions Judge, Budaun (Sessions Trial No. 427 of 1981). According to the informant Savitri Devi (P.W.-10), her husband Charan Singh was murdered on 20.07.1980 at 6:30 a.m. near village Nachni because the appellants were infuriated by his alleged illicit relationship with appellant Prem Pal's sister, Susheela. The deceased, who had been bailed out from an Arms Act arrest just a day prior, was allegedly accosted and shot 5–6 times each by Prem Pal and Babu Lal using shotguns.

Paragraphs 4–7 (Investigation & Trial Court Verdict): The prosecution later added a secondary motive involving appellant Babu Lal's sister, Kiran. Following an investigation by P.W.-13, a charge-sheet was submitted. The trial court framed murder charges on 27.11.1982, and the prosecution examined 13 witnesses, including seven purported eye witnesses. The accused denied the charges under Section 313 Cr.P.C., claiming false implication due to village rivalry. Appellant Babu Lal raised an alibi defence, examining two witnesses (D.W.-1 and D.W.-2) to prove he was in Sultanpur. The trial court rejected the alibi, found both guilty, and sentenced them to life imprisonment.

Paragraphs 8–13 (Arguments of Both Sides): Senior counsels for the appellants argued that six out of seven eye witnesses turned hostile, and the remaining lone witness, Savitri Devi, was highly unreliable and contradicted by medical evidence. They also emphasized Babu Lal's solid alibi backed by a senior government officer (D.W.-1). Conversely, the learned AGA supported the conviction, arguing that the FIR was logged promptly within two hours despite a 5-kilometer distance, leaving no room for concoction. He maintained that the prior arrest provided immediate motive, and dismissed the defence witnesses as unreliable.

Paragraphs 14–16 (Legal Standard for a Solitary Hostile Witness): The High Court observed that because six out of seven eye witnesses refused to support the prosecution, the case rested entirely on the solitary testimony of the wife, Savitri Devi (P.W.-10). The Court noted that while a conviction can legally stand on a single witness, the testimony must be of “sterling quality,” wholly natural, credible, and free from blemish, requiring an extraordinarily close and cautious critical scrutiny when all other witnesses turn hostile.

Paragraphs 17–20 (Glaring Contradictions & Backdated FIR): Upon close scrutiny, the Court found vital contradictions in Savitri’s testimony. She initially stated she went to the police station completely alone, but later claimed the village Chowkidar accompanied her. Furthermore, the police General Diary and the Investigating Officer confirmed that she was actually accompanied by her father-in-law, Man Singh. Since Man Singh lived in Aligarh, it was logistically impossible for him to arrive in Budaun within two hours of the crime, strongly indicating that the FIR was backdated and that Savitri was concealing facts.

Paragraphs 21–25 (Absence of Motive & Spatial Fabrications): The Court found no independent proof of the alleged illicit relationships. Appellant Babu Lal’s sister had already left for her matrimonial home days prior, leaving him with zero motive, and the two accused shared no established friendship or caste affinity. Furthermore, Savitri changed her story regarding their direction of travel, referenced landmarks (a culvert) missing from the official site plan, and falsely claimed she slept next to the corpse overnight at the police station—a claim directly disproved by the constable (P.W.-12) who transported the body straight to the mortuary by noon.

Paragraphs 26–30 (Ocular Account vs. Medical Evidence & Logic): The physical circumstances completely discredited the informant’s presence. She claimed she stood four paces away while the accused fired over a dozen shotgun rounds from close range, yet she did not receive a single scratch or pellet injury. Crucially, she testified that the accused shot the deceased face-to-face during a confrontation, but the post-mortem report conclusively revealed multiple firearm entry wounds on the back of the deceased. Additionally, the prosecution failed to explain how the accused could have known about the couple’s highly private, early-morning travel plans.

Paragraphs 31–35 (Procedural Lapses, Alibi Validated & Final Disposal): The Court criticized the trial judge for failing to question Babu Lal about the alleged motive during his Section 313 examination. It also ruled that the trial court improperly brushed aside the defence evidence, noting that defence witnesses must be evaluated using the same yardstick as the prosecution. The Court found the alibi provided by D.W.-1 (a senior officer) completely cogent and credible. Finding Savitri’s lone testimony weak, uncorroborated, and unsafe, the High Court granted the appellants the benefit of doubt, allowed the appeal, set aside the conviction, and ordered their immediate release.

List of Citations

Bhimapa Chandappa Hosamani and others v. State of Karnataka, (2007) 1 SCC (Cri) 456

(Delivered by Hon’ble Bharat Bhushan, J.)

1. The appellants have directed this appeal against the judgment and order dated 7.6.1983 passed by the then 5th Addl. Sessions Judge, Budaun in Sessions Trial No. 427 of 1981 arising out of Case Crime No. 135 of 1980 (State VS Prempal and another), Police Station (in short P.S.) - Islamnagar whereby the appellants were convicted under Section 302 IPC and sentenced to life imprisonment.

2. According to the informant Savitri Devi (P.W.-10), her deceased husband Charan Singh was practicing medicine and living at the residence of appellant/accused Prem Pal Singh Thakur, at village Nachni, District Budaun. It is alleged that the deceased Charan Singh developed illegitimate physical relationship with one Susheela, sister of appellant Prem Pal Singh. Prem Pal Singh and his family members got infuriated and kept on looking the opportunity to eliminate deceased Charan Singh.

3. Informant tried to reason with her husband but of no avail. In fact he procured a country made pistol for his protection. Six days prior to the incident both the appellants Prem Pal Singh and Babu Lal got the deceased Charan Singh arrested for possession of unlicensed weapon. He was bailed out one day prior to the episode. Next day i.e. on the date of occurrence the deceased Charan Singh along with his wife Savitri Devi (informant) went to the village Nachni for realization of remaining dues from patients. Appellants accosted them on their way to Village Nachni. Appellant Prem Pal Singh was holding Double Barrel Gun and appellant Babu Lal was wielding Single Barrel gun. They fired 5-6 shots each upon the deceased Charan Singh who died instantaneously. The incident was allegedly witnessed by Yadram, Gendan Lal (P.W.-9), Chunni (P.W.-1), Bhagirath (P.W.-2), Tinku, Kallu (P.W.-4) and Bheekam Singh (P.W.-3). They reportedly rescued the informant Savitri Devi (P.W.-10) also. The incident is said to have been occurred on 20.7.1980 at about 6.30 a.m. P.W.-10 Savitri Devi lodged the FIR on the same day at about 8.30 a.m. The distance between the place of occurrence near village Nachni and police station Islam Nagar is indicated to be 5 Kilometers as per chik report (Ex-Ka-2).

4. The aforesaid story was later on improved upon and it was also added that the deceased Charan Singh had also developed intimate relationship with Kiran, Sister of second appellant/accused Babu Lal. The police went to the place of occurrence immediately in the aftermath of the incident. It is stated that the police personnel reached the place of occurrence at about 9.30 a.m. Inquest was conducted and investigation ensued. On completion of investigation the Investigating Officer Sri Harimaya Sharma (P.W.-13) submitted a charge sheet (Ex-Ka15) against both the accused appellants.

5. Trial court framed charges against both the accused under Section 302 IPC on 27.11.1982. Appellants pleaded not guilty and claimed to be tried. The prosecution adduced testimony of as many as 13 witnesses namely P.W.-1 Chunni (eye witness), P.W.-2 Bhagirath (eye witness), P.W.-3 Bheekam Singh (eye witness), P.W.-4 Kallu (eye witness), P.W.-5 Dr. N. P. Singh, (who conducted autopsy), P.W.-6 H.C. Radhey Shyam Sharma (who recorded the FIR), P.W.-7 H.C. Om Prakash (who prepared inquest), P.W.-8 Tilak Singh (eye witness), P.W.-9 Gendan Singh (eye witness), P.W.-10 Savitri Devi (informant/eye witness), P.W.-11 Constable Kanwar Pal Singh (who registered a case against the deceased Charan Singh under Arms Act on 14.7.1980), P.W.-12 Constable Subhash Chandra who took corpse of deceased to the mortuary and P.W.-13 Harimaya Sharma (Investigating Officer).

6. The appellants denied all the allegations in their statements under Section 313 Cr.P.C. and have claimed false implication due to village party bandi. Appellant Prem Pal has not adduced

any evidence, oral or documentary in his defence. However, second appellant Babu Lal has raised the plea of alibi and produced two witnesses namely D.W.-1 A.S. Rizvi, the then A.C.O. (Consolidation), Sultanpur and D.W.-2 Malkhan Singh, then Kannungo, Sultanpur who is also father of the appellant Babu Lal.

7. On conclusion of the trial, trial court held both the accused guilty of offence under Section 302 IPC and both of them were sentenced to life imprisonment vide judgment and order dated 7.6.1983. It is this judgment which is under challenge before this court in appeal.

8. Heard Sri V. P. Srivastava, learned senior counsel assisted by Mr Mohit Singh for appellant Babu Lal and Mr Brijesh Sahai and Mr Sharad Srivastava advocate on behalf of appellant Prem pal and Mr Syed Ali Murtaza, learned AGA for the State.

9. Learned counsel for the appellants have submitted that there is virtually no evidence on record to support the allegations against the appellants. They have submitted that out of seven eye witnesses, six have not supported the prosecution version. They have argued that presence of sole remaining witness Savitri Devi on spot is highly doubtful in view of her weak testimony. She has not been able to narrate the incident in convincing manner.

10. Learned counsel appearing on behalf of appellant Babu Lal has also claimed that appellant Babu Lal was in Sultanpur with his family at the time of incident. His father was posted at Sultanpur as Consolidation (Chakbandi) Kannungo. Senior Officer D.W.-1 A. S. Rizvi and his own father testified on oath that on the date of incident the appellant Babulal was present in district Sultanpur, situated at very long distance from District Budaun.

11. Learned counsel for the appellants have also argued that the ocular testimony is inconsistent with the medical evidence, thereby creating doubt about the veracity of testimony of sole remaining witness P.W.-10 Savitri Devi.

12. To the contrary, learned AGA has submitted that the incident occurred at 6.20 in the morning and the report was lodged within two hours at Islam Nagar police station at 8.30 a.m. despite the distance of 5 Kilometers. He has argued that there was no occasion and opportunity for the informant to concoct the story and that there was no reason for the wife to lie about the murder of his husband. He has drawn the attention of the court towards the arrest of Charan Singh (deceased) six days prior to the incident at the instigation of both the appellants. Both the appellants have admitted the arrest of deceased Charan Singh under Arms Act in their evidence under Section 313 Cr.P.C.

13. Learned AGA has further argued that this clearly provides a motive to both the appellants as deceased Charan Singh had been bailed out one day prior to the incident annoying the appellants. He has further submitted that the marriage of Kiran, sister of appellant Babu Lal was admittedly solemnized at village Nachni on 15.7.1980, five days prior to the incident and this was precisely the reason, deceased was arrested at the instigation of appellants. Learned AGA has also

submitted that this prior arrest and the subsequent release of Charan Singh had angered both the appellants. Both of them were unhappy because of rumours floating around regarding the relationships of deceased with their respective sisters. Learned AGA has denounced the testimony of both the Defence Witnesses saying that the presence of Babu Lal at Village Nachni is admitted till 18.7.1980 even to the appellants and there is no evidence on record to suggest that family of Babu Lal had left village Nachni for Sultanpur on 18.7.1980 as claimed by him.

14. Perusal of evidence on record would reveal that as many as seven eye witnesses were named by the informant Savitri Devi (P.W.-10) in the FIR meaning thereby this incident was seen at least by eight person, if we include Savitri Devi in the list of witnesses. Seven witnesses were produced by the prosecution. Six stated eye witnesses have refused to support the prosecution version. They have categorically denied the involvement of appellants in the murder of deceased Charan Singh, therefore, that leaves only Savitri Devi (P.W.-10) wife of deceased as sole witness of the incident.

15. Learned trial judge has relied completely upon the testimony of Savitri Devi. Trial Judge has concluded that the testimony of Savitri Devi is sufficient to hold the appellants guilty of offence under Section 302 IPC.

16. As a matter of law, there is no doubt that the testimony of solitary witness can be the basis of conviction provided found to be trustworthy. Where the prosecution has produced a single witness in support of the offence, same can be used for conviction of accused provided such evidence is found credible and trustworthy. But where seven eye witnesses have been produced and as many as six such witnesses have declined to support prosecution case then it is absolutely necessary to undertake a very close and critical scrutiny of remaining solitary witness. There is no law which says that the conviction of the accused cannot be based on evidence of solitary witness but the evidence of solitary witness must be scrutinized with great caution. While appraising such evidence the court must be satisfied that his testimony is of such sterling quality that the court finds safe to base conviction solely on that witness. Evidence of such witness must be free from any blemish or suspicion. Evidence of solitary witness must impress the court as wholly truthful and convincing. **(Bhimappa Chandappa Hosamani and others State of Karnataka, (2007) 1 SCC (Cri) 456.** It is well established principle of law that evidence is weighed and not counted but it is essential that such appraisal is done with great caution. The evidence must appear to be natural and so convincing that the court has no hesitation in recording the conviction solely on the basis of single witness.

17. In this case too, testimony of sole witness, Savitri Devi (P.W.-10) has to be subjected to serious scrutiny. The FIR was lodged by the informant Savitri Devi allegedly within two hours of the incident. The contents of the FIR gives impression that she alone went to the police station for lodging the FIR. She has clearly mentioned in the FIR that she left the witnesses by side of corpse of her husband and then went to the police station to file the FIR. Same fact was reiterated by the informant on oath while deposing before the trial court as P.W.-10. She has stated that she escorted her deceased husband on the day of occurrence at 6 a.m. in the morning while going to Islam Nagar. It is pertinent to point out that it is the case of prosecution that P.W.-10 Savitri Devi was

living at Islam Nagar at the time of incident and that her slain husband used to live at village Nachni. As soon as the informant and deceased reached the culvert, the appellants Babu Lal and Prem Pal, armed with DBBL and SBL Guns respectively, accosted them and opened fire indiscriminately at her husband who died instantaneously on the spot. Interestingly, this time, she simply named one Yadram only as eye witness, although, she did mention that few other persons also arrived at the spot but she did not name them. However, it is pertinent to point out that she named at least seven eye witnesses in her first information report (EX-Ka-2) though six of those eye witnesses have refused to support the prosecution case.

18. In paragraph no. 5 of her testimony, she has clearly and emphatically asserted that she alone went to the police station for lodging the FIR and that no other person had accompanied her to the police station. This part of statement was recorded on 19.3.1983 during initial stage of cross examination. After six days i.e. on 25.3.1983 during last leg of her cross examination she changed her version in paragraph no. 18 and stated that one Chowkidar also accompanied her to the police station at the time of lodging of the FIR. This is vital contradiction.

19. The FIR gives impression that informant went alone to the police station for lodging the FIR. In her initial testimony also, she categorically reiterated that she alone went to the police station but on the last leg of her cross examination she resiled from her earlier statement and said that village Chowkidar also accompanied her. But the fact of the matter is, that she was not completely truthful even at this stage. While recording the FIR the relevant entries were made in the General Diary of police station, extract of which is available on record as (Ex-Ka-3) wherein it has been mentioned that the informant Savitri Devi was accompanied by one Chunni Lal, Kallu and her father-in-law Man Singh (father of deceased). Now the question arise why was this solitary witness refusing to acknowledge the presence of these other persons at the police station ? It is pertinent to point out that P.W.-10 Savitri Devi has admitted during her cross examination that her father-in-law, a healthy person of 68 years, was resident of District Aligarh. She has emphatically denied that Man Singh, her father-in-law lived at Islam Nagar with them. She again reinforced this statement by saying that no other member of family used to live with them. Now the question is if incident occurred at 6.30 a.m. and report was lodged at 8.30 a.m., how the presence of Man Singh could be accounted for ? There is nothing on record to demonstrate when the father of deceased, resident of Aligarh, arrived at Budaun. There is no way Man Singh could have arrived at Village Nachni in time to accompany Savitri Devi to the P.S. Islam Nagar. The fact that Man Singh was present at the time of lodging of FIR bolster the argument of appellants that the FIR had been ante-timed. It really creates doubt about truthfulness of testimony of P.W.-10 Savitri Devi as well. Why is she denying the presence of Chunni, Kallu and Man Singh at the police station ? Prosecution has failed to provide any answer to this question.

20. The investigating Officer Harimaya Sharma, P.W.-13 has admitted in paragraph no. 3 of his testimony that Chunni Lal (witness) and village Chowkidar Kallu and Man Singh, father of deceased had accompanied Savitri Devi to the police Station. If presence of Man Singh is established then it begs the question why is his presence being disowned by the informant and how

could Man Singh arrived at village Nachni or Islam Nagar from District Aligarh within two hours of the incident ?

21. The FIR says the appellant Prem Pal Singh was unhappy on account of alleged illicit relationship between the deceased Charan Singh and his sister Susheela. This is the motive suggested by prosecution for the murder of deceased Charan Singh. The fact of the matter is that there is no evidence on record to support the claim of the illicit relationship between Susheela and deceased Charan Singh. All witnesses of facts have denied this claim barring P.W.-10 Susheela but even if we assume for a moment that this story of illicit relationship between Susheela, sister of appellant Prem Pal Singh and deceased Charan Singh is true then the question would arise why was Babu Lal involved in the murder of deceased Charan Singh ? The record reveals that accused Prem Pal belongs to high caste and appellant Babu Lal belongs to lower caste. Appellant Prem Pal alone could have killed Charan Singh. There is no evidence on record to suggest the close affinity between the appellant Prem Pal and appellant Babu Lal. There is no allegation of prior concert or prior meetings of mind. There is no whisper to suggest that both were friends. During course of trial, feeble suggestion was made that the deceased Charan Singh also had close intimacy with Kiran, sister of Babu Lal, but this claim is neither mentioned in the FIR nor supported by any eye witness including P.W.-10 Savitri Devi. Infact she has denied the knowledge of any relationship between the deceased Charan Singh and sister of appellant Babu Lal. She has clearly stated that she did not even know the name of that girl.

22. The evidence further reveals that the marriage of Kiran was solemnized on 15.7.1980 and she had already left for her matrimonial home on next date i.e. on 16.7.1980; that leaves appellant Babu Lal with no motive and there is no suggestion of any friendship between the appellant Babulal and Prem Pal. Prosecution has not given any suggestion in this regard.

23. Testimony of P.W.-10 Savitri Devi is shaky on several counts. We have noted earlier that in paragraph no. 2 of her testimony, this witness had asserted that they were going towards Islam Nagar. Later on she changed her story and stated both her husband and she were going towards village Nachni from Islam Nagar. This really changes the place of occurrence. The FIR says that they were going to village Nachni. P.W.-10 Savitri Devi in her initial part of statement says that they were going to Islam Nagar but in paragraph no. 6 of her testimony she changed her version and stated that they were going from Islam Nagar to village Nachni for realizing the money dues from village folks. If the narration of P.W.10 Savitri Devi is taken in account then the place of occurrence shown in the site plan (Ex-Ka-11) becomes doubtful. Savitri Devi indicates that incident occurred near culvert of village Nachni. No culvert is shown in the site plan (Ex-Ka-11). It is alleged that the incident occurred near seed warehouse (cht xksnke) and she was merely four steps away from her husband. The fact of the matter is that the incident did not occur near seed warehouse. The contents of site plan indicate that there is distance of at least 60 yards between the seed warehouse and place of occurrence. This witness could not name the farmers of agricultural fields nearby. The site plan further reveals that the place of occurrence is not a desolate place and yet not a single witness of vicinity has supported the prosecution case.

24. The credibility of P.W-10 (Savitri Devi) has further got hit by her another assertion. She has said in her testimony that the corpse of deceased was sent first to Police Station Islam Nagar on the same date at about 4 p.m. and next day dead body was sent to Budaun. She claims to have spent whole night with the corpse at Police Station but this cannot be true because P.W-12 constable Subhash Chandra has testified on oath that he took the body of deceased Charan Singh from village Nachni directly to District Head Quarter Budaun for postmortem on the same day. He has deposed that he took the corpse in his possession at about 12 p.m. on 20.7.1980 and deposited the dead body at district Headquarter Budaun at 7 p.m. Then he specifically and categorically denied that the dead body was kept whole night at the police station Islam Nagar. One of two witnesses must be lying. There is no reason for the P.W.-12 to lie about the status of the dead body. But the discrepancy of Savitri Devi can be explained by observing that she was not present at the place of occurrence at the time of incident and that her testimony has been later on concocted and manufactured to lend weight to prosecution case. Inquest report (Ex-Ka-4) itself says that the proceedings were initiated by 12.15 p.m. on the day. There was no reason for the police to keep the dead body at village Nachni or police station subsequent to the completion of the inquest proceedings.

25. There is something wrong about the stated knowledge of the incident of P.W-10 Savitri Devi. Her attempt to conceal the presence of Man Singh, her father in law and other witnesses at Police Station also creates doubt about her veracity. It is pertinent to point out that the story of residing at Islam Nagar too has been disclosed for the first time during her testimony in the court.

26. There is another strange phenomenon. If we consider the contents of the FIR as well as the testimony of P.W.-10 (Savitri Devi), it would reveal that both the husband and wife were traveling on foot despite the availability of bicycle. Obviously they were traveling together. Savitri Devi has admitted in her testimony that she was closely walking with her husband. She has admitted that she was four paces aside from her husband. She has also conceded that it was not her practice to accompany her husband in ordinary course. She merely accompanied her husband for the first time due to safety concerns. It has also come in evidence that each accused fired more than 5-6 shots. Medical report and the testimony of P.W.-5 Dr. N. P. Singh discloses that several pellets were recovered from the body of the deceased Charan Singh. The doctor has testified that as many as 126 pellets, one cork piece, 4 "Tiklee" and several pieces of corks were taken out from the body of deceased. The nature of injuries and description of weapon including presence of blackening and tattooing would indicate that shots were fired from close range. P.W.-10 Savitri Devi has also stated that accused persons first came and shook hands with the husband, searched him and then opened fired from a few steps away. The deceased was holding his bicycle at the time. Informant was standing by his side. More than dozen shots were fired upon him and yet not a single pellet even touched the wife of deceased who was allegedly standing by his side. Not even a scratch resulted on her person with this kind of indiscriminate use of two guns.

27. The effect produced by the shot gun vary according to the distance of weapon from the body and choking device. Three injuries indicate blackening and two injuries indicate tattooing but the deceased sustained as many as nine gun shot injuries. Injury no. 4 disclose multiple gun shot

wound of entry each 0.25 cm X 0.25 cm and dispersal of pellets must in ordinarily course result in some injuries to a person standing nearby. The doctor has opined that he had recovered several pieces of corks indicating disintegration of cork at the time or prior to the impact of shot upon the body. The medical evidence and injuries sustained would reveal that at least some pellets would have touched the person standing nearby due to dispersal. Evidence reveal that appellant Babu Lal allegedly refilled his gun several times, indicating discharge of guns more than once. In such a scenario absence of even the scratch on the person of the informant is surprising. Cumulatively, these circumstances give rise to serious doubt about the presence and truthfulness of P.W.-10 Savitri Devi.

28. In addition to that, there is inconsistency between the ocular testimony and medical report. The testimony of Savitri Devi, solitary witness would indicate that accused persons came from opposite side and then shot her husband after shaking hands with him and searching him, prior to killing. She has categorically stated in paragraph no 9 of her testimony that at the time of discharge of guns accused and deceased were standing face to face and they kept firing upon him. This story does not explain the medical report which says that several firearm shots were found on the back of body of the deceased. This inconsistency between the ocular testimony and the medical evidence is also fatal to the prosecution case. Infact, it clearly belies the claim of presence of Savitri Devi on the spot at the time of incident.

29. P.W.-10 Savitri Devi further says that she showed the place of occurrence to the Investigating Officer. But P.W.-13 Hari Maya Sharma (Investigating Officer) disputes this assertion. He says that the site plan was prepared at the instance of Chunni Lal. He did not even refer to any assistance from Savitri Devi (informant).

30. Learned counsel for appellants have also raised another question. They have argued that deceased Charan Singh was bailed out on Saturday and later on murdered on Sunday. The testimony of Savitri Devi (informant) reveals that they were going to realize remaining dues from the people of village Nachni and some other place. They deliberately left early with the intention of returning back early. They did not share this information with any body, then how come accused became knowledgeable about the whereabouts of deceased and time of his arrival? There is nothing on record to show that such information was publicly available.

31. Surprisingly, learned Trial Judge did not question accused persons regarding alleged relationship between Kiran and deceased during examination of accused person under Section 313 Cr.P.C. This was very pertinent question as far as appellant Babu Lal was concerned. There was no motive for appellant Babu Lal to join any body for murder of deceased Charan Singh. Even Savitri Devi has not made any reference regarding Kiran, sister of Babu Lal, who had already gone to her matrimonial home four to five days prior to the incident. An opportunity should have been given to appellant Babu Lal for explaining the alleged relationship of deceased Charan Singh with Kiran, sister of Babu Lal under Section 313 Cr.P.C.

32. It is evident from the perusal of the impugned judgment of trial court that the defence evidence has not been carefully considered by it. We do not understand why the statements of the D.W.-1 A. S. Rizvi, ACO (Consolidation) and D.W.-2 Malkhan Singh, father of appellant Babu Lal have been brushed aside in the manner as done by the Trial Judge. There is no reason why their evidence should not be accepted when they have asserted before the trial court on oath that appellants Babulal was present in Sultanpur on the date of incident. The courts below have held that the two witnesses produced by the defence are unreliable. But the Trial Judge has not given any satisfactory reason for the same. It is necessary to point out that as far as courts are concerned, witnesses of both sides, prosecution and defence, sail in the same boat. Both have to appraised on the touchstone of credibility and truthfulness. Courts cannot say that she will not trust some witnesses merely because they have been produced by defence. Testimony of defence witnesses has to be evaluated in same manner as that of prosecution. Same yardstick has to be applied. Testimony of D.W.-1 A.S. Rizvi is cogent and credible. There was no reason for him to lie. D.W-2 Man Singh was his subordinate. There was no pressure upon him to favour Babu Lal. We have carefully examined the testimony of D.W.-1 A. S. Rizvi. He has established the presence of appellant Babu Lal on the date of incident in District Sultanpur, situated at long distance away. We feel that there is no reason to disbelieve his evidence especially in the light of shaky, weak and untrustworthy evidence of P.W-10 Savitri Devi who alone tried to support the prosecution story, out of seven eye witnesses produced by the prosecution.

33. As discussed above, P.W. 10 (informant) is not reliable and there is no other evidence on record to support the conviction of appellants. There are very serious and significant inconsistencies in the prosecution. Six stated witnesses have not supported the prosecution case. Presence of remaining witness P.W.-10 Savitri Devi is highly doubtful. We have carefully scrutinized her evidence. We believe the evidence of P.W.-10 Savitri Devi is not of such sterling quality so as to make it safe to base conviction solely on her testimony. Her evidence is not free from blemish or suspicion. We do not find her evidence trustworthy. We have a lurking suspicion about her presence on the spot at the time of incident. We therefore, find it unsafe to sustain the conviction of the appellants on the sole testimony of PW-10 Savitri Devi. We, therefore, hold that the appellants are entitled of benefit of doubt.

34. In the result, we allow this appeal and set aside the conviction and sentence of the appellants and direct that they shall be released forthwith, if in jail, unless required in any other case. In case the appellants are on bail, the bail bonds are cancelled and sureties are discharged.

35. Let this judgment be certified to the concerned Court within 15 days. The concerned court shall report a compliance within one month thereafter.

(2016) 8 ILRA 1148
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.08.2016

BEFORE

THE HON'BLE MRS. VIJAY LAXMI, J.

Criminal Appeal No.- 1873 Of 2016

Sanjeev @ Sanju

...Appellant
Versus

State Of U.P.

...Respondent

Counsels for the Appellant:

Shri Jitendra Rana

Counsel for the Respondent:

G.A.

Held –

Paragraph 1: Appeal and Conviction Details

This criminal appeal challenges the judgment dated December 24, 2015, passed by the Additional Sessions Judge/F.T.C., Baghpat, in S.T. No. 443 of 2012. The trial court convicted the appellant, Sanjeev @ Sanju, under Sections 376 and 506 of the Indian Penal Code (IPC) for allegedly raping and threatening the prosecutrix. He was sentenced to seven years of rigorous imprisonment under Section 376 IPC and one year under Section 506 IPC, to run concurrently.

Paragraph 2–3: The Prosecution's Case

The prosecution alleged that in late June 2012, while the prosecutrix's husband was away in Gauhati for a family ritual, the appellant (the husband's nephew) called her to his house at 6:00 AM under the pretext of milking his cow. Once there, he allegedly forced her into his bedroom and raped her. The trial court found this account reliable and convicted the appellant.

Paragraph 4: Grounds of Appeal

The appellant challenged the conviction on multiple grounds: the absolute lack of external/internal bodily injuries or chemical evidence of spermatozoa; material contradictions in the sole testimony of the prosecutrix; and the complete disregard of defense evidence showing a financial dispute where the prosecutrix falsely implicated the appellant to evade a loan repayment.

Paragraph 5–6: Arguments and Witness Layout

The State (A.G.A.) supported the conviction, arguing that a rape conviction can stand solely on the uncorroborated testimony of the victim. Upon reviewing the record, the High Court noted the prosecution examined six witnesses (only the prosecutrix being a witness of fact), while the defense produced two witnesses, including the victim's own husband (DW-2).

Paragraph 7: Testimony of the Prosecutrix (PW-1)

In her examination-in-chief, the prosecutrix repeated the FIR narrative, adding that the appellant forcibly pulled her into the room, pinned her down, threatened her life, and raped her. She further admitted that after the act, she accepted Rs. 1,000 from the appellant, visited her uncle Mahipal's house for five minutes, and then went alone to the police station.

Paragraph 8–9: Contradictions Exposed in Cross-Examination

During cross-examination, the prosecutrix admitted she did not preserve her crime-scene clothes or record a Section 164 Cr.P.C. statement before a Magistrate. Severe contradictions emerged regarding whether she raised an alarm inside or outside the room. Furthermore, while she claimed her bangles broke and the appellant tried to strangle her with a rope, the medical officer found absolutely no injuries on her wrist, neck, or body. She also admitted her husband had previously required expensive medical treatment following an accident.

Paragraph 10: High Court's Initial Assessment of the Victim's Credibility

The High Court observed that while a rape conviction can rest on a victim's sole testimony, it must be of "sterling quality." The prosecutrix's narrative failed this test. Her admissions suggested either a consensual relationship in the absence of their families, or a malicious fabrication to escape a heavy financial debt, a doubt compounded by the lack of physical injuries and the non-examination of her uncle Mahipal or the report scribe.

Paragraph 11–13: Analysis of Defense Evidence (DW-1 & DW-2)

The Investigating Officer (PW-6) confirmed he found no broken bangles at the scene. Defense witness Yashpal Singh (DW-1) testified to a running community knowledge of a severe debt dispute between the families and heard no alarms. Crucially, the victim's husband, Baburam (DW-2), testified that his right hand was amputated in an accident, forcing him to borrow Rs. 60,000 from the appellant. He stated that his illiterate wife was instigated by locals to file a false FIR to escape the debt, and later lied in court out of fear of being jailed for perjury.

Paragraph 14–16: Rejection of the Trial Court's Findings

The trial court had brushed aside the defense and the lack of physical injuries by pointing out that the FIR was lodged promptly and that minor injuries could fade within the seven-hour gap before the medical exam. The High Court rejected this, noting that the trial court completely ignored blatant structural contradictions, embellishments, and improvements in the victim's statements.

Paragraph 17–19: Application of Supreme Court Precedents

Citing apex court rulings, the High Court reiterated that a "sterling witness" must be of exceptionally high calibre, natural, and entirely consistent from the first statement to the trial testimony. Testing the facts against this threshold, the Court ruled it completely unjustifiable to convict the appellant based on a solitary testimony riddled with omissions and contradictions.

Paragraph 20–22: Final Order and Acquittal

The High Court set aside the trial court's judgment and acquitted the appellant of all charges, allowing the appeal. The Court lamented that the appellant had already languished in jail for over four years without fault due to repeated bail rejections, and ordered his immediate and forthwith release from custody.

List of Citations:-

- 1.Krishan Kumar Malik v. State of Haryana, (2011) 7 SCC 130**
- 2.Rai Sandeep v. State (NCT of Delhi), (2012) 8 SCC 21**

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. This criminal appeal has been directed against the judgment and order dated 24.12.2015 passed by the Additional Sessions Judge/ F.T.C., Baghpat, in S.T. No. 443 of 2012, State Vs. Sanjeev @ Sanju, u/s 376, 506 I.P.C., P.S. Baroth, District Baghpat, arising out of Case Crime No. 513 of 2012, whereby the learned trial court has convicted the appellant under section 376 I.P.C. and has sentenced him to rigorous imprisonment for seven years with fine of Rs. 5000/- and in default of payment of such fine, to undergo six months additional imprisonment. By the impugned order the appellant has also been convicted under section 506 I.P.C. for which he has been awarded R.I. for one year. Both the aforesaid sentences were directed to run concurrently.

2. Heard learned counsel for the appellant and learned AGA. Perused the record.

3. As per the prosecution case, the prosecutrix lodged an FIR against the applicant alleging that when her husband Baburam had gone to Gauhati to attend the Terahvi (a ritual performed on 13th day from the death of a person) of her Jeth, the accused-appellant, who is the nephew of her husband (Bhanja) and is a resident of the same locality called her at 6.00 A.M. in the morning for milking his cow. It is alleged that when she went to his house for milking his cow, the appellant took her inside his bedroom and committed rape on her. The learned trial judge found the prosecution case reliable and convicted the appellant as aforesaid.

4. The aggrieved appellant, in this appeal, has questioned the legality and correctness of the impugned judgment and order mainly on the following grounds:

1. That the aforesaid prosecution story is totally false and concocted, which is evident from the fact that no injury was found either on external or internal part of the body of the prosecutrix and no spermatozoa was found after chemical examination, which totally belies the prosecution story.

2. There are several contradictions, infirmities and omissions in the testimony of the prosecutrix, who is the solitary witness of fact, produced by the prosecution in this case. But the learned trial court without taking into consideration the material contradictions occurred in her statement and ignoring the medical report, has passed the impugned judgment on the basis of mere conjectures and surmises.

3. The husband of the prosecutrix, Baburam, has been produced by the defence as DW2, who has categorically stated that the appellant had lent him money for meeting out his medical expenses, as he had met with an accident and had to incur an expenditure of Rs. 60-70 thousand on his surgery. The appellant was demanding his money back, which he, (Baburam), was unable to pay, hence his wife, the prosecutrix, on the instigation of other people, lodged the FIR. It was only due to the fear of her own conviction for giving false evidence, she did not retract from her statement during the trial. However, the learned trial judge neither considered the explanation put forth by the appellant u/s 313 Cr.P.C. nor the aforesaid evidence of DW1, while convicting the appellant.

5. Per contra learned AGA has supported the impugned judgment by contending that the learned trial court has rightly convicted the appellant because in case of rape the sole testimony of the prosecutrix can form the basis of conviction and there is no need for any further corroboration.

6. Considered the rival submissions of both the parties and perused the original record.

7. The prosecution in this case has produced only six witnesses out of which only PW1, the prosecutrix herself, is the witness of fact. The remaining five witnesses are formal witnesses, PW2 is the doctor and PW3 to PW6 are police personnel including the I.O.

8. The defence has also produced two witnesses. DW1 is Yashpal Singh and DW2 is Baburam, who is the husband of the prosecutrix.

9. The prosecutrix during her examination in chief has repeated the FIR version by stating that in June 2012 her Jeth, who was living in Gauhati, had expired. On the date of occurrence her husband had gone to attend the Terahvi of her Jeth. The accused-appellant is her nephew, whose family members had also gone to Gauhati to attend Terahvi ceremony. The occurrence is of the last week of June. In the early morning at about 6 or 6.30 A.M. the appellant called her to milk the cow. She went and milked the cattle. When she was about to return to her home the appellant came and asked her to come inside the house as he had to talk to her on some important issue. When she denied he forcibly took her inside the room holding her hand. Thereafter he pressed her mouth from his hand, put his leg on her breast and pressed her neck. He also threatened her to kill. Thereafter he committed rape with her. She has further stated that after committing rape, the appellant gave her Rs. One thousand, which she accepted. From the house of the appellant she went to her uncle Mahipal's house and informed about the whole episode. At Mahipal's house she stayed for five minutes and from there she went to police station to lodge the FIR.

10. During her cross-examination the prosecutrix has stated that she had gone to the police station all alone. She has also stated that when she had gone to lodge the report, she did not take with her, her clothes, which she was wearing at the time of occurrence. When asked as to why she did not raise any alarm, she stated that she had raised alarm from inside the room. However, when she was confronted with her earlier statement recorded u/s 161 Cr.P.C. in which she has stated that she had raised alarm after coming outside the room and hearing her alarm several persons had gathered at the spot, she replied that she had not given any such statement to the I.O. and she cannot assign any reason as to how it was written. She has admitted that she accepted Rs. One thousand, which the appellant gave to her, after committing the rape and those are still lying with her and she did not give those rupees to the I.O. She has also admitted that she did not get her statement u/s 164 Cr.P.C. recorded before the Magistrate. She has stated that her bangles were broken causing injuries on her wrist. She has also stated that the appellant tried to strangle her by rope causing marks on her neck but the doctor has not found any such injury either on her wrist or neck or even any part of her body. She has admitted the fact that her husband had met with an accident in which his hand had to be amputated and he had to remain admitted in hospital for one month incurring Rs. 60-70 thousand in his treatment.

11. There is no doubt that in the cases of rape sole testimony of the victim of rape is sufficient to convict the accused but as per settled legal position the said sole testimony should be trustworthy, reliable and must be of sterling quality. In so far as the case in hand is concerned, the statement of the prosecutrix as discussed in the preceeding paragraph, does not appear to be of such sterling quality. Her admissions clearly suggest that either she was a consenting party, who out of her own freewill and in the absence of her husband and the other family members and also in absence of family members of the appellant, had made physical relations with him voluntarily or as per the defence version, she has falsely implicated the appellant so as to avoid the payment of loan to him. The absence of any mark of injury on her external or internal part of the body totally belies the prosecution story. It also appears unbelievable that her uncle Mahipal, to whom she had immediately informed about her rape and from whose house she had gone directly to police station to lodge the FIR, did not accompany her to the police station. The aforesaid Mahipal, could have been the best witness in this case, but the prosecution, for reasons best known to it, has not examined Mahipal as a witness in this case. One more fact, which raises a serious doubt in the prosecution story is that the prosecutrix has stated that when she had gone to lodge the report she did not take the clothes with her, which she was wearing at the time of occurrence, whereas, as per her own narration, after returning from the house of the appellant, she directly went to the house of Mahipal where she stayed for five minutes and then she went to the police station to lodge the FIR. Thus, it is not clear as to when and where she changed her clothes. She has stated that she got the written report scribed by a tea vendor but the said tea vendor has also not been examined by the prosecution.

12. The story of rape as narrated by the prosecutrix becomes unreliable also, in view of the statement of investigating officer (PW-6 Kunwar Pal Singh), who has stated that he had inspected the spot and he did not find any broken bangle at the place of occurrence. He has also stated that the prosecutrix had never informed him about any such fact that the appellant kept his legs at her breast and pressed her mouth with his hands.

13. The defence has produced one Yashpal Singh as DW1, who is the neighbour of both i.e. the prosecutrix and the accused-appellant being a resident of the same Awas Vikas Colony, who has stated that the husband of the prosecutrix had to incur heavy expenditure on his medical treatment after his accident and the appellant had lent him a handsome amount for his treatment but Baburam (the husband of prosecutrix) was not returning this loan despite the repeated demands made by the appellant. DW1 has further stated that on 29.6.2012 between 5 to 7 A.M. he was on routine morning walk in the park situated at the front of his house but he did not see the prosecutrix going towards the house of the appellant. He has also stated that the appellant used to milk the cattle and to give them the fodder himself. DW1 has further stated that he did not hear any alarm of the prosecutrix. He has also stated that the entire colony knows that due to dispute of payment of loan, the prosecutrix has lodged the false FIR against the appellant.

14. The husband of the prosecutrix Baburam has been produced as DW2. He has stated that due to truck accident his right hand had to be amputated and he had to take loan of Rs. 60,000/- from the appellant. When he returned home from the hospital, the appellant started to demand back

his money. As his right hand had been amputated, he was unable to earn so he could not return the loan. In June 2012, when he had gone to Gauhati, some people instigated his wife to lodge the FIR against the appellant, who was continuously demanding his money back. DW2 has stated that his wife is an illiterate lady, who, under the influence and instigation of some people of the locality, put her thumb impression on the FIR. Later on, when Sanjeev (appellant) was lodged in jail, the persons, who had instigated his wife, told her that if she would not support the story, mentioned in the FIR, in the court, she would also be lodged in jail. Hence out of fear, his wife has deposed in the court against the appellant. The appellant is his real nephew and is married too.

15. The learned trial court disbelieved the defence witnesses and relied on the statement of the prosecutrix mainly on the ground that as the FIR has been lodged promptly by the prosecutrix, there was no time for her to concoct a false story. The learned trial court did not find any good ground to disbelieve the prosecution case on the basis of the fact that Mahipal, uncle of the prosecutrix, was not produced.

16. With regard to absence of injuries on the body of the prosecutrix, the learned trial court expressed its view that the incident has taken place at 6.00 A.M. and the medical examination has been conducted on the same day at 1.45 P.M., hence during this time gap the marks of injuries may fade and vanish.

17. No opinion has been expressed by the learned trial court with regard to the contradictions and improvements in the statement of the prosecutrix.

18. There is no doubt that the cases of rape should be dealt by the courts with an iron hand and the conviction of an accused of rape can be based even on the sole testimony of the prosecutrix but the condition is that the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. In so far as the present case is concerned, undoubtedly the solitary evidence of prosecutrix does not fall in that category and it is neither safe nor proper to hold the appellant guilty of rape only on the basis of her sole testimony.

19. In the case of **Krishan Kumar Malik Vs. State Haryana, (2011) 7 SCC 130** the Apex court under almost same facts has set aside the conviction and has acquitted the accused. Explaining/ elaborating the meaning of 'sterling witness', Hon'ble Supreme Court in the case of **Rai Sandeep Vs. State (NCT of Delhi) (2012) 8 SCC 21** has observed as under:-

"In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and

consistent with the case of prosecution qua the accused. There should be not be any prevarication in the version of such a witness."

20. Testing the facts of the present case on the touchstone of law as laid down by the Apex Court in the judgments cited above, this court is of the considered view that it was not justifiable for the learned trial court to convict the appellant on solitary statement of prosecutrix, which being full of contradictions, omissions, embellishments and improvements, cannot be termed as that of sterling quality.

21. Therefore, the impugned judgment of the trial court is liable to be set aside and the appellant deserves to be acquitted from the charges leveled against him.

22. Accordingly, this appeal succeeds and is allowed. The impugned judgment and order of conviction dated 24.12.2015 passed by the trial court is hereby set aside.

23. It is unfortunate that the appellant, from the first date of his arrest, is languishing in jail because his bail application was rejected by the trial court and this court also, taking into account that the appeal is ripe for final hearing, did not consider his bail. As a result, the appellant has been languishing in jail and has already spent more than four years in jail without any fault. Therefore, it is directed that the appellant shall be released forthwith from jail, if not wanted in any other case.

24. Let a copy of this judgment be sent to the court concerned for immediate compliance.

(2016) 8 ILRA 1155
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.08.2016

BEFORE

THE HON'BLE PANKAJ MITHAL, J.

Writ A No.- 1974 Of 2015

Smt. Rashmi Bhatiya & Anr.

...Petitioners

Versus

Smt Geeta Sharma & Anr.

...Respondents

Counsel for the Petitioners:

Shri Rishikesh Tripathi

Counsel for the Respondents:

Shri Anil Sharma, Shri Sanjay Agrawal

Held –

Background and Parties: The dispute concerns shop No. 341/1-2, Sadar Bazar, Jhansi. Smt. Geeta Sharma (Respondent No. 1) is the owner and landlady. The original tenant, Naresh Bhatiya, ran a stationery shop; upon his death, the tenancy passed to his widow (Smt. Rashmi Bhatiya) and two unmarried daughters (Km. Ritu and Km. Richa).

The Release Application: The landlady filed a release application under Section 21(1)(a) of the U.P. Act No. 13 of 1972 ("the Rent Act") to establish an Ayurvedic Clinic, either in the shop's existing form or after reconstruction. The application was contested by the widow and Km. Ritu Bhatiya, while Km. Richa did not contest.

Lower Court Decisions: The Prescribed Authority allowed the release application on April 10, 2013, and the tenants' subsequent appeal was dismissed on February 16, 2014. The tenants filed this writ petition under Article 226 of the Constitution of India to challenge both lower court orders.

Petitioners' Three Legal Grounds: The petitioners' counsel, Sri Rishikesh Tripathi, challenged the judgments on three grounds: (1) the release application was unmaintainable because it was filed by a power of attorney holder, (2) the courts below erred on the "bona fide need" factor, and (3) comparative hardship favored the tenants.

Core Issue Identified: Both parties agreed that the primary legal question is whether a power of attorney holder can validly file a release application. The other two issues (hardship and bona fide need) are mostly factual and limited under Article 226/227 jurisdiction.

Petitioners' Argument on Maintenance: Sri Tripathi argued that under Section 3(j) of the Rent Act and Rule 15, a release application must be signed and verified strictly by the owner-landlord themselves and none else. The current application was signed/verified only by the power of attorney holder, Narendra Mukhraiya.

Nature of the Current Application: The High Court observed that the application was explicitly filed *on behalf* of the owner, Smt. Geeta Sharma. The bona fide need set up belonged strictly to the owner-landlady, not to the personal interest of the attorney holder.

Law on Power of Attorney: A power of attorney is an instrument of agency governed by the Contract Act and the Powers of Attorney Act, 1882. It is a document of convenience that formally empowers a specified person to represent and act in the name of the principal.

Supreme Court Precedent on Agency: In *Tmt. Kasthuri Radhakrishnan*, the Supreme Court held that acts

done by a power of attorney holder are done on behalf of the principal. The agent gains no personal title, and the legal effect is exactly as if the principal had executed the document themselves.

High Court Precedent on Writ Petitions: A Full Bench of the Allahabad High Court (*Syed Wasif Husain Rizvi*) recently affirmed that a person is legally entitled to maintain a writ petition through a power of attorney holder.

Application to the Rent Act: Based on these precedents, because a power of attorney holder can file suits and writ petitions in the name of a principal, they can also file a release application under Section 21(1)(a) of the Rent Act, as there is no express statutory prohibition.

Distinction of Landlord Ownership: Under Section 21, the application must reflect the bona fide need of the landlord or their family. In *M.M. Quasim*, the Supreme Court clarified that for eviction based on bona fide need, the "landlord" must be the actual owner with a right to occupy, not just a mere rent collector.

The Scope of "Landlord" in Previous Judgments: The Court noted that past rulings (*Smt. Sughra Begum*, *Smt. Ved Rani Diwan*, *Fakaruddin Khan*, and *Mam Chand*) rightly established that a simple rent-collecting agent cannot file a release application for their *own* personal use, as they cannot substitute the real owner.

Current Case Distounded from Past Rulings: In this case, the actual owner applied for the release *through* the attorney. The attorney did not claim his own personal need. Therefore, the application is fully maintainable as an action by the principal.

Pleadings and Rule 15 Compliance: The petitioners' objection regarding Rule 15 (signing/verification) was rejected. Rule 15 references the Code of Civil Procedure (CPC) Order VI Rules 14 and 15. The proviso of Order VI Rule 14 expressly allows an authorized person to sign pleadings if the principal party is unavailable.

Ratification by Owner: Furthermore, the owner-landlady filed her own separate affidavit in court, expressly accepting that the application was filed on her behalf and explicitly reiterating and verifying its contents. Thus, the verification is legally sound.

Bona Fide Need Upheld: On the factual question of bona fide need, both lower courts concurrently ruled in favor of the landlady. The High Court stated that simply being wealthy does not disqualify a landlord from having a genuine, bona fide need for their property.

Comparative Hardship Upheld: Comparative hardship does not favor the tenants. They made no serious or active efforts to search for alternative accommodations or apply for a shop allotment. Their approach was deemed too casual.

Status of the Tenant: Additionally, the record shows that Petitioner No. 1 is a schoolteacher. She cannot legally or physically run the stationery shop herself, and the tenants did not claim that the daughters or anyone else would run it on her behalf.

Cantonment Board Sanction Argument: The petitioners argued that since the shop is within cantonment limits, reconstruction requires prior Cantonment Board approval, making the need a "mere desire." The Court found this to be a misreading of the case.

Final Ruling: The landlady's primary intent is to use the shop in its existing state, with reconstruction being only a remote possibility. Seeking prior building sanctions was unnecessary to prove immediate bona fide need. The writ petition lacks merit and is dismissed.

Case Laws Cited:-

Tmt. Kasthuri Radhakrishnan and others Vs. M. Chinniyan and another, AIR 2016 SCW 609

State of Rajasthan Vs. Basant Nahata, (2005) 12 SCC 77

Syed Wasif Husain Rizvi Vs. Hasan Raza Khan, 2016 (2) ADJ 571 (LB)(FB)

M.M. Quasim Vs. Manohar Lal Sharma and others, AIR 1981 SC 1113

Smt. Sughra Begum Vs. Sri Ram and others, 1982 (2) ARC 143

Smt. Ved Rani Diwan and another Vs. VIIIth Additional District Judge, Ghaziabad and others, 1996 (2) ARC 14

Fakaruiddin Khan Vs. Xth Additional District Judge, Kanpur and others, 1998 (1) ARC 449

Mam Chand and others Vs. Pramodini Srivastava and others, 2014 (5) ALJ 106

(Delivered by Hon'ble Pankaj Mithal, J.)

1. The dispute is about a shop No.341/1-2, Sadar Bazar, Jhansi.
2. Smt. Geeta Sharma the respondent No.1 is the owner and landlady of the said shop. It was under the tenancy of Naresh Bhatiya who was running a stationary shop. On his death the tenancy devolved upon his widow Smt. Rashmi Bhatiya and the two unmarried daughters.
3. The owner and landlady, respondent No.1 applied for release of the above shop under Section 21(1)(a) of the U.P. Act No.13 of 1972 (hereinafter referred to as "the Rent Act") for her bona fide need to establish an Ayurvedic Clinic in its existing form or, if necessary, after demolition and its reconstruction. The release application was contested by Smt. Rashmi Bhatiya by filing a written statement. Later the two daughters of the deceased-tenant were also impleaded and one of them, petitioner No.2 Km. Ritu Bhatiya filed a separate written statement. The other daughter Km. Richa Bhatiya, proforma respondent No.2 did not contest.
4. The release application was allowed vide judgment and order dated 10.4.2013 passed by the Prescribed Authority and the appeal preferred on behalf of the tenants was dismissed on 16.2.2014. These two orders have been impugned through this writ petition under Article 226 of the Constitution of India.
5. I have heard Sri Rishikesh Tripathi, learned counsel for the petitioners and Sri Anil Sharma along with Sri Sanjay Agarwal for the contesting respondent No.1. The respondent No.2 is a formal party who had not participated in the proceedings in the courts below.
6. Sri Tripathi in assailing the impugned judgments has raised the following three points:-
 - (1) The release application was filed by the power of attorney holder of the landlady and, as such, was not maintainable;
 - (2) The courts below have erred in holding the need set up in the release application to be bona fide; and
 - (3) The comparative hardship is in favour of the petitioners.
7. Learned counsel for the parties accept that the principal issue for consideration is whether a power of attorney holder of the owner-landlord can file the release application and that

the other two points are more or less factual in nature and probably may not require to be dealt with in view of the limited scope under Article 226/227 of the Constitution of India.

8. Sri Tripathi in addressing the first point submitted that the release application can only be filed by the landlord who is the owner of the property and that the power of attorney holder has no right to file it. In order to elaborate his argument he relied upon the definition of the landlord given under Section 3(j) of the Rent Act and certain decisions of the Court. He has also submitted that Rule 15 of the Rules framed under the Rent Act contemplates signing and verification of the release application in the manner prescribed in C.P.C. and provides that where there are more than one landlords it should be signed by all the co-landlords which mean that it has to be signed by the landlord i.e. the owner and by none else.

9. The release application as filed by the respondent No.1 is Annexure - 1 to the petition. The said release application has been filed in the name of the respondent No.1, Smt. Geeta Sharma through special power of attorney holder Narendra Mukhraiya. The release application in the end has been signed and verified by the aforesaid power of attorney holder. It does not bear the signatures of the owner-landlady/respondent No.1.

10. A reading of the release application amply demonstrates that it is an application on behalf of the owner and landlady of the shop through the power of attorney holder. The need set up in the application is also of the owner and landlady and it is not for any personal right or interest of the power of attorney holder.

11. A power of attorney is ordinarily a document of convenience empowering a person to act for in the name of the principal. It is an instrument of agency covered by the Contract Act in general.

12. There is a specific Act governing the powers of attorney i.e. the Powers of Attorney Act, 1882. It defines the "powers of attorney" to include any instrument empowering a specified person to act for in the name of the person executing it.

13. In common parlance a "power of attorney" means a formal instrument by which one person empowers another to represent him or to act in his place for certain or all purposes.

14. Recently, the Supreme Court had an occasion to deal with the powers of attorneys in the case of ***Tmt. Kasthuri Radhakrishnan and others Vs. M. Chinnian and another*** AIR 2016 SCW 609. In the said case one V. Dhanapal was power of attorney holder of A. Radhakrishnan. He executed a tenancy agreement on his behalf in favour of respondent No.1. The question arose as to whether any tenancy had come into existence between V. Dhanapal and respondent No.1. The court applying the well settled principles of law held that when Dhanapal, who was acting as an agent of A. Radhakrishnan on the strength of power of attorney, executed the tenancy agreement with respondent No. 1 in relation to the suit premises then he did such execution for and behalf of his principal - A Radhakrishnan, which resulted in creating a relationship of landlord and tenant

between A. Radhakrishnan and respondent No. 1 in relation to the suit premises. In this execution, Dhanapal being an agent did not get any right, title and interest of any nature either in the suit premises or in tenancy in himself. The effect of execution of tenancy agreement by an agent was as if A. Radhakrishnan himself had executed it with respondent No.1.

15. The Supreme Court therein quoting **from State of Rajasthan Vs. Basant Nahata (2005) 12 SCC 77** and considering the provisions of Power of Attorney Act, 1882 held that it is well settled that an agent acting under a power of attorney always acts, as a general rule, in the name of his principal. Any document executed or thing done by an agent on the strength of power of attorney is as effective as if executed or done in the name of principal, i.e., by the principal himself. An agent, therefore, always acts on behalf of the principal and exercises only those powers, which are given to him in the power of attorney by the principal. Any act or thing done by the agent on the strength of power of attorney is, therefore, never construed or/and treated to have been done by the agent in his personal capacity so as to create any right in his favour but is always construed as having done by the principal himself. An agent, therefore, never gets any personal benefit of any nature.

16. More recently a Full Bench of the Allahabad High Court in **Syed Wasif Husain Rizvi Vs. Hasan Raza Khan 2016 (2) ADJ 571 (LB)(FB)** was seized of a question whether a writ petition can be filed through a power of attorney holder. The Court after considering entire law on the subject came to the conclusion that a person is entitled to maintain a writ petition through a power of attorney.

17. In view of the aforesaid decisions there is no legal bar for a power of attorney holder in presenting a suit or filing a writ petition in the name of the principal. Accordingly, when a power of attorney holder is authorised to file a writ petition in the name of the principal the inference is clear that he can also file a release application under Section 21(1)(a) of the Rent Act on behalf of the principal owner-landlord as there is no specific prohibition.

18. Section 21 of the Rent Act envisages an application of the landlord for eviction of a tenant if the premises is bona fide required by him for occupation by him or any member of his family.

19. In view of the above, the application for release has to be an application by the landlord for bona fide need of himself or any member of his family. In such circumstances, the need cannot be of anyone else, much-less that of the agent or the power of attorney holder.

20. The decision in the case of **M.M. Quasim Vs. Manohar Lal Sharma and others AIR 1981 SC 1113** is only to the effect that the word 'landlord' may include a person who is receiving or is entitled to receive rent of a building but for the purposes of claiming possession on the ground of bona fide need he must show that he is landlord in the sense that he is the owner of the building and has a right to occupy it in his own right. A mere rent collector may not be sufficient for such an application.

21. The aforesaid decision was rendered by the Supreme Court in connection with the Bihar Buildings (Lease, Rent and Eviction) Control Act which contains provisions analogous to the Rent Act in U.P.

22. The definition of the 'landlord' in the rent enactments is of wide amplitude which not only covers the owner of the property who has the right to occupy it but also the person receiving or collecting rent on his behalf. But for the purposes of release of the property from the tenant the word 'landlord' was interpreted in a narrower sense excluding the rent collector and confining it to the owner of the property.

23. In ***Smt. Sughra Begum Vs. Sri Ram and others 1982 (2) ARC 143*** His Lordship of this Court (Later Chief Justice) relying upon ***M.M. Quasim Vs. Manohar Lal Sharma and others (supra)*** held that an agent or attorney of the owner of the house may realise rent and may be considered to be landlord within the meaning of Section 3(j) of the Rent Act but such a person would not be entitle to move an application for release under Section 21 of the Rent Act.

24. The aforesaid decision was followed by another judge of this Court in the case of ***Smt. Ved Rani Diwan and another Vs. VIIIth Additional District Judge, Ghaziabad and others 1996 (2) ARC 14*** wherein it was laid down that a person taken as a landlord for the purposes of realising rent under Section 3(j) of the Act if not entitle to occupy the building let out to a tenant in his own right as landlord, cannot be recognized as a landlord for the purposes of filing application for release under Section 21(1)(a) of the Act for his own use.

25. A similar view was expressed in ***Fakaruddin Khan Vs. Xth Additional District Judge, Kanpur and others 1998 (1) ARC 449***.

26. In ***Mam Chand and others Vs. Pramodini Srivastava and others 2014 (5) ALJ 106*** it has been held that an application under Section 21 of the Rent Act cannot be filed by mere agent or attorney as he cannot substitute the real owner or the landlord for the purposes of adducing evidence. The right to get a building demolished and reconstructed cannot be allowed to be exercised at the instance of a person who has been authorised to collect rent. The authority of the person empowered to collect the rent must be much more than mere collection of rent which necessarily means that of an owner or the person entitle to occupy the property in his own right.

27. All the aforesaid decisions deal with the definition of landlord as contained in various statutes including the Rent Act in question and it is held to be narrower for the purposes of applying for release of the accommodation. Even in the narrower sense, as explained by the aforesaid authorities, it is the owner who has been held to be entitle to apply for release of the building.

28. In the instant case, it is the owner who has applied for release under Section 21 of the Rent Act through power of attorney. The application through power of attorney is as if it is by the principal. The power of attorney has not set up his own need and has not filed the release

application in his own name. Therefore, the submission that the release application is not maintainable as it has been filed through the power of attorney holder has no force.

29. The power of attorney holder acts on behalf of the principal and not for any of his personal rights. There is no express prohibition under the Rent Act debarring the owner-landlord from applying for release through power of attorney holder.

30. The submission that the release application is not signed and verified by the owner and landlady as contemplated by Rule 15 of the Rules framed under the Rent Act is also without substance.

31. Rule 15 of the Rules provides that the application for release must be signed and verified in the manner prescribed under Rules 14 and 15 of Order VI of the First Schedule to the Code of Civil Procedure.

32. Rule 14 of Order VI C.P.C. states that every pleading shall be signed by the party and his pleader, if any. Under the proviso it lays down that if a party is not available it may be signed by any person duly authorised by him to sign the same or to sue or defend on his behalf. It by necessary implication means that ordinarily pleadings/release application are required to be signed by the party concerned but in his absence a person duly authorised to sign on his behalf may also sign it which definitely includes the power of attorney.

33. Thus, there is no bar for the power of attorney holder to sign and verify the pleadings as contemplated by Rule 14 Order VI C.P.C. referred to in Rule 15 of the Rules framed under the Rent Act.

34. The release application in the case at hand as stated earlier, has been filed in the name of the owner-landlady through the power of attorney holder. It has been signed and verified by the power of attorney holder on behalf of the owner-landlady. The owner-landlady by her own affidavit (paper No.74A-2) has accepted that the release application has been filed on her behalf through the power of attorney holder and that she reiterates and verifies the contents of the release application.

35. In view of the above, there is no illegality in signing and verifying the release application by the power of attorney holder.

36. Now advertng to the bona fide need of the owner-landlady, the courts below have concurrently held in her favour. The mere fact that the owner-landlady is a rich person is not enough to deny the release of the shop to her when otherwise her need is found to be genuine and bona fide. The finding in this regard is not shown to be perverse which may permit any interference by this Court.

37. The comparative hardship as held by the courts below does not tilt in favour of the petitioners for the simple reason that they have not made any serious effort to search out any

alternative accommodation. They have not even applied for allotment of any shop which clearly indicates their casual approach, if any, in searching out an alternative shop.

38. This apart, it has come on record that petitioner No.1 is a Teacher in a school. She, therefore, cannot run the shop despite tenancy having devolved upon her. It is not their case that the shop would be run by the daughter of the deceased-tenant or by someone on her behalf.

39. Sri Rishikesh Tripathi had argued that the need of the landlady-respondent No.1 is for establishing an Ayurvedic Clinic in place of the shop. The shop is situate within the cantonment limits where no new construction can be done without prior permission of the Cantonment Board as envisaged under Section 234 of the Act. The landlady-respondent No.1 has not applied for sanction of the map, her need is not imminent and is a mere desire.

40. The argument is based upon a complete misreading of the plaint case. The landlady-respondent No.1 in her release application has clearly stated that on the release of the shop in dispute she would open an Ayurvedic Clinic/Spa therein for which she has no other place and the shop in dispute is ideal for it. In paragraph 7 of the release application it has clearly been stated that she requires the shop in its existing state and only, if necessary, she will undertake some changes or its reconstruction. The reconstruction of a new building after demolition of the shop was only a remote possibility. The permission for reconstruction would be necessary only after a final decision is taken for the demolition of the existing shop and its reconstruction. The said situation has not arisen. In these circumstances, seeking permission for reconstruction of the shop was not necessary to establish bona fide need.

41. In view of the aforesaid facts and circumstances, there is no merit in the petition and the same is dismissed.

(2016) 8 ILRA 1163
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.08.2016

BEFORE

THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Criminal Revision No.- 2297 Of 2016

Shankar Shah @ Shankar Shahu ...Revisionist
State Of U.P. Versus
 ...Opposite party

Counsel for the Revisionist:
Shri Anish Kumar Singh

Counsel for the Opposite Party:
G.A.

Held –

Paragraph 1: This criminal revision challenge is filed against the trial court's judgment (dated 27.2.2012 by the ACJM, Ghazipur) and the lower appellate court's judgment (dated 26.7.2016 by the Additional Sessions Judge, Ghazipur) convicting the revisionist under Section 7/16 of the Prevention of Food Adulteration Act.

Paragraph 2: The High Court heard arguments from the revisionist's counsel, the Additional Government Advocate (AGA), and thoroughly examined the case records.

Paragraph 3: The revisionist was charged for selling adulterated namkeen (containing Khesari dal) and violating packaging rules. The trial court found that the prosecution followed all legal procedures, proved the adulteration and lack of proper packaging labels, gave the accused a fair defense opportunity, and sentenced him to one year of simple imprisonment with a Rs. 2,000 fine.

Paragraph 4: The revisionist appealed the conviction, but the lower appellate court dismissed it, finding no technical or factual errors. The appellate court confirmed that the accused was properly questioned under Section 313 CrPC, chose not to test a second sample, and upheld the sentence despite noting the accused's advanced age and health issues.

Paragraph 5: The High Court concluded that there are no factual, legal, or procedural errors in the concurrent findings of the two lower courts, thereby officially confirming the revisionist's conviction.

Paragraph 6: The Court noted that awarding an appropriate and adequate sentence based on the nature, motive, and planning of the crime is a judicial duty, which is why sentencing hearing provisions (Sections 235(2) and 248(2) CrPC) exist.

Paragraph 7: The Court observed that the lower courts failed to properly evaluate the mitigating factor of the revisionist's old age. Rather than sending the case back and delaying it further, the High Court decided to modify the sentence itself.

Paragraph 8: Noting that the revisionist's voter ID shows he is now approximately 73 years old, ailing, and physically disabled, the Court determined he is unlikely to repeat the offense. Consequently, it reduced the punishment to the statutory minimum of six months imprisonment and a Rs. 1,000 fine.

Paragraph 9: The revision is partly allowed. While the conviction is upheld, the sentence is officially reduced to six months of simple imprisonment with a fine of Rs. 1,000 (plus an additional month of imprisonment if the fine is not paid).

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. This revision has been preferred against judgement dated 27.2.2012 passed by Additional Chief Judicial Magistrate, Ghazipur in criminal case no. 2091 of 2004 (State Vs. Shankar Shah and others) under Section 7/16 of Prevention of Food Adulteration Act, P.S. Mardah, Ghazipur and the judgment dated 26.7.2016 passed by Additional Session Judge, Court No. 6, Ghazipur.

2. Heard learned counsel for the revisionist, learned AGA and perused the records.

3. The revisionist was charged for offence under Section 7/16 Prevention of Food Adulteration Act for selling the edible articles (*namkeen*), which was found adulterated, inter alia, with Khesari, and also for not complying mandatory legal directions required for selling such articles. Trial court had afforded opportunity of hearing to the complainant side as well as accused/revisionist and thereafter reached to the conclusion that at the time of charged incident, revisionist, Shankar Shah @ Shankar Shahu was selling adulterated edible articles (*namkeen dalmot*), and also without complying mandatory directions regarding packaging and printing of information that should be mentioned on the packing of edible items. After giving conclusion on facts, trial court had also considered the compliance of rules and procedure being carried out by Food Inspector since before initiation of proceedings of prosecution till conclusion of trial, and found that prosecution side had not committed any illegality or procedural irregularity and proved its case on facts of the charge, about prosecution sanction and about affording opportunity to accused to adduce his proper defence. Thereafter trial court had passed order of conviction. After that learned Magistrate had afforded opportunity of hearing to the accused on the point of quantum of sentence and then passed sentence of simple imprisonment of one year with fine of Rs. 2,000/- (in default of payment of fine, one month further imprisonment).

4. Against the judgement of trial court, criminal appeal no. 25 of 2012 (Shankar Shah @ Shankar Shahu Vs. State of U.P. and another) was preferred, which was heard and dismissed by the judgement dated 26.7.2016 of Addl. Sessions Judge, Court no.-6, Ghazipur. In this judgment, lower appellate court had also considered the evidences including the facts relating to report of Government Public Analyst regarding adulteration found in the edible articles sold by revisionist, non-compliance of mandatory provisions regarding packaging and printing of information, prosecution sanction and other technical points. After considering the legal, technical and factual aspects of the matter, lower appellate court had found that judgment of trial court is not erroneous. First appellate court had also considered those arguments of appellant side that he was not afforded proper opportunity to place his defence and gave specific finding that during statement under Section 313 CrPC all relevant questions relating to prosecution case and relevant evidences of prosecution side were put to revisionist/accused, and that he was afforded

proper opportunity of hearing. Learned appellate court had considered that revisionist/ accused had option of sending another sample to Government Public Analyst for testing, but he had not opted for the same. By appreciating the evidences independently the lower appellate court had confirmed the finding and judgment of trial court. Appellate court had also considered the aspect that revisionist is a old man and he has certain difficulty in movement and his daily affairs inspite of it appellate court had not changed the judgment of learned Magistrate.

5. Considering the above facts and circumstances including evidence of the parties, there appears no factual legal or procedural illegality or irregularity in the proceedings carried out before the trial court as well as lower by appellate court. There appears no infirmity in concurrent findings of facts of the two courts below about the correctness of the charge. It is found that the judgment of conviction by the courts below is found without any error, therefore the judgment of conviction is hereby confirmed.

6. It is the duty of the court to see that appropriate sentence is imposed regard being had to the commission of the crime. The justice includes adequate punishment cannot be lightly ignored. For this reason the provisions of sections 235(2) and 248(2) have been incorporated in the Code of Criminal Procedure. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive and all other attending circumstances are relevant facts which would enter into the area of consideration. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed.

7. In present matter lower courts had not properly appreciated the point of sentence to be awarded to accused/ revisionist. Considering the old age of revisionist who is senior citizen it appears appropriate that instead of remanding the matter for affording proper opportunity of point of sentence, either to trial or to appellate court, proper sentence should be passed by this court.

8. This contention of learned counsel for the revisionist requires consideration that in spite of revisionist being old man having difficulty in movement and daily affairs, he was given harsh punishment. First appellate court had also discussed these points about the age etc. Of the revisionist, who had not given any reason as to why punishment of one year simple imprisonment is appropriate. This point is being considered by this Court. At the time of passing judgment, revisionist/ accused was old man and as per copy of the voter I.D. card of revisionist, his age on 1.1.2001, was about 57 years; therefore at this stage his age should be about 73 years. Lower appellate court had found him ailing and unable to move properly. Considering his old age, ailment and physical inability due to which there may be possibility of not repeating such acts again, this Court is of the opinion that for these reasons minimum punishment would serve to the accused/revisionist would serve the ends of justice, which is imprisonment of six months and fine of Rs. 1,000/-.

9. For the reasons above, the conviction awarded to revisionist Shankar Shah @ Shankar Shahu by trial court as well as lower appellate court is hereby confirmed, but sentence is modified to six months simple imprisonment with fine of Rs. 1,000/-, and in default of payment further imprisonment of one month. Accordingly, this revision is partly allowed.

(2016) 8 ILRA 1166
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.08.2016

BEFORE

THE HON'BLE VIKRAM NATH, J.
THE HON'BLE RAVINDRA NATH KAKKAR, J.

Criminal Appeal No.- 4046 Of 2005

Nares Raidas

...Appellant

Versus

State Of U.P.

...Respondent

Counsels for the Appellant:

Shri Shiv Nath Singh, Shri Ravesh Kumar Singh, Shri Ambrish Kumar

Counsel for the Respondent:

G.A.

Held –

Paragraph 1: Appeal and Conviction Details

This criminal appeal challenges the judgment dated April 13, 2005, passed by the Additional Sessions Judge, Kanpur Dehat. The trial court convicted the appellant, Naresh Raidas, under Sections 304 and 201 of the Indian Penal Code (IPC) for killing his wife, Nanhi Devi, and burying her body. He was sentenced to rigorous life imprisonment under Section 304 IPC and 3 years of rigorous imprisonment under Section 201 IPC, with concurrent sentences.

Paragraph 2: The Prosecution's Case

On September 15, 2003, village chaukidar Kallu reported to the police that the appellant had beaten his wife to death during a quarrel on the night of September 11/12, 2003, and buried her body in a pit inside his mud house. Following the FIR, the police and Naib Tehsildar Rajesh Kumar unearthed the dead body, conducted an inquest (Panchayatnama), and sent it for a post-mortem. The police subsequently filed a charge sheet, and the case was committed to the Sessions Court where the accused pleaded not guilty.

Paragraph 3: Prosecution Witnesses

To prove its case, the prosecution examined nine witnesses, including the informant (PW-1), family members of the deceased (PW-3 and PW-5), the medical officer (PW-7), the Investigating Officer (PW-8), and the Naib Tehsildar (PW-9). They also produced documentary evidence, including photographs of the deceased and news cuttings.

Paragraph 4: Statement of the Accused (Section 313 Cr.P.C.)

In his statement, the accused admitted his marriage but denied the murder. He raised an alibi, claiming he was out of town attending a funeral. He argued that his mud roof collapsed due to heavy rain, causing his wife's accidental death, and claimed he was falsely implicated by his brother-in-law over an unpaid loan of Rs. 25,000. No defense evidence was led.

Paragraph 5–8: Key Witness Testimonies (PW-1 to PW-5)

PW-1 and PW-2 testified about learning of the beating from villagers and participating in the recovery of the buried, decomposing body. PW-3 (brother) and PW-5 (brother-in-law) established that the accused was an alcoholic gambler who regularly abused the deceased. They testified that the accused later approached them, confessed to the murder out of jealousy over an alleged illicit affair, and begged for help. PW-4 verified his signature on the inquest report.

Paragraph 9–11: Medical and Investigative Evidence

PW-7, Dr. Arun Kumar Agrawal, detailed five major ante-mortem injuries on the victim's body, including a fractured left parietal bone and torn brain membranes. He concluded that death occurred roughly four days prior due to a coma caused by head injuries and noted that the presence of soil on the body matched a burial. PW-8 and PW-9 verified the crime scene mapping and the formal unearthing of the body.

Paragraph 12–14: Arguments of Both Parties

The appellant's counsel argued that the conviction relied on weak circumstantial evidence, lacked independent eyewitnesses, and contained contradictions regarding the time the body was dug up. Conversely, the State (A.G.A.) argued that the chain of circumstantial evidence—including prior marital abuse, the hidden body in the husband's house, and a failed alibi—firmly established the husband's guilt.

Paragraph 15–18: Court's Evaluation of Circumstantial Evidence

Invoking established legal principles for circumstantial evidence, the High Court rejected the husband's accidental roof-collapse theory. The Court reasoned that an accidental death would not result in a body being buried 1 to 1.5 meters underground. Furthermore, the accused failed to explain his immediate disappearance, never reported the "accident" to the police, and was arrested only after evading law enforcement for 12 days.

Paragraph 19–21: Rejection of Appellant's Technical Objections

The Court highlighted that the severe head injuries indicated a physical assault prior to death. It noted that the victim would unlikely choose to sleep in a dilapidated mud room during rainy weather when a solid (pukka) room was available next door. Additionally, historical written proof from 1998 showed the accused had previously fractured his wife's hands and promised to reform, aggravating the circumstances against him. Minor timeline discrepancies between witnesses were dismissed as irrelevant.

Paragraph 22–24: Review of the Sentence Quantum

While upholding the conviction, the High Court reviewed the sentence. The appellant's counsel pleaded for leniency, highlighting that the case relies entirely on circumstantial evidence, the appellant had no prior criminal record, he was 35 at the time of the offense, had two young children, and had already spent over 13 consecutive years in prison.

Paragraph 25–28: Modification of Sentence and Final Order

Balancing the aggravating factors of the crime with mitigating personal factors (such as age and time served), the Court confirmed the 3-year sentence under Section 201 IPC but modified the life sentence under Section 304 IPC. The Court reduced his imprisonment to the period already undergone (over 13 years). The appeal was partly allowed, and the jail authorities were directed to process the compliance.

List of Citations

1.Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622

2.Bachan Singh v. State of Punjab, AIR 1980 SC 898

(Delivered by Hon'ble Ravindra Nath Kakkar, J.)

1. This appeal has been preferred against the judgment and order dated 13.4.2005 passed by the Additional Sessions Judge, Court No.8, Kanpur Dehat in S.T.No.556 of 2003 arising out of Case Crime No.108 of 2003, State vs. Naresh Raidas, convicting the appellant under Section 304 and 201 I.P.C. and sentencing him under Section 304 IPC rigorous life imprisonment with fine of Rs.3000/- and under Section 201 IPC 3 years rigorous imprisonment with a fine of Rs.2000/- and in default of payment of fine to undergo additional imprisonment for two years. All the sentences were to run concurrently.

2. The prosecution case, in brief, is that on 15.9.2003 Kallu gave a written script to the police stating that he is chowkidar of the village Shahjahanpur; he heard people of village Marua Shahjahanpur saying that Naresh Raidas of the village quarrelled with his wife Nanhi Devi on the intervening night of 11/12.9.2003 and started beating her badly which resulted in her death, thereafter he dug a pit in a room of his muddy dilapidated house and buried the dead body in the pit and since then neither he nor his wife was seen in the village. Based on the written report (Ex. Ka-1) original chick of First Information Report (Ex. Ka-2) was lodged in police station and its entry in GD is Ex.Ka-3. On receiving the report Investigating Officer rushed to the place of occurrence and informed the Sub Divisional Magistrate of the dead body that was laid underneath the mud house thereby requesting him to send an official in whose presence the body may be unearthed. In the presence of Rajesh Kumar, Naib Tehsildar Bhognipur the dead body was dug out and a Panchayatnama (Ex. Ka-7) was prepared. The Naib Tehsildar got a letter prepared addressed to the Chief Medical Officer, Kanpur Dehat that was Ex. Ka-8 and the dead body was sent for post-mortem examination. The Investigating Officer thereafter investigated the matter and submitted charge sheet (Ex. Ka-6) against the accused appellant under Sections 304 and 201 IPC to the court. The learned Chief Judicial Magistrate took cognizance on the charge sheet and committed the case to sessions court for trial of accused. Thereafter, charges were framed by the trial court against the accused under Sections 304 and 201 IPC. The accused denied charges and claimed trial.

3. To prove its case the prosecution examined PW-1 Kallu, PW-2 Prakash, PW-3 Ganga Ram, PW-4 Rajendra, PW-5 Radheshyam, PW-6 Prem Babu, PW-7 Dr. Arun Agrawal, PW-8 B.S. Ponia, Sub Inspector and PW-9 Rajesh, Kumar, Naib Tehsildar, Bhognipur Kanpur Dehat and original written letter Ex.Ka13 along with photograph of the deceased and paper cuttings, paper no.16-Ka and 17 Ka-1 to 17 Ka-4 were produced from prosecution side.

4. After the close of prosecution evidence, statements of the accused appellant under Section 313 Cr.P.C. were recorded by the trial court in which he admitted to have married to Nanhi Devi and birth of the children but denied the incident. He said that two days before the fateful day he had gone to Chandeli ka Nagla, District Etawah to attend funeral of his sister's demised maternal father-in-law. He stated that his wife was alone in the house as his parents were living separately and his children were living with him. Due to rain the roof had fallen on his wife and she succumbed to her injuries. He further stated that his brother-in-law (Sadu) Radheyshyam had taken

Rs.25000/- from him and when the money was demanded, he got me falsely implicated in this case. However, no evidence was led by the appellant in his defence.

5. PW-1 Kallu stated that he dictated the script to one Mister and put his thumb impression after it was read over to him. He further stated that he knew accused Naresh Raidas who was present in the court. He recollected that it was the incident of 11/12 September 2003 and the villagers told him that Naresh was beating his wife but he did not find Naresh on reaching his house and when the accused or his wife had not been seen for two-three days, the report was lodged at the police station.

6. PW-2 Prakash stated that he knew the accused who had killed his wife Nanhi Devi.. He heard the villagers saying that both Naresh and his wife used to often quarrel and therefore he had killed his wife. He went to police station with Kallu where large number of villagers were present. He further stated that the Tehsildar and the Station House Officer took them to the house of Naresh, they dug the place and brought the dead body out which was swollen and bad smell was coming out of it.

7. PW-3 Ganga Ram, who is brother of deceased Nanhi, stated that his sister was married to accused Naresh Raidas about 11 years ago and out of the wedlock three children were born. Naresh became alcoholic and fell prey to gambling after his marriage and lost almost all household belongings in gamble and used to beat his sister and when she resisted he beat her badly and thereafter he along with his brother-in-law Radheyshyam had gone to his house and Naresh had promised not to repeat such acts in future and gave it in writing. He also stated that he came to know about his sister's death from newspapers and then he came to the house of Radheyshyam, who is his brother-in-law and a teacher. The accused also came there and admitted that he had killed his wife (deceased) on suspicion of her having illicit relations with one Balbir and afraid of being apprehended, he had concealed the dead body after digging out a pit in a room of his mud house and requested to save him from the police.

8. PW-4 Rajendar who is resident of the same village stated in his evidence that he knew the accused as well as the deceased Nanhi Devi and the panchayatnama of the dead body was prepared before him and he has signed on it along with Jodha Lal, Lakshmi, Bhagwati Prasad Katiyar, Surendra Prasad Rai. The witness has also verified his signatures on the panchayatnama.

9. PW-5 Radheyshyam in his evidence reiterated the same story as was stated by PW-3 Ganga Ram in his evidence. He said that on receiving the news of his sister's death, Ganga Ram came to his house on 18.9.2003 and informed about the death of his sister. PW-5 in his evidence said that the deceased Nanhi was married to Naresh Raidas in the year 1990 and the marriage was solemnized by him at his own residence because the father of the deceased had died. He further stated that three children were born out of their wedlock. After his marriage Naresh used to drink and beat his wife and became a gambler. This witness also showed a picture of the deceased in which she had plaster in her both hands because the accused had beaten her badly in a state of drunkenness.

10. PW-6 Constable Ram Babu stated in his evidence that on 15.9.2003 he had registered the F.I.R. (Ex. Ka2) on the basis of script given by the informant which was disclosed at Report No.14, its carbon copy is Ex.Ka-3.

11. PW-7 Dr. Arun Kumar Agrawal who was Medical Officer posted at P.H.C. Vidhanu, Kanpur Nagar had conducted the post mortem examination of the deceased. He stated in his evidence that on 16.9.2003 he had conducted the post mortem examination of the deceased Nanhi, wife of Naresh. The deceased was brought by Constable Subhash Singh and Constable Ram Chandar. P.W.7 Dr. Arun Kumar Agrawal proved the post moretm report Ext. Ka-4 before the trial court and stated that following ante moretm injuries were found on the body of the deceased :-

1. 12 x 6 c.m. bluish mark on the upper and external side of right hand and 7 c.m. bluish mark on elbow of right hand.
2. 30 x 6 c.m. bluish mark on upper side and elbow of left hand
3. 8 x 3 c.m. bluish mark on external side of left thigh which was 17 c.m. before the left knee
4. 35 x 18 c.m. small bluish mark on the left side of chest
5. 2 x 1 c.m. rupture mark on the left side of head which was 7 c.m. away from left ear.

12. He also stated in his examination that if the dead body is burried beneath the earth and taken out, there is possibility of the soil wrapped on the dead body. He further stated that there was no rigor mortis present. The doctor has opined as under :-

मृत्यु के बाद की अकड़न हाथ पैरों से जा चुकी थी, आंखे बाहर निकली थी, मुँह खुला था, पेट फूला था। सर के ऊपर बाल और खाल नहीं थी। पूरे शरीर पर मिट्टी थी दांत और नाखून न ढीले थे और खाल जगह से उतर गई थी।

बांयी पैराइटल हड्डी टूटी हुई थी, दिमाग की झिल्लियां फटी हुई थी तथा दिमाग, द्रव व खून से मिला हुआ था।

मृतका की मृत्यु का कारण सिर पर चोटो के कारण उत्पन्न कोमा था और मृत्यु पोस्टमार्टम करने के चार दिन पहले हुई थी। यदि शरीर को जमीन में गाड़ दिया जाये और बाद में उसको निकाला जाये तो शरीर पर मिट्टी लगी रहना सम्भव है।¹⁸

13. P.W.8 the Investigating Officer proved site plan and inquest report and after completion of the investigation filed a charge sheet Ext. Ka6. P.W.9 - Rajesh Kumar is Naib Tehsildar who stated before the trial court that on the orders of the Sub-Divisional Magistrate he visited the spot and in his presence the body of the deceased Nanhi Devi was dug out and further he conducted the preparation of the inquest report which is Ext.Ka-7.

14. After close of the prosecution evidence, statements of all the charged accused were recorded under Section 313 Cr.P.C.

15. The contention of the learned counsel for the appellant is that the judgment and order of conviction and sentence passed by the court below is against the weight of evidence, against the law and there is material contradiction between P.W.1 and P.W.2. Further submission is that there had not been any independent eye witness of the said incident. The material evidence produced before the trial court has not been properly appreciated. Hence, the impugned judgment is patently illegal, arbitrary and unsustainable in the eye of law. Lastly it has been submitted that the sentence awarded to the appellant is too severe, therefore, the judgment and order is liable to be set aside and the appeal is liable to be allowed.

16. Per contra, learned A.G.A. made submission that the case is based on the circumstantial evidence. The accused is the husband of the deceased. There is evidence that prior to the incident relations were strained between the accused and his wife Nanhi Devi. This resulted into the frequent assault by the husband on the deceased Smt. Nanhi Devi. It is also established by cogent evidence tendered before the lower court that on 11/12.9.2003 the accused husband Naresh Raidas had beaten his wife resulting in death of the deceased and thereafter he had concealed the dead body beneath the mud house. It is also contended that the defence statement of the accused under Section 313 Cr.P.C. regarding the plea of alibi has not been substantiated by tendering any evidence in defence. The case is based on circumstantial evidence and all the chain of the link evidence has been tendered before the court below. The judgment and order of the court below is well reasoned and there is neither any illegality nor perversity in the impugned judgment of conviction and order. Accordingly, appeal is liable to be dismissed.

17. We have considered the submissions raised by both the parties and perused the impugned judgment along with the relevant records. Undoubtedly, this case is based on the circumstantial evidence. So far as the legal proposition regarding the proof of circumstantial evidence is concerned, in the case of **Sharad Birdhi Chand Vs. State of Maharashtra, AIR 1984 SC 1622** the Apex Court has laid down five golden principles which constitute Panchshel of the proof in a case based on circumstantial evidence. They are as follows :-

1. The circumstances from which the conclusion of guilt is to be drawn should be fully established;

2. The facts so established should be consistent with the hypothesis of guilt and the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

3. The circumstances should be of a conclusive nature and tendency;

4. They should exclude every possible hypothesis except the one to be proved; and

5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

18. It transpires from the record that FIR was lodged by the chaukidar P.W.1 Kallu and it is also established that the dead body was recovered by digging the pit in the mud house of the accused and it was done in the presence of police as well as the Naib Tehsildar. It is also established by the prosecution evidence that the dead body was recovered by digging the pit. On the basis of the oral evidence tendered by P.W.1 Kallu, P.W.2 Prakash, P.W. 8 Investigating Officer B.S. Ponia, P.W.9 Rajesh Kumar, Naib Tehsildar and the inquest report clearly establishes that the dead body of the deceased Smt. Nanhi Devi was recovered from the mud house by digging a pit near about 1 x 1.5 mt. in depth. So far as the defence of the accused that it is due to the falling of the roof by rain is concerned, although the accused has not substantiated it by any oral evidence, but the circumstance is so clear that the dead body was taken out by digging the pit. More so, there cannot be a doubt that the defence version is to be appreciated on the principles of preponderance of probabilities but taking out of the dead body by digging a pit, that too by 1 x 1.5 mt. in depth and ante mortem injuries were also found while conducting the post mortem report which is proved by the prosecution witness P.W.7 Dr. Arun Kumar Agarwal.

19. It is also pertinent to mention here that the accused has not explained as to from which date he was out from his house and when he returned and in what condition he saw the dead body. More so, he has not reported this incident to anyone else neither to the police nor to the villagers which is sufficient to disbelieve the defence version. It also transpires from the record that after this incident the accused Naresh Raidas, the husband of the deceased, was arrested after 12 days of the registration of the FIR. This is indicative of the fact that if the death of the wife was caused by an accident why this matter has not been reported to anyone specially to the police and the accused got himself out of the picture for 10-15 days. The learned trial court has rightly come to the conclusion that the defence has been taken in order to save himself from the culpability of the offence. As it has already been mentioned that if the death was caused in an accident due to the fall of the roof during rainy season then under what circumstances the dead body was to be recovered by digging the pit and that too 1 x 1.5 mts. This circumstance itself proved that the explanation tendered by the defence is neither believable nor in ordinary course can be taken to be correct.

20. In this case the dead body has been recovered from the mud house by digging 1 x 1.5 mts pit. It is proved that only husband, wife and the children reside in the house and the site plan reveals that in addition to this dilapidated mud house there is a 'pukka' room adjacent to it. The ante mortem injuries is indicative of the fact that some altercation and assault had taken place before the death of the deceased. More so, the husband (accused) had not informed this incident neither to the villagers nor to the police. In addition to it, the husband accused escaped from the spot and it was only after the registration of the FIR his arrest was made after 12 days of the incident.

21. There is presence of five ante mortem injuries in which there were two contusions on the right and left hand, one contusion on thigh, one contusion on chest and lacerated wound on the

left side of the head and fracture of the left parietal bone and membranes of brain were torn. It also establishes the fact that before the death of the victim certain assault has been attributed. One of the important features in this circumstance to the extent that if there is an adjacent permanent room then in a rainy season why the deceased will prefer that room which was in a dilapidated condition in a mud house. The story of the defence that the accident took place due to heavy rain which resulted in the death of the deceased seems to be improbable and not believable under the facts and circumstances as stated above. The learned court below has rightly concluded that this defence has been taken only to save his complicity and involvement in the commission of crime.

22. It is also relevant to mention here that there is supporting evidence tendered by P.W.5 Radheyshyam and P.W.3 Ganga Ram, who happen to be the close relatives of the deceased. One is brother and another his brother-in-law. They had established the fact that there were serious altercations and assaults prior to the incident resulting into the fracture of the deceased Nani Devi in 1998 and about that incident the accused Nares Raidas had promised not to repeat such acts in future and had also given a written assurance on 24.8.1998 which is paper no. Ext.Ka-3 proved by the witness. This is one of the attending and aggravating circumstances to the incident, involvement and complicity of the accused in commission of the crime.

23. So far as the submission with regard to the fact that there is no mention in the facts about the entry and exit of the police force and Naib Tehsildar at the spot, we are unable to accept this contention as it is not so relevant under the facts and circumstances of the case. So far as the contention regarding variance of the statement between P.W.1 Kallu and P.W.2 Prakash about the timing of the digging of the dead body, we do not find any substance in this argument because the inquest report Ex.Ka7 which has been proved before the trial court clearly and categorically mentions the timing at about 12.15 P.M. which has been confirmed by P.W.2 Prakash. Under such circumstances we do not find any substance in the argument of the learned counsel for the appellant.

24. For the foregoing reasons we are of the considered opinion that the judgment of conviction passed by the court below does not suffer from any illegality, perversity or infirmity which requires any interference by this Court. Accordingly, the order of conviction is hereby confirmed.

25. So far as the argument of the learned counsel for the appellant regarding the quantum of sentence is concerned, the submission raised by the appellant before us is that the whole prosecution case is based on the circumstantial evidence. There is no direct evidence of the commission of the culpable homicide. Accused is the husband and the deceased is his wife. Accused was aged about 35 years at the time of the incident having two small kids. The accused is languishing in jail for the past more than 13 years. The case is of conviction under Section 304 IPC in which maximum sentence is life imprisonment; accused has no criminal antecedents nor he has been convicted in any other offence prior to this conviction. Keeping in view the age, incident, nature, gravity, circumstance, manner and mode and all the attending and relevant circumstances

into consideration, since substantial portion of the conviction has been served so his submission is that his sentence may be reduced as almost 13 years has already been undergone by him.

26. In **Bachansing Vs. State of Punjab, AIR 1980 SC 898** the Hon'ble Apex Court while interpreting Section 354(3) and 235(2) Cr.P.C. elaborated two aspects, firstly that the extreme penalty can be inflicted only in gravest cases of extreme culpability and secondly in making the choice of sentence due regard must be paid to the circumstances of the offender also.

27. The Court has to decide the punishment after considering all aggravating and mitigating factors and the circumstances in which the crime has been committed. Conduct and state of mind of the accused and age of the victim and the gravity of the criminal act are the factors of paramount importance. The court must exercise its discretion in imposing the punishment objectively considering the facts and circumstances of the case.

28. With reference to the sentence we have perused the record. The accused appellant was convicted under Section 304 IPC for life imprisonment and a fine of Rs.3,000/-; under Section 201 I.P.C. rigorous imprisonment for three years and a fine of Rs.2,000/- and in default of payment of fine to undergo further additional two years imprisonment. It transpires from the record that the accused is the husband and deceased is his wife. It also transpires from the record that at the time of incident they had two children out of the said wedlock. The conviction is recorded on 13.4.2005 and at the time of recording of this sentence order the accused was aged about 35 years and now he is above 45 years and he has already spent about more than 13 years in jail. Also convict has no criminal antecedents.

29. Perusal of record shows that accused was arrested on 26.9.2003 during investigation and since then he is languishing in jail.

30. Considering the nature of the offence, gravity, seriousness of the offence, circumstance of the case, previous antecedents and all the circumstances we are of the view that the sentence may be modified and reduced to period already undergone by him.

31. The sentence order under Section 201 I.P.C. for three years and the remaining period of detention of more than 10 years have already been served by him. Therefore, sentence order under Section 201 I.P.C. recorded by the court below is confirmed, but sentence order under Section 304 I.P.C. is modified and reduced to period already undergone by him.

32. Accordingly, this appeal is partly allowed. The sentence is reduced to period already undergone by the appellant.

33. Let a certified copy of the judgment and order be sent to the Chief Judicial Magistrate concerned for compliance report. The lower court records be returned for compliance.

(2016) 8 ILRA 1175
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.08.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 16947 Of 2016

Durgesh Pathak @ Rohit Pathak ...Applicant
State Of U.P. Versus
...Opposite party

Counsel for the Applicant:

Shri Brijesh Sahai, Shri Rajiv Dwivedi

Counsel for the Opposite Party:

G.A., Shri M. Shahanshah

Held –

Paragraph 1 (Introduction & Applicant's Arguments): The Court heard the arguments of the applicant's counsel and the Additional Government Advocate (A.G.A.), and perused the record. The applicant's counsel submitted that the incident occurred on December 13, 2015, and a Non-Cognizable Report (N.C.R.) was lodged the next day by the deceased child's grandfather. In this initial report, the grandfather stated that the child had a squabble with someone, received a thrashing, and was referred to the hospital, where he died later that day.

Paragraph 2 (Inquest and Subsequent Implication): The applicant’s counsel highlighted that during the inquest proceedings on December 15, 2015, the child’s father was a witness. The inquest witnesses jointly opined that an “unknown person” killed the deceased with a motive of sodomy. No specific accused was named until December 17, 2015, when the father gave a statement to the Investigating Officer (I.O.) claiming that, while traveling to the hospital, the child gave an oral dying declaration naming the applicant as the assailant who attempted to sodomize and strangle him.

Paragraph 3 (Arguments on Fabricated Evidence): The counsel argued that it is unbelievable and inexplicable that the grandfather and father would completely fail to mention the applicant's identity in the N.C.R. and the inquest if they already knew it. Instead, they explicitly labeled the assailant as an "unknown person" during the inquest. The defense contended that this subsequent implication was a fabricated afterthought by the I.O. to solve the case, noting that there is no other evidence connecting the applicant to the crime, and the deceased's chain was recovered by police independently, not at the instance of the accused. The applicant has been jailed since December 18, 2015, with no early trial conclusion in sight, and promised to cooperate fully if released.

Paragraph 4 (Prosecution's Opposition): The A.G.A. and the informant's counsel opposed the bail. They argued that the grandfather filed the N.C.R. while the father was taking the child to the hospital, explaining the omission of the name. They also noted that the applicant has one prior criminal case. Furthermore, they contended that under Section 174 of the Cr.P.C., the scope of an inquest is limited to finding the cause of

death, not identifying the accused, so the omission of the name at that stage should not cast doubt on the prosecution's case.

Paragraph 5 (Defense Rejoinder on Inquest Scope): In reply, the applicant's counsel elaborated that while naming an accused is not legally mandatory during an inquest, if witnesses choose to give a description of the culprit, that description matters. They argued there is a qualitative difference between simply omitting a name and explicitly labeling an assailant as "unknown." If the father knew the applicant's identity via a dying declaration (admissible under Section 32 of the Indian Evidence Act), declaring the culprit as an "unknown person" at the inquest creates a loud, irreconcilable contradiction that severely damages his credibility.

Paragraph 6 (Court's Decision): After considering the arguments, reviewing the evidence, evaluating the length of detention, noting the unlikelihood of an early trial conclusion, and finding no evidence of potential tampering, the Court decided to grant bail to the applicant.

Paragraph 7 & Conditions (Operative Order): The Court ordered the release of the applicant, Durgesh Pathak @ Rohit Pathak (involved in Case Crime No. 2370 of 2015, under Section 304 I.P.C., P.S. Kotwali Dehat, District Mirzapur), upon executing a personal bond and two sureties. The release is subject to two conditions: the applicant must not tamper with evidence and must personally appear on every court date.

Paragraph 8 & 9 (Final Directives): The Court authorized the lower court to cancel the bail if any conditions are breached. Finally, it clarified that the observations made in this order are strictly limited to deciding the bail application and will have no bearing on the final merits of the trial.

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. Heard learned counsel for the applicant and learned A.G.A.

2. Perused the record.

3. Submission of the counsel for the applicant is that the incident took place on 13.12.2015 and the N.C.R. with regard to the incident was lodged on next day i.e. on 14.12.2015 at 2.10 p.m. by the grand-father of the deceased. Further submission is that in this N.C.R. which was the first information in point of time about the occurrence, the version given by the grand-father of the deceased was to the effect that on the preceding day i.e. 13.12.2015 the deceased who was a child had picked up some squabble with somebody and it appeared that some body has given him a thrashing as a result of which he was referred to Banaras Hindu University Varanasi. It was further pointed out by the counsel that the deceased had died on 14.12.2015 at 6.00 p.m. in the Hospital. The inquest proceeding of the deceased was also performed on 15.12.2015. It has been emphasized by the counsel that in the inquest proceeding the father of the deceased was himself one of the witnesses of inquest. Counsel has drawn the attention of the court to the inquest proceeding which has been annexed as annexure 3 to the application showing that during the inquest of deceased when the opinion of the inquest witnesses was procured then it was expressed by the inquest witnesses that the deceased was playing in a grove on 13.12.2015 and an 'unknown person' took him to field and probably killed him with the motive of committing sodomy. Further submission is that though till the inquest was prepared the name of any accused did not surface but when the father of the deceased namely, Panchu Yadav was examined on 17.12.2015 he disclosed the name of the applicant as the culprit and gave the statement to the I.O. that while the deceased was being

carried to the hospital, he had disclosed to him the fact that while he was flying a kite the applicant caught hold of him and dragged him to Aarahar field and wanted to sodomize him and when he resisted the applicant tried to strangle him and made assault upon him and snatched away the chain which he was bearing and threw it in the field. Submission is that had there been any truth in this assertion of the father of the deceased that he had been told the name of the culprit and the other details of entire murderous assault made upon the deceased by the applicant, then there is no earthly explanation as to why and under what circumstances the aforesaid fact could remain undisclosed earlier. Contention is that it is unthinkable that even though the N.C.R. of the case would be lodged by none else than the grand-father of the deceased and yet he would neither know as to who was the assailant nor would he disclose the identity of applicant therein. It is also wholly inexplicable as to how and why the assailant was disclosed as an 'unknown person' specifically even at the stage of inquest proceeding during the course of which the father of the deceased himself was present and was also a signatory of the same as witness. Submission is that it is so manifestly demonstrable that this subsequent introduction implicating the applicant is nothing but the brain child of the I.O. who some how in order to work out the case has falsely implicated the applicant in the case. Further submission is that apart from the claim of the father of the deceased of having heard the oral dying declaration of the deceased implicating the applicant, there is absolutely no evidence to connect the applicant with crime. Even the chain belonging to the deceased has been recovered by the police on its own and not at the instance of the accused. Further submission is that in the aforesaid circumstances the falsity of the allegation made against the applicant is apparent on the face of record. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required. It has also been submitted that the applicant is languishing in jail since 18.12.2015 and in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

4. Learned A.G.A. and learned counsel for the informant have opposed the prayer for bail and submitted that N.C.R. was lodged by the grand-father of the deceased while the deceased was taken by the father of deceased to the hospital and therefore, the omission of the applicant's name in the N.C.R. can be attributed to the same reason. Further submission is that there is also one criminal case registered against the applicant before this crime and the applicant has not come up with clean hands in the court. It has also been submitted by the first informant's counsel that the scope of inquest proceedings u/s 174 of Cr.P.C. is very limited and it is beyond the scope of such proceedings to ascertain the identity of the accused. It is not at all required that the name of accused should also be mentioned in the inquest proceedings or should also be disclosed by the witnesses. Contention, therefore, is that the omission of applicant's name in the inquest proceedings should not and can not constitute any legitimate basis to reflect any doubt against the complicity of the applicant in the crime or his identity.

5. Learned counsel for the applicant while placing his rejoinder submission has tried to elaborate upon the scope of inquest proceedings. It has been contended that though it is not necessary to disclose the name of accused in the inquest proceedings as a matter of Law or as a matter of any Rule but if some witnesses of the inquest who are also eyewitnesses of the occurrence or are also the witnesses of some relevant fact having the knowledge about the name of the accused who committed the crime, do on their own volition give out the description of the culprit then such description of the culprit or the name as disclosed by them shall have to be looked into by the court. Submission is that if the description of the culprit given out at the time of inquest proceeding is in contradiction with the name of the accused facing trial then it shall be very relevant fact to be considered and weighed by the court in order to adjudge the truthfulness or the falsehood of the subsequent implication. According to counsel if a witness of inquest who is also eyewitness of the incident of murder discloses the name of a particular accused as the assailant and then subsequently he changed the version and introduced another name of assailant then the contraction of such a nature will substantially detract the evidentiary value of such witness and will also cut at the root of veracity of such witness. In such kind of situation the dichotomy in the name of the culprit and the contradiction with regard to his identity cannot be explained away by resorting to the plea that the earlier contradictory disclosure made at the stage of inquest proceedings was not necessary for the witness to make and that the witness was not bound under law to disclose the name of the accused during the course of inquest proceedings or that it is beyond the scope of proceedings u/s 174 Cr.P.C. to ascertain the name of the accused. In fact those cases where the name of the accused remained undisclosed during the course of inquest proceedings and those cases where a contradictory description has been given in the course of inquest proceedings about the identity of the accused, both of them are on entirely different footing. In the present case the father of the deceased claims to have accompanied his son to the hospital and during his journey the deceased is said to have disclosed the entire details of assault made on him by the applicant. Such a statement said to have been made by the deceased is tantamount to his dying declaration admissible u/s 32 of Indian Evidence Act and would have been a very crucial evidence against the applicant. It is so noteworthy that after the deceased died in the hospital, the same father having full knowledge about the complicity of the applicant in the crime, having full knowledge of the fact that the applicant was responsible for the murder of his son, was made the witness of the inquest proceedings. Yet when he was enquired by the police Officer and his opinion was procured he described the assailant to be of 'unknown identity'. According to counsel, a complete omission to make any mention about the accused or his identity is qualitatively and entirely a different proposition of fact in comparison to the situation where the assailant or the accused has been described to be of 'unknown identity'. Contention of the counsel is that had the father chosen not to give any description about the assailant at all and had he chosen not to make any mention about the accused at the time of inquest, it would have been a very different matter. But if the father of the deceased has chosen to give out the description of the accused then all the logical inference which such description is capable to give rise to shall inevitably follow and there will be no escape out from it. According to counsel, the aforesaid contradiction is too loud to be lightly ignored or be soft-pedaled. The counsel has emphasized upon the distinction between the two situations, one where the name of the accused has not been mentioned in the inquest proceedings, and the other where the accused has been described as some 'unknown person' and has tried to expatiate upon applicant's innocence and his false

implication which according to the counsel is nothing but the result of subsequent afterthought and confabulations.

6. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, this Court is of the view that the applicant may be enlarged on bail.

7. Let the applicant-Durgesh Pathak @ Rohit Pathak, involved in Case Crime No.2370 of 2015, u/s 304 I.P.C., P.S.-Kotwali Dehat, District- Mirzapur be released on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(1) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicant will personally appear on each and every date in the court and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

8. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

9. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merits of the case.

(2016) 8 ILRA 1180
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.08.2016

BEFORE

THE HON'BLE RITU RAJ AWASTHI, J.

Misc. Single/Writ Petition No.- 17288 Of 2016

Ram Lakhan

...Petitioner
Versus

State Of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Shri Anurag Narian Srivastava

Counsel for the Respondents:

C.S.C.

Held –

Paragraph 1–3: Core Challenge and Procedure

The petitioner approached the High Court challenging an order dated July 16, 2016, which cancelled his fair price shop license. The primary grounds for the challenge were that the Sub Divisional Magistrate (SDM) passed the order under administrative pressure from the District Magistrate (DM) of Hardoi, and that the SDM lacked any legal authority to review or recall his own final order. Given the straightforward question of law involved, the Court decided the matter finally with the consent of both parties without waiting for a formal counter-affidavit.

Paragraph 4: Background of the Dispute

The petitioner's license was initially suspended on April 16, 2016, following an inquiry into irregularities reported by a complainant. After considering the petitioner's explanation, the SDM (Respondent No. 3) passed a final order on June 7, 2016, choosing not to cancel the license. Instead, the SDM confiscated the security deposit, imposed a penalty of Rs. 5,000 with a warning, and fully restored the fair price shop. Subsequently, a third party filed a fresh complaint with the DM, who then directed the SDM to recall the restoration order due to the seriousness of the allegations. Acting on these administrative dictates, the SDM recalled his order and re-suspended the license.

Paragraph 5–7: Arguments and Subsequent Inquiries

The petitioner's counsel argued that the SDM lacks statutory review powers and failed to apply independent mind. The State's standing counsel countered that the DM acted in public interest given the gravity of the essential commodity distribution fraud. They noted that a fresh investigation by the Regional Food Officer had since commenced, a formal charge-sheet had been issued, and the final decision was pending the petitioner's response.

Paragraph 8–9: Reviewing the Scope of the Legal Authority

The High Court framed the core issue around whether an SDM holds the legal authority to review a finalized restoration order, especially when doing so at the behest of a superior officer. The Court observed from the records that the impugned order was explicitly triggered by the DM's directive letter dated July 5, 2016.

Paragraph 10–12: Finding on Exceeded Jurisdiction and Final Order

The Court held that the SDM is the designated, independent statutory authority for regulating fair price shop licenses. Once the SDM passed the final order on June 7, 2016, his statutory powers were completely exhausted. Since the relevant Government Orders and Rules do not grant a power of review or recall, the SDM could not reverse his decision. Furthermore, because the order was made "at the dictates" of the DM rather than through an independent application of mind, it was legally unsustainable.

Paragraph 13: Procedural Clarification and Final Relief

The High Court clarified that while the DM, as the overall district in-charge, can forward evidence and recommend initiating fresh separate proceedings against a licensee, he cannot order a subordinate statutory authority to recall a final quasi-judicial order. Consequently, the High Court set aside the impugned order dated July 16, 2016, while granting the competent authority liberty to initiate fresh proceedings strictly in accordance with the law, ensuring a fair opportunity of hearing to the petitioner.

(Delivered by Hon'ble Ritu Raj Awasthi, J.)

1. Heard learned counsel for petitioner as well as learned standing counsel and perused the records.

2. The writ petition has been filed challenging the order dated 16.7.2016 mainly on the ground that the order impugned has been passed at the dictates of the District Magistrate, Hardoi, without proper application of mind. It is also contended that the opposite party no. 3, Sub Divisional Magistrate has no power or authority to recall/review its earlier final order.

3. Learned standing counsel was directed to seek instructions.

4. With the consent of parties' counsel, the matter is being decided finally without calling for the counter affidavit as it involves trivial question of law.

5. Learned counsel for petitioner submits that by the impugned order dated 16.7.2016 the license of fair price shop of petitioner has been cancelled. It is submitted that on the complaint of Smt. Somwati an enquiry was done by the Regional Food Inspector on 14.4.2016 in which certain alleged irregularities were found and the license of fair price shop of petitioner was suspended vide order dated 16.4.2016. On the basis of the enquiry report, a notice was issued to petitioner to which he had submitted his reply/explanation vide letter dated 30.5.2016. The opposite party no. 3, Sub Divisional Magistrate considering the entire material on record including the explanation submitted by the petitioner had taken a final decision dated 07.06.2016 to the effect that the security amount deposited by the petitioner at the time of grant of license shall be confiscated and penalty of Rs. 5,000/- with a warning shall be imposed. The license of fair price shop of petitioner was restored. It was thereafter that one person, namely, Narpati son of Paragi submitted application dated 21.6.2016 before the District Magistrate, Hardoi on which the District Magistrate vide order dated 05.07.2016

had issued direction to the opposite party no. 3, Sub Divisional Magistrate to recall his earlier order as the allegations made against the petitioner are of very serious nature and there are sufficient grounds to cancel his license of fair price shop. It was on these dictates of the District Magistrate that the opposite party no. 3, Sub Divisional Magistrate vide impugned order dated 16.7.2016 has recalled its earlier order dated 07.06.2016 and provided that license of fair price shop of petitioner shall remain suspended.

6. It is contended by learned counsel for petitioner that the opposite party no. 3 has no such power to review/recall its earlier final order dated 07.06.2016. Moreover, the impugned order has been passed without application of mind as it has been passed on the dictates of the District Magistrate.

7. Learned standing counsel, on the basis of instructions, submits that the District Magistrate was of the opinion that the allegations made against the petitioner were of serious nature. There were sufficient grounds for cancellation of fair price shop license and, therefore, on the complaint received by him had directed the opposite party no. 3, Sub Divisional Magistrate to reconsider his decision dated 07.06.2016 and thereafter the opposite party no. 3 has passed the impugned order.

8. It is also submitted that pursuant to the impugned order an enquiry has been conducted by the Regional Food Officer and report has been submitted in which, prima facie, petitioner has been found guilty of certain serious irregularities in the distribution of essential commodities. Considering the said report a charge-sheet along with notice has been issued to petitioner and the reply of the petitioner is still awaited. No final order has been passed so far.

9. The short question involved in the writ petition is as to whether the Sub Divisional Magistrate has power or authority to review/recall its order dated 07.06.2016 which had attained finality more-so when the impugned order has been passed without application of independent mind by the competent authority.

10. The perusal of the order impugned indicates that the District Magistrate vide letter dated 05.07.2016 had issued direction to the opposite party no. 3 to reconsider its decision dated 07.06.2016 as the District Magistrate was of the opinion that there were sufficient grounds to cancel the license of fair price shop of petitioner as the allegations made against the petitioner are of serious nature and his agreement is liable to be cancelled. It was pursuant to the aforesaid direction of the District Magistrate that the order impugned has been passed.

11. It is to be noted that the competent authority for the purpose of grant of fair price shop license and its suspension/cancellation is the Sub Divisional Magistrate concerned and he is the final authority in this regard. The opposite party no. 3, Sub Divisional Magistrate, Sadar, District Hardoi had taken a final decision dated 07.06.2016 whereby he had imposed certain penalty and had confiscated the security amount deposited by the petitioner and had restored the fair price shop license of the petitioner. The Sub Divisional Magistrate, Sadar, Hardoi after passing of the final

order was not empowered to review/recall its order as there is no such provision under the relevant Rules and the Government Orders. Once the Sub Divisional Magistrate had passed the final order, he had exhausted his powers and no review/recall was permissible.

12. Moreover, it is also to be noted that the order impugned has been passed at the dictates of the District Magistrate and has not been passed by application of independent mind of the concerning competent authority, as such, it is not sustainable in the eyes of law.

13. It is needless to observe that in case the District Magistrate was of the opinion that there are serious allegations against the sitting fair price shop licensee i.e., petitioner and they have not been considered, he being overall incharge of the district was fully empowered to forward his opinion as well as the material on the basis of which he has made such opinion to the competent authority to initiate fresh proceedings against the licensee, however, he could not have issued direction to review/recall or reconsider the final order passed by the opposite party no. 3.

14. In view of above, I am of the considered opinion that the order impugned is not sustainable in the eyes of law. The order impugned dated 16.7.2016 is hereby set-aside with liberty to the concerning competent authority to initiate fresh proceedings, in case he is satisfied and pass appropriate orders in accordance with law, giving opportunity to petitioner, expeditiously.

BEFORE

Misc. Bench No.- 17299 Of 2016

The Commission and the Standing Counsel further argued that the petitioner's reliance on Sections 13-H and 13-I was completely misplaced because Section 13-H(2) was deleted long ago. They contended that Section

44-A, introduced in 1994, explicitly commands the Commission to hold a President's/Chairman's bye-election within three months of a vacancy, acting as a mandatory special exception to the general rules governing ordinary members.

Paragraph 8: Submission on Lack of Legal Impediments

The respondents concluded that there was no legal impediment to holding the election for the office, which had been vacant since 2013 due to a successful election petition. They clarified that the State Election Commission can only act once notified of the vacancy by the State Government, meaning there was no administrative delay, and requested the outright dismissal of the writ.

Paragraph 9: Court's Findings on the Voter List Revision

Upon reviewing the arguments, the High Court found that a valid voter list did exist and rejected the petitioner's claim. The Court ruled that because this was a casual vacancy bye-election rather than a general election, the state was not obligated to conduct a full electoral roll revision. Affected individuals had ample opportunity since 2013 to manually update their names under the 1994 Rules, and structural revisions naturally align with impending general elections.

Paragraph 10–12: Statutory Interpretation of Sections 13-H and 13-I

The Court then analyzed the text of Sections 13-H and 13-I regarding casual vacancies. It noted that Section 13-I states a vacancy "may" be left unfilled if the remaining ordinary tenure is less than a year, but emphasized that the word "may" cannot be interpreted as a mandatory "shall."

Paragraph 13–14: Primacy of Section 44-A and Final Dismissal

, the Court held that while the term "Member" generally includes office bearers, Section 44-A is a special provision specifically tailored for the bye-election of a President/Chairman. This special law dictates that a presidential casual vacancy must be filled as soon as possible, completely excluding it from the timeline restrictions applied to standard members under Section 13-I. Finding no merit on either ground, the High Court refused to interfere with the election notification and dismissed the writ petition.

List of Citations:

Sandeep @ Sandeep Mehrotra and another v. State of U.P. and others, [2012 (30) LCD 222]

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.

&

Hon'ble Dr. Vijay Laxmi, J.)

1. The petitioner claiming herself to be an eligible Elector is aggrieved by the holding of the bye-election to the office of Chairman, Nagar Panchayat Kichhauchha, district Ambedkar Nagar to be held on 31.7.2016 on the ground that the said elections are being held on the basis of the Electoral List of the year 2012 that was prepared on the basis of Census of 2001, whereas the new Electoral List should be prepared on the basis of Census of 2011 and then only a valid Electoral List would exist for the purpose of holding of the election. He therefore submits that this violates Article 243-P (g) of the Constitution of India.

2. His further contention is that in the absence of any such list, a bye-election cannot be held and in view of the judgment in the case of **Sandeep @ Sandeep Mehrotra and another v. State of U.P. and others [2012 (30) LCD 222]**, the entire election process is vitiated.

3. He then contends that the provisions of Sections 13-H and 13-I of the U.P. Municipalities Act, 1916 are being violated as this is a bye-election which cannot be held as the casual vacancy would give a term of less than one year and hence, the vacancy may be left unfilled.

4. Thus, either way, the initiation of the elections is vitiated and therefore, the post of Chairman should be filled-up in the forthcoming election of 2017 for which the revision of Electoral Roll is already going on and is likely to be completed in the month of September, 2016 whereafter the elections of the office of Chairman can be held alongwith all of the elections of the local bodies scheduled upon expiry of the term. For this, he has invited the attention of the Court to the timetable, which fixes the finalization of the Electoral College by 10.9.2016, a copy whereof is Annexure – 3 to the writ petition.

5. Opposing the petition, Ms.Aparajita Bansal, learned Counsel for the State Election Commission has urged that the argument of the petitioner of violation of any rights does not arise, inasmuch as if the petitioner had become of age as an Elector as alleged by her, then she could have got the Electoral List corrected under the existing rules by moving an application before the Electoral Registration Officer. According to the learned Counsel for the Commission, it is not understood as to why the petitioner or any other aggrieved person waited for the same since 2013 when the election of the then Chairman was declared as invalid in an Election Petition. It is urged that since 2013 till now, there was ample time for the petitioner to seek correction in the Electoral Roll before the Electoral Registration Officer under the relevant rules of 1994. The filing of the petition on the eve of the holding of the bye-election therefore cannot be a ground to question the correctness of the election process which has already been notified and it should not be interfered at this stage under Article 226 of the Constitution of India.

6. She also contends that the argument on the strength of Sections 13-H and 13-I of the 1916 Act is also misplaced as the petitioner's Counsel has totally ignored the impact of Section 44-A thereof. The Election Commission is duty bound to get the election held within three months of its vacancy. It is further submitted that Section 13-H (2) stood deleted long back.

7. Learned Standing Counsel submits that with the introduction of Section 44-A by U.P. Act No.12 of 1994, the bye-election of the Chairman has to be held. This has been carved out as an exception to Section 13-H which only talks of a Member whereas for the office of President there is a specific provision under Section 44-A.

8. In the aforesaid background, Ms. Aparajita Bansal and learned Standing Counsel both contend that there is no legal impediment in the holding of the election for the causal vacancy of the office of a Chairman which is vacant since 2013 on account of the setting aside of the election of the elected Chairman. The State Election Commission can only proceed when such information is

given to it by the State Government for filling up of the vacancy and therefore, there is no delay on the part of the Election Commission in proceeding to get the bye-election held. It is therefore submitted that the writ petition is devoid of merit and deserves to be dismissed.

9. We have considered the rival contentions and we find that the revision of the Electoral Roll has already commenced on account of the general election of local municipalities that are to be held in 2017. If any individual was affected by the non-inclusion of his/her name, the remedy is provided. During the intervening period since 2013, the 1994 Rules were in existence under which a person who had come of age could have always got the Electoral Roll supplemented by getting his/her name added in the event he/she intended to exercise the right of franchise. The contention of the learned Counsel for the petitioner that it is the obligation of the State to revise the Electoral Roll has not been raised in the context of the General Election but of a bye-election and of a casual vacancy. In such a situation, the proceedings initiated on the strength of the Electoral College already existing cannot be vitiated as the revision of Electoral Rolls ordinarily takes place with the impending General Election. The State is therefore discharging its obligations and had the petitioner or any other individual approached the Electoral Registration Officer, the State would have discharged its obligation. In such a situation, the holding of the bye-election on the basis of the existing Electoral List cannot be said to be vitiated on that count. The argument of the learned Counsel for the petitioner that bye-elections are going to be held on the basis of no Voter List is therefore misplaced and is accordingly rejected. The Voter List exists and the bye-elections are being held on a casual vacancy having arisen.

10. Coming to the next argument, it is evident that Sections 13-H and 13-I indicate the filling up of the casual vacancy of Members and a Member would also include the office bearer. Sections 13-H and 13-I are extracted hereunder:-

“13-H Bye-elections –(1) Subject to the provisions of sub-section (2) of Section 13-I, when the seat of a member, elected to a Municipality becomes vacant or is declared vacant or his election is declared void, the State Election Commission shall in consultation with the State Government by a notification in the Official Gazette, call upon the ward concerned to elect a person for the purpose of filling the vacancy caused before such date as may be specified in the notification and the provisions of this Act and of the Rules and Orders made thereunder, shall apply, as far as may be, in relation to the election of member to fill such vacancy.

(2) If the vacancy so caused be a vacancy in a seat reserved in any such ward for the Scheduled Castes, the Scheduled Tribes, the Backward Classes or the women the notification issued under sub-section (1) shall specify that the person to fill that seat shall belong to the Scheduled Castes the Scheduled Tribes, the Backward Classes or the women, as the case may be.”

“13-I Certain casual vacancies not to be filled – Where a vacancy occurs on a Municipality by reason of death, resignation, removal or avoidance of an election of the elected member and the term of office of that member would, in the ordinary course of events, have determined within one year of the occurrence of the vacancy. Such vacancy may be left unfilled.”

11. The words used in Section 13-I are that if the tenure of the office of a Member on a casual vacancy is less than a year, then the vacancy may not be filled. The word '*may*' cannot be read as '*shall*' in the context it has been used. However, even attaching the ordinary meaning to the words used in the aforesaid two Sections, it is correct that the word '*Member*' would also include an office bearer, but for the purpose of bye-elections of a President, the provisions of Section 44-A would directly come into play, which is extracted hereunder:-

*“44-A Bye-election of President – If a casual vacancy occurs in the office of the President owing to death or resignation or any other cause, the President **shall be elected** as soon as may be thereafter, but **not later than three months** from the date of occurrence of the said vacancy, in the manner provided in Section 43.”*

12. This special provision therefore excludes the status of a Member as understood in the context of his tenure under Section 38 of the U.P. Municipalities Act, 1916. A perusal of Section 44-A would therefore clear any doubt that it is a special provision that has been made in relation to the office of Chairperson, namely, the President of the Municipality. Sub-Section (3) of Section 43 applies to the provisions of the Act and Rules mutatis mutandis in relation to the election of a President, but at the same time, the provision of Section 44-A exclusively defines the bye-election of a President and therefore, the same would not be governed by the provisions of bye-elections of the Members under Section 13-I.

13. Thus, on both counts, we do not find any reason to interfere with the notification of the bye-election of the office of President of the Municipality at the instance of the petitioner. The writ petition lacks merit and is accordingly **rejected**.

(2016) 8 ILRA 1189
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2016

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Criminal Misc. Writ Petition No.- 17614 Of 2016

Smt. Kirtan Kokila Baranwal & Ors. ...Petitioners
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Shri Anand Prakash Paul, Shri Brij Bhushan Paul, Shri Vishal Talwar

Counsel for the Respondents:

G.A.

Held –

Paragraph 1–2: Parties and Reliefs Sought

The High Court heard arguments from the counsels representing the school management (petitioners), the informant (respondent), and the State. The petitioners sought a writ of certiorari to quash the criminal proceedings and the First Information Report (FIR) under Sections 109, 304, and 336 of the Indian Penal Code (IPC) at Police Station Aurai, District Bhadohi, along with a mandamus to protect them from arrest.

Paragraph 3: Arguments of the Petitioners

The petitioners argued that running an educational institution is not a criminal offense and that they committed no illegal acts. Their counsel emphasized that legal judgments should not be driven by emotional reactions and relied on established judicial precedent regarding strict parameters for police arrests.

Paragraph 4–5: First FIR and Account of the Accident

The criminal case originated from a horrific accident on July 25, 2016. An initial FIR filed by Kamla Shankar Mishra stated that a “Tata Magic” van carrying young students to ‘Tender Hearts English School’ was approaching an unmanned railway crossing. Despite explicit warnings from the children and bystanders about an oncoming passenger train, the driver, Rashid Khan, angrily insisted he could beat the train, sped forward, and crashed. Three children died instantly, and two more succumbed to injuries at the hospital, while multiple others were severely injured.

Paragraph 6: Second FIR Implicating School Management

A subsequent detailed written complaint was filed by Aditya Narayan Ojha against the school's Manager (Smt. Kokila Baranwal), Principal (S.P. Vishwakarma), and Owner (Surendra Baranwal). The FIR alleged that the management, driven purely by commercial profit, forced excessive overloading of the transport vehicles, hired an unskilled driver on meager wages without checking his background, and ignored prior safety complaints from parents. It asserted that the management pressured the driver to make hasty trips, directly causing the fatal accident that killed 8 children in total.

Paragraph 7–9: Petitioners' Background and Vehicle Status

The petition listed the names of the 8 deceased and 8 injured students. The petitioners' counsel strongly argued that Petitioner No. 2 was a reputable carpet manufacturer and exporter, and that both management officials were senior citizens (aged 67 and 71) suffering from various age-related ailments. However, the petition explicitly admitted that the school management had deployed the offending "Tata Magic" vehicle (Registration No. U.P. 66 T 4566) as part of their official transport fleet.

Paragraph 10–12: Court's Analysis and Dismissal of the Petition

The Court invoked classic legal jurisprudence to state that the law cannot sit by limply or allow influential wrongdoers to break through the legal system like "wasps through a cobweb" while the vulnerable suffer. It found that the petitioners failed to present any convincing argument showing that a cognizable offense was absent or that the police lacked the statutory authority to investigate. Concluding that the FIR clearly disclosed a serious cognizable crime, the High Court refused to quash the proceedings and dismissed the writ petition for lack of merit.

List of Citations:

1.Joginder Kumar v. State of U.P., (1994) 4 SCC 260

2.Jennison v. Baker, (1972) 1 All ER 997 / (1972) 2 QB 52

(Delivered by Hon'ble Prabhat Chandra Tripathi, J.)

1. Heard Sri B.B. Paul, learned counsel for the petitioners, Sri S.P. Giri, learned counsel for the respondent no.7 and Sri Gaurav Pratap Singh, learned A.G.A. for the State and perused the record.

2. The petitioners have made following prayer:

“(i) To issue a writ, order or direction in the nature of certiorari, calling for record of the case, quashing proceeding of Case Crime No.0194 of 2016, under Sections 109, 304 and 336 I.P.C., Police Station Aurai, District Bhadohi including first information report of respondents 2nd set dated 26.7.2016 (Annexure-1).

(ii) To issue a writ, order or direction in the nature of mandamus commanding the respondents not to arrest the petitioners in Case Crime No.0194 of 2016, under Sections 109, 304 and 336 I.P.C., Police Station Aurai, District Bhadohi without considering necessary of their arrest.

(iii) To issue ad interim mandamus, staying arrest of petitioner in Case Crime No.0194 of 2016, under Sections 109, 304 and 336 I.P.C., Police Station Aurai, District Bhadohi arising out of first information report of respondents 2nd set dated 26.7.2016 (Annexure-1).

(iv) To issue any other suitable writ, order or direction as this Hon'ble Court may deem fit and proper in the peculiar facts and circumstances of the case.

(v) To award cost of petition to the petitioners.”

3. Learned counsel for the petitioners submitted that running of an educational institution is not a crime and no offence has been committed by the petitioners. It has also been submitted that the law should not be emotional and much emphasis was also laid upon the case of **Joginder Kumar v. State of U.P. reported in 1994 SCC (4) 260.**

4. The genesis of this horrific incident is narrated in the F.I.R. registered in case crime no.0194 of 2016, under Sections 109, 304, 336 I.P.C., P.S. Aurai, District Bhadohi against Rashid Khan, driver of a Magic Van bearing registration no.U.P.T4566.

5. Informant, Kamla Shankar Mishra s/o late Shivraj Mishra, r/o Dinanathpur, Kaieermau, Aurai, District Bhadohi informed on date 25.7.2016 at 10:15 A.M. that on date 25.7.2016 at about 7:15 A.M. a Magic Van bearing registration no.U.P. 66 T 4566 which was driven by its driver, Rashid Khan, was carrying small children from village Dinanathpur to 'Tender Hearts English School', Ghosia. At the same time, an 'Up' passenger train no.55122 was going from Varanasi to Allahabad. Viewing the approaching train persons present near the railway track and the children sitting inside the vehicle prohibited the driver not to cross the railway line since the train was nearby. At this, driver became angry and quipped that no sooner than the train would arrive he would cross the railway line and he would show this that day that how the Magic Van carrying the small children happened to cross the railway line and he started crossing the railway line by driving the Magic Van in a high speed. At that time, passenger train arrived and rear portion of the Magic Van was hit by the train. Due to forceful hitting the Magic Van turned turtle to the lower slope on the northern side of the slope and of all the children sitting inside the vehicle became injured and Abhishek, Aniket and Pradyumn died on the spot. Km. Shakshi, Arpit, Naitik, Km. Shweta, Shreyansh, Ayush, Abhichal, Praphulla, Anjali, Akanksha, Aryan Dubey, Pratyush and Ansh were sent to different hospitals for treatment in a precarious injured condition and during treatment Km. Shweta and Km. Sakshi died. Rest of the injured were being treated in the hospital and driver is also treated at Varanasi. This daring act of the driver was being informed to register the case.

6. Now the F.I.R. in case crime no.0194 of 2016, under Sections 304, 337, 338 I.P.C., P.S. Aurai, District Bhadohi is narrated as below:

7. On date 25.7.2016 informant, Aditya Narayan Ojha r/o Meghipur, Kaieermau, Aurai, District Bhadohi has given a written information on date 25.7.2016 to the Superintendent of Police, Bhadohi which was registered on date 26.7.2016 at P.S. Aurai, District Bhadohi at 20:45 hours. This F.I.R. describes that Manager, Smt. Kokila Baranwal, Principal, S.P. Vishwakarma and real owner Surendra Baranwal of 'Tender Hearts English School', Ghosia compelled students for transportation to the school for their commercial profit. They accommodated more students than the capacity of 'Magic' vehicle of the school. Without enquiring about the skill, social and criminal antecedents of the vehicle's driver they made the driver to drive the vehicle on meagre wages. The informant and on narration of the boys (Ajay Mishra, Kamla Kant Mishra, Jay Shankar Tiwari, Ahswani Kumar Mishra etc.) the complaint was made to the Manager and the Principal in this regard; but no heed was paid. Instead the management created pressure upon the Magic driver to make haste and make several trips. On date 25.7.2016, gross negligence was committed by the

Magic driver due to this pressure, wherein collision between the train and the Magic Tata vehicle occurred at Kaieermau (Meghipur) Railway Line Crossing; 08 children died on the spot and 08 children were struggling with their lives in different hospitals. Whole peace and tranquillity had been disturbed due to this incident. The Manager and Principal of 'Tender Hearts English School', Ghosia were fully responsible for that. It has been prayed that strict penal action may be taken.

8. In para-19 of the writ petition, the names of 08 injured students and the names of 08 deceased students have been mentioned.

9. It has been vehemently argued by the learned counsel for the petitioners that the petitioner no.2 is the Manufacturer and Exporter of carpets and his two sons are stationed at different places in U.S.A. The petitioner no.1 and the petitioner no.2 are aged about 67 years and 71 years respectively and are suffering from different ailments.

10. In para-16 of the writ petition, it has been mentioned that for the convenience of the students, the management of the school has deployed 03 new buses besides 05 new vans titled 'Tata Magic' and at the serial no.8 the description of the offending vehicle bearing registration no.U.P. 66 T 4566 has been mentioned.

11. It is apt to quote:-

“Also In **Jennison Vs. Baker 1972 (1) ALL ER 997=(1972) 2OB52**, it was pithily stated:

“Law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope. “Increasingly people are believing as observed by Salmond quoted by Diogenes Laertius in “Lines of the philosophers” laws are like spiders webs, if some light or powerless thing falls in to them, it is caught, but bigger one can break through and get away. Jonathan Swift in his “Essay on the Faculties of the Mind” said in similar lines: “laws are like of cob webs, which may catch small flies, but let wasps and hornets break through.”

12. The learned counsel for the petitioners has not brought forth anything cogent or convincing argument to manifest that no cognizable offence is disclosed prima facie on the allegations contained in the F.I.R. or that there was any statutory restriction operating on the police to investigate the case.

13. Having scanned the allegations contained in the F.I.R. the Court is of the view that the allegations in the F.I.R. do disclose commission of cognizable offence and, therefore, no ground is made out warranting interference by this Court. The prayer for quashing the same is refused.

14. The petition lacks merit and is accordingly, **dismissed**.

(2016) 8 ILRA 1193
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.08.2016

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.

Writ C No.- 20797 Of 2016

Hari Narayan Singh & Ors. ...Petitioners
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Shri Vijay Kumar Singh, Shri Hritudhwaj Pratap Sahi

Counsel for the Respondents:

C.S.C., Shri Manish Goel, Shri Piyush Kishore Srivastava, P K Upadhyay

Held –

Core Legal Issue: The principal issue for consideration in this writ petition is whether the ex-officio members (the Principal and two teachers) of an educational institution's committee of management, as envisioned by Section 16-A of the U.P. Intermediate Education Act, 1921, are legally entitled to vote in an election to fill a casual vacancy for the post of Manager.

Background and Original Election: The Rastriya Intermediate College, Sirsi, Jaunpur, is run by a registered society under a scheme of administration providing a 5-year term for its Committee of Management. In the last regular elections held on September 10, 2013, Babban Singh was elected President and Ram Murti Singh was elected Manager.

Triggering Casual Vacancies: On March 23, 2014, President Babban Singh died, creating the first casual vacancy. The first petitioner claimed he was elected as the new President on June 8, 2014. Subsequently, on July 23, 2015, Manager Ram Murti Singh resigned, creating a second casual vacancy for the Manager's post, which became the core bone of contention.

The Fourth Respondent's Claim: The fourth respondent (the Deputy Manager) claimed that Ram Murti Singh's resignation was accepted on July 26, 2015, in meetings of both the general body and the Committee of Management, wherein he was authorized to officiate as Manager. On November 6, 2015, the District Inspector of Schools (DIOS) recognized him and attested his signature.

The Petitioners' Rival Claim and Consent Order: The petitioners set up a rival claim, stating a meeting on October 4, 2015, had co-opted Mahavir Singh as Manager. This led to a previous writ petition which was disposed of by consensus on December 11, 2015, directing the DIOS to hold a fresh election for the post of Manager via secret ballot.

Objections Over the Electoral College: In preparation for the new election, the fourth respondent supplied an outdated list of 15 members containing deceased individuals (including the original President

Babban Singh) and the resigned Manager, while excluding the first petitioner. The petitioners filed an affidavit objecting to this list and specifically argued that the three ex-officio members had no right to vote.

The Disputed Election and DIOS Order: The Election Officer ignored the petitioners' objections and conducted the election on February 16, 2016, using the fourth respondent's list. The fourth respondent was declared the winner with 9 votes against the fourth petitioner's 3 votes. On February 27, 2016, the DIOS formally recognized this election, which the petitioners challenged via the current writ petition.

Petitioners' Contentions: Senior Counsel for the petitioners argued that: (a) the scheme of administration explicitly prohibits ex-officio members from voting for office bearers; (b) the deceased President was wrongly included while the first petitioner was excluded; and (c) the resigned Manager was illegally allowed to vote.

Fourth Respondent's Counter-Arguments: Counsel for the fourth respondent countered that: (a) Section 16-A of the Act grants ex-officio members an absolute right to vote; (b) any conflicting provision in the scheme of administration is void; and (c) the first petitioner was never properly approved or elected as President.

Statutory Framework of Section 16-A: The Court examined Section 16-A of the Act, noting that it explicitly states the Head of the institution and two teachers shall be ex-officio members of the Committee of Management "with a right to vote." It restricts voting only when a member's personal conduct is under discussion.

Strict Rules of Statutory Interpretation: Citing Supreme Court precedents, the Court noted that when the language of a statute is plain and unambiguous, courts must adhere to its grammatical and ordinary sense. Words cannot be added, substituted, or interpreted away based on perceived inconvenience or a desire to import external rationality.

Conflict Between Statute and Management Scheme: The Court held that Section 16-A confers an unequivocal, absolute right to vote. If an institution's approved Scheme of Administration contains clauses restricting this statutory voting right, such provisions are inconsistent with the Act, cannot be infused with life, and must give way to the statute.

Overruling of Division Bench Precedent as Per Incuriam: The Court addressed a past Division Bench judgment (Ajab Singh) which had barred ex-officio members from voting to keep them out of college politics. The Court agreed with a later Single Judge ruling that Ajab Singh was rendered per incuriam (in ignorance of the law) because Section 16-A(1) was never brought to that bench's attention.

Distinguishing Harjinder Nagar Case: The Court noted that another case relied upon by the petitioners (Harjinder Nagar) also failed to consider Section 16-A(1). Furthermore, the Division Bench in that case's appeal did not actually endorse the restriction on ex-officio voting, but rather upheld the ultimate decision on different mathematical grounds.

The Practical Utility of Ex-Officio Voting: The Court explained that once a 15-member management committee is formed, decisions are made by majority will. If ex-officio members are excluded from filling casual vacancies, an office bearer might be elected who lacks the confidence of the full composite committee, effectively paralyzing the institution's management. Thus, the legislature deliberately did not curtail their right.

Disqualification of the Resigned Manager: Turning to the next issue, the Court ruled that when Ram Murti Singh resigned from the post of Manager, he ceased to be part of the Committee of Management. Because the electoral college must consist of members currently holding office on the election date, allowing him to vote was illegal.

Estoppel Against Disputing the President's Status: On the issue of the first petitioner's exclusion, the Court found that the fourth respondent had previously sent notices addressing the first petitioner as President and had recorded his absence due to illness in prior minutes. The fourth respondent was therefore legally stopped from claiming the first petitioner was never elected.

Administrative Approval for Casual Vacancies: The Court clarified that while a full election of a Committee of Management requires recognition from educational authorities, no separate, explicit statutory approval is required when filling an internal casual vacancy for a non-managerial post like President. Simple communication of the proceedings to the authorities is sufficient.

Invalid Electoral College Vitiates the Election: The Court concluded that even though the ex-officio members were properly allowed to vote, the illegal inclusion of the resigned Manager and the illegal exclusion of the actual President were fatal errors. An election conducted with an fundamentally flawed and unfinalized electoral college cannot stand.

Final Order and Directions: The High Court quashed the DIOS order dated February 27, 2016, and declared the election of February 16, 2016, void. The DIOS was directed to convene a fresh election meeting where the first petitioner must be included, the resigned manager must be excluded, and the ex-officio members shall retain their right to vote.

Case Laws Cited:-

1. **Stock vs. Frank Jones (Tipton) Ltd., [1978] 1 All ER 948 (referenced via Supreme Court reliance)**
2. **Grey vs. Pearson, (1857) 6 H.L. Cas. 61**
3. **Abley vs. Dale, (1851) 11 C.B. 378**
4. **Sangeeta Singh vs. Union of India and others, (2005) 7 SCC 484**
5. **Padma Sundara Rao (Dead) & Others vs. State of Tamil Nadu and Others, (2002) 3 SCC 533**
6. **Ajab Singh vs. District Inspector of Schools, Meerut and others, 1971 A.L.J. 165**
7. **Committee of Management DAV Inter College, Tateir Baghpat and another vs. State of U.P. and others, 2010 (3) ADJ 35**
8. **State of U.P. vs. Synthetics and Chemicals Ltd., 1991 (4) SCC 139**
9. **Harjinder Nagar Inter College and Another vs. State of U.P., 2012 (9) ADJ 1**
10. **Lalappa Lingappa & Ors vs. Laxmi Vishnu Textile Mills Ltd., AIR 1981 SC 85211. Robert Wigram Crawford vs. Richard Spooner, (1846) 4 M.I.A. 179**

(Delivered by Hon'ble Manoj Kumar Gupta, J.)

1. One of the issues which arise for consideration in the instant writ petition is whether the *ex-officio* members of the committee of management envisaged by Section 16-A of the U.P. Intermediate Education Act, 1921¹ are entitled to vote at an election for filling up the casual vacancy of manager.

2. The background facts in which the controversy arose are that Rastriya Shiksha Samiti, Sirsi, Jaunpur, later came to be known as Vishwanath Singh Shiksha Samiti, Sirsi, Jaunpur is a registered society under the provisions of the Societies Registration Act, 1860. It runs an Intermediate College in the name of Rastriya Intermediate College, Sirsi, Jaunpur. It is a recognised institution under the provisions of the Act. The institution receives grant-in-aid from the State

Government and consequently the provisions of U.P. Act No. 24 of 1971 are also applicable. The institution is being run in accordance with a duly approved scheme of administration whereunder the term of the Committee of Management of the institution is five years. The last election of the Committee of Management was held on 10.9.2013 in which one Babban Singh was elected as President and Ram Murti Singh as Manager. Petitioners 2, 3 and 4 were elected as members of the Committee. Babban Singh, the President died on 23.3.2014. The first petitioner claimed that he, who was President of the parent society, was also elected as President of the College by the Committee of Management on 8.6.2014 against the casual vacancy that occurred on account of death of Babban Singh. On 23.7.2015, Ram Murti Singh, the Manager resigned. This again gave rise to a casual vacancy on the post of Manager. The filling up the said vacancy is the bone of contention between the petitioners and the fourth respondent, the Deputy Manager. According to the fourth respondent, the resignation submitted by Ram Murti Singh was accepted in a meeting of the general body of the parent society held on 26.7.2015 at 11:00 a.m. and in his place, he was authorised to work as Manager until the post is filled up by regular arrangement. It was followed by a meeting of the Committee of Management of the institution held at 4:00 p.m. on the same day in which a similar decision was taken. The fourth respondent on the basis of the decision taken in the meeting held on 26.7.2015 submitted a request to the second respondent, the District Inspector of Schools for attestation of his signature as Manager for the purpose of operating the accounts of the institution.

3. The petitioners setup a rival claim contending that no meeting had taken place on 26.7.2015, rather a meeting of the Committee of Management took place on 4.10.2015 in which the resignation of Ram Murti Singh was accepted and in his place one Mahavir Singh, a member of the Committee was co-opted as Manager.

4. The aforesaid rival claim set up by the parties was subject matter of consideration by the District Inspector of Schools by order dated 6.11.2015. The District Inspector of Schools, taking into consideration the affidavit filed by Ram Murti Singh in support of the alleged proceedings dated 26.7.2015, in which the fourth respondent was authorised to discharge the duties as Manager until regular arrangement is made, recognised him as Manager for the remainder of the term and also attested his signatures.

5. The order of the District Inspector of Schools dated 6.11.2015 was subjected to challenge by the petitioners by means of a writ petition². In the said writ petition, the main contention of the petitioners was that the fourth respondent had been recognised as Manager without considering the case set up by them disputing the genuineness and validity of the proceedings dated 26.7.2015. During the course of hearing of the writ petition, it was admitted that Mahabir Singh, whom the petitioner alleged to have been elected as Manager, had died on 4.10.2015. Thus, the claim set up by him for attestation of his signature was rendered infructuous. In view of it, counsel for the parties, in order to put quietus to the controversy agreed to the disposal of the writ petition on basis of consensus. Accordingly, by judgment dated 11.12.2015, the writ petition was disposed of in following terms :-

a) The second respondent is directed to convene a meeting of the committee of management of the institution within three weeks of receipt of certified copy of this order. The date of the meeting shall be duly intimated to the office bearers and members of the committee of the institution by registered post as well as by publishing a notice in a local Hindi Newspaper. The expenses in this regard shall be borne by the third respondent.

b) The meeting shall be presided over by the second respondent himself or by his nominee, who could be the Accounts Officer in his office or Principal of some Government College.

c) In the aforesaid meeting, the only agenda would be regarding filling up of the vacancy on the post of the Manager of the committee of management of the institution. The motion shall be put to vote by secret ballot and thereafter, appropriate decision shall be taken in regard to the filling up of the post of Manager, as per the result of the election.

d) Until the new Manager is elected, the Deputy Manager i.e. the third respondent shall be entitled to function as Manager in officiating capacity.

e) However, soon after the elections are held, the newly elected Manager shall be entitled to take over the duties attached to the post of the Manager of the institution and the second respondent shall act accordingly in attesting the signatures of the newly elected Manager. The impugned order will thus abide by the outcome of the elections, which would be held in pursuance of the directions aforesaid.

6. In pursuance of the directions of this Court, the District Inspector of Schools by order dated 1.1.2016 nominated the third respondent (Finance & Accounts Officer, Secondary Education, Jaunpur) as Election Officer for conducting the election on the post of Manager. The third respondent on 27.1.2016 issued an order convening meeting of the Committee of Management on 16.2.2016 for filling the casual vacancy of Manager. It was further notified that in case any one has any objection in relation to the election process, the same could be filed in his office by 8.2.2016. The fourth respondent submitted a list of 15 persons supposedly containing the names of the members and office bearers of the Committee of Management before the Election Officer on 28.1.2016. It comprises of the name of those who were elected in the last election held in the year 2013-14. Thus, it mentioned name of Babban Singh as President who had infact died on 23.3.2014, Ram Murti Singh as Manager, who had resigned on 23.7.2015 and names of Kripa Shankar Lal and Mahavir Singh as Treasurer and member respectively, though they had also died since after the election held in the year 2013. On the other hand, the list did not contain the name of the first petitioner though he claimed to be elected as President after the death of Babban Singh. This prompted the petitioners to file their objection by way of affidavit before the third respondent pointing out the aforesaid discrepancies. They further raised a plea that the *ex-officio* members namely, the Principal and two teachers of the institution whose name find place in the list supplied by the fourth respondent, do not have right to vote in election of the office bearers of a committee of management. They also supplied a list of the office bearers and members, which according to them reflected the position of the Committee as was in existence at the relevant time.

7. The third respondent did not pay heed to the objection filed by the petitioners. He proceeded to hold the election on the assigned date and time i.e., on 16.2.2016 from the list supplied by the fourth respondent. In the election held on that date, the fourth petitioner and the fourth respondent were the only two contestants for the post of Manager. The fourth respondent was declared elected having got 9 votes whereas the fourth petitioner got only 3 votes. The petitioners made a representation on the same date before the District Inspector of Schools pointing out various irregularities allegedly committed by the third respondent in conducting the election and requested for fresh election being held from the list of office bearers and members supplied by the petitioners. However, the District Inspector of Schools by impugned order dated 27.2.2016 has recognised the election of the fourth respondent on the post of Manager. Aggrieved thereby, the instant writ petition has been filed.

8. The fourth respondent entered appearance by means of a caveat and filed a short counter affidavit. The petitioners filed a supplementary affidavit. Counsel for the parties made a statement before the Court that they do not intend to file any further affidavits and requested for the matter being heard finally.

9. Sri G. K. Singh, learned senior counsel appearing on behalf of the petitioners assailed the election proceedings dated 16.2.2016 as well as the order passed by the District Inspector of Schools dated 27.2.2016 recognising the said election on the following grounds :-

(a) The three *ex-officio* members of the Committee of Management, namely, the Principal and two teachers were not entitled to vote in the election. It is urged that clause 5 (ga) of the Scheme of Administration as originally framed (Annexure 3) specifically prohibits participation of the *ex-officio* members in the election of the office bearers or members of the Committee of Management or any proceedings relating to the passing of no confidence motion or determination of disability of any member/ office bearer. Consequently, the participation of three *ex-officio* members, all of whom had voted in favour of the fourth respondent, had rendered the election proceedings illegal and void.

(b) Babban Singh, erstwhile President being dead was wrongly shown as President of the Committee of Management on the basis of which election had been conducted by the third respondent, whereas the first petitioner who was elected as President in his place was wrongly excluded from the election process.

(c) Ram Murti Singh, erstwhile Manager who had admittedly resigned on 23.7.2015 was wrongly permitted to participate in the election process. He had voted in favour of the fourth respondent, thus adversely affecting the outcome of the election.

(d) Non-inclusion of the name of the first petitioner in the electoral college for filling up the casual vacancy has rendered the entire election null and void. He has been deprived of his right to contest the election and/or cast his vote, thus, vitiating the entire election process.

(e) The third respondent though had invited objections against the election process but he held the elections without considering the objections filed by the petitioners and also without finalising the electoral college which is sine qua non for holding of a valid election.

10. On the other hand, Sri Manish Goel, appearing on behalf of the fourth respondent submitted that :

(a). the *ex-officio* member viz, the Principal and two teachers were rightly permitted to vote in view of such right conferred in their favour by Section 16-A of the Act.

(b). The only approved scheme of administration in existence is the one approved by the Dy. Director of Education on 25.1.1985 (Annexure 5 to the writ petition). Therein, there is no prohibition for the *ex-officio* members participating in the election of the office bearers and particularly for filling up the casual vacancy on the post of Manager.

(c). Arguendo that the scheme brought on record as Annexure 3 was in existence, the same stood superseded by the new scheme approved on 25.1.1985 and thus the petitioners cannot be permitted to place reliance on the old scheme. Further any provision in the scheme of administration which restricted the right of the *ex-officio* members to vote, is contrary to the provision of Section 16-A of the Act, consequently, such provision is unenforceable and void.

(d). The first petitioner was not permitted to participate in the election as the election was to be held from the Committee as originally elected on 10.9.2013, in which concededly the first petitioner was not elected as President. It is further sought to be suggested that infact, the first petitioner was never elected as President after death of Babban Singh and thus even otherwise, he had no right to contest the election or to vote therein.

11. Countering the submissions made by Sri Manish Goel, learned counsel for the petitioners submitted that the scheme approved by the Deputy Director of Education on 25.1.1985 is only an amendment to the earlier scheme of administration and it does not supersede the same. To buttress the submission, he placed reliance on various provisions of earlier scheme of administration and the amended scheme of administration and tried to bring home the fact that in the scheme subsequently approved, various provisions as contained in the original scheme do not find place and thus the same does not stand superseded altogether as sought to be urged on behalf of the contesting respondent. He further submitted that the election of the first petitioner on the post of President had never been a matter of dispute. He submitted that even when previous writ petition was filed by the first petitioner showing himself as President, assailing the order dated 6.11.2015, the claim of the first petitioner was not disputed. It is further submitted that the fourth respondent himself, in the notice issued on 23.7.2015 for convening the meeting dated 26.7.2015 had shown the first petitioner as President and again in the proceedings dated 26.7.2015, thus, it does not lie in the mouth of the fourth respondent to dispute the election of the first petitioner on the post of President.

12. Section 16-A of the Act envisages a Scheme of Administration for every institution which amongst other matters provides for the constitution of a Committee of Management vested with the authority to manage and conduct the affairs of the institution. It stipulates that the Head of the institution and two teachers thereof elected by rotation according to seniority, shall be *ex-officio* members of the Committee of Management with a right to vote. For convenience of reference, relevant part of section 16-A is reproduced below :-

16-A. Scheme of Administration --- Notwithstanding anything in any law, document, or decree, order of a Court or other instrument there shall be a Scheme of Administration (hereinafter referred to as the Scheme of Administration) for every institution, whether recognised before or after the commencement of the Intermediate Education (Amendment) Act, 1958. The Scheme of Administration shall amongst other matters provide for the constitution of a Committee of Management (hereinafter called the Committee of Management) vested with authority to manage and conduct the affairs of the institution. The Head of the institution and two teachers thereof, who shall be elected by rotation according to seniority in the manner to be prescribed by regulations, shall be *ex-officio* members of the Committee of Management with a right to vote.

(2) No member of the Committee of Management shall either attend a meeting of the committee or exercise his right to vote whenever a charge concerning his personal conduct is in discussion.

(3) The Scheme of Administration shall also describe subject to any regulations, the respective powers, duties and functions of the Head of the Institution and Committee of Management in relation to the institution.

13. Section 16-CC of the Act substituted by U.P. Act No.1 of 1981 provides that the Scheme of Administration of an institution whether recognised before or after commencement of the Intermediate Education (Amendment) Act, 1980, shall not be inconsistent with the principles laid down in the Third Schedule. The Third Schedule postulates that every Scheme of Administration shall –

(1) provide for proper and effective functioning of the Committee of Management;

(2) provide for procedure for constitution of the Committee of Management by periodical elections;

(3) provide for the qualifications and disqualifications of the members and office-bearers of the Committee of Management and the term of their offices.

Provided that no such Scheme shall contain provisions creating monopoly in favour or any particular person, caste, creed or family;

(4) provide for the procedure of calling meeting and the conduct of business at such meetings;

(5) provide that all the decisions shall be taken by the Committee of Management and powers of delegation, if any shall be limited and clearly defined;

(6) ensure that the powers and duties of the Committee of Management and its office-bearers are clearly defined;

(7) provide for the maintenance and security of property belonging to the institution and also for the utilisation of its funds and for the regular checking and auditing of accounts.

14. The language of Section 16-A is plain and unambiguous and admits of no confusion regarding right of ex-officio members to vote. The right conferred in their favour is in absolute terms without any qualification or exception. The provision of sub-section (1) of Section 16-A when contrasted with sub-section (2) further reinforces an interpretation that where the legislature intended to limit the right to vote, as in case of a member whose personal conduct is in discussion, the same has been specifically provided for.

15. The Supreme Court in the case of **Sangeeta Singh vs. Union of India and others**³ has held that "*the Court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous. The intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence, a construction which requires for its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided. It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. [See **Stock vs Frank Jones (Tipton) Ltd.**⁴] Rules of interpretation do not permit the courts to do so, unless the provision as it stands is meaningless or of doubtful meaning. The question is not what may be supposed and has been intended but what has been said*".

16. In **Padma Sundara Rao vs. State of Tamilnadu**⁵, the Supreme Court noticed the golden rule of construing statutes by quoting the following passages from **Grey vs. Pearson**⁶ and **Abley vs. Dale**⁷ :-

"The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further" (See *Grey v. Pearson* 6 H.L. Case 61).

The latter part of this "golden rule" must, however, be applied with much caution. "if," remarked Jervis, C.J.,

"the precise words used are plain and unambiguous in our judgment, we are bound to construe them in their ordinary sense, even though it lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning" (See Abley v. Dale) (ER p.525).

17. If these principles of construction of statutes are kept in mind it can safely be held that the statute has conferred an unequivocal right to vote in favour of the *ex-officio* members. Ordinary all members of the Committee have a right to vote, as under Clause (5) of the Third Schedule, all decisions are to be taken by the Committee but in order to obviate any doubt regarding the right of *ex-officio* members, it has been specifically provided for by the statute. However counsel for the petitioners placed reliance on Clauses 5 and 8 of the scheme of administration in contending that the scheme of administration as duly approved itself prohibits the *ex-officio* members from voting in an election of the office-bearers of the Committee of Management. These Clauses of the Scheme of Administration are to the following effect :-

5. समिति का संगठन—समिति में निम्नलिखित पन्द्रह सदस्य होंगे:—

(क) पदाधिकारी—

1—अध्यक्ष, 2—उपाध्यक्ष, 3—प्रबन्ध, 4—सहायक प्रबंधक, तथा 5— कोषाध्यक्ष।
उपरोक्त 5 पदाधिकारी सोसाइटी द्वारा चुने जायेंगे।

(ख) साधारण सदस्य 7 — सोसाइटी अपने सदस्यों में से समिति के सात साधारण सदस्यों का चुनाव करेंगी।

(ग) पदेन सदस्य 3— प्रधानाचार्य तथा दो अध्यापक ऐक्ट के सेक्शन 16—ए(1) और विनियम : 1 : के अनुसार पदेन सदस्य होंगे, जो प्रबन्ध समिति के पदाधिकारियों के चुनाव में तथा किसी सदस्य या पदाधिकारी के विरुद्ध अविश्वास के प्रस्ताव में या आयोग्यताओं के निर्धारण में भाग नहीं लेंगे।

8. आकस्मिक रिक्ति — सदस्यों (पदेन सदस्यों से भिन्न) या समिति के पदाधिकारियों के पद में होने वाली किसी आकस्मिक रिक्ति (उपरोक्त मद 7 की स्थिति के अतिरिक्त) की पूर्ति समिति द्वारा कार्यकाल की शेष अवधि के लिये की जायेगी और इस प्रकार नियुक्ति कोई व्यक्ति उस शेष काल के लिये समिति का सदस्य या पदाधिकारी (जैसी भी दशा हो) होगा, जिसके लिये वह व्यक्ति, जिसके स्थान की वह पूर्ति करता है, सदस्य या पदाधिकारी रहता।

18. As discussed above, Section 16-A specifically confers a right to vote in favour of *ex-officio* members. The right conferred is in absolute terms without any exception. There is no other provision under the Act which may be taken aid of to restrict such right of vote. If a Scheme of Administration envisaged by Section 16-A contains a stipulation which is contrary to the specific provisions of the Act, such a stipulation has to pave way to the provisions of the Act.

19. It is noteworthy that Section 16-A was inserted by U.P. Act no. 35 of 1958. By the same amending Act, Section 16-B was also inserted which empowers the Director to suggest

alteration or modification in the Scheme of Administration. Subsequently, when Section 16-CC was inserted by U.P. Act No.1 of 1981 which stipulates that the Scheme of Administration has to be consistent with the principles laid down in the Third Schedule, the other provision inserted was Section 16-CCC. It again empowered the Director to compel the alteration or modification in a Scheme of Administration in so far as it is inconsistent with the provisions of the Act. In case, the Director has not taken recourse to such power or has approved a Scheme containing a stipulation which is inconsistent with the provision of the Act, it would not infuse life into it. A scheme of administration of an institution recognised under the Act is a creature of statute. It cannot contain a stipulation which whittles down the provisions of the Act.

20. Counsel for the petitioners has placed reliance on a Division Bench judgement of this Court in **Ajab Singh vs. District Inspector of Schools, Meerut and others**⁸ wherein the Scheme of Administration contained a provision to the effect that elected member of the Committee alone would have the right to participate in the election of an office bearer. The Court explained the rationale behind such a provision by holding as under :-

"The Scheme of Administration provided that the twelve elected members of the Committee of Management alone have a right to participate in the election of the office bearers and the ex-officio members have no right to participate therein. The intention behind this provision seems to be clearly that employees of the Institution who became ex-officio members of the Committee of Management will not participate in the election politics of the college concerned and that when they have been debarred from participating in the election proceedings."
(emphasis supplied)

21. It is noticeable that while taking the said view, the stipulation in the Scheme of Administration alone was taken into consideration. The provisions of Section 16-A(1) of the Intermediate Education Act which specifically confers a right to vote in favour of *ex-officio* members, was not brought to the notice of the Court. The aforesaid judgment of the Division Bench of this Court came up for consideration before a learned Single Judge in **Committee of Management DAV Inter College, Tateir Baghat and another vs. State of U.P. and others**⁹. The learned Single Judge after noticing the fact that the Division Bench judgement was rendered in ignorance of the statutory provision, held that it would have no binding effect. For taking such view, the learned Single Judge placed reliance on the decision of the Supreme Court in **State of U.P. vs. Synthetics and Chemicals Ltd.**¹⁰ wherein the law relating to per incuriam was laid down. The relevant portion from the said judgement is as under :-

"10. I have gone through the said judgment of the Division Bench of this Court. It is apparently clear that the Division Bench has not noticed the aforesaid provisions of Section 16A(1) of the Intermediate Education Act and therefore, the said judgment in the opinion of the Court is based on non-consideration of a statutory provision and as such has no binding effect in the facts of the case.

11. The legal position in that regard has been explained by the Hon'ble Supreme Court in the judgment in the case of *State of U.P. v. Synthetics and Chemicals Ltd.*, 1991 (4) SCC 139. In the said judgment the Hon'ble Supreme Court has held as follows:

"Incuria' literally means 'carelessness. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. (Young v. Bristol Aeroplane Co. Ltd.). Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In Jaisri Sahu v. Rajdewan Dubey this Court while pointing out the procedure to be followed when conflicting decisions are placed before a Bench extracted a passage from Halsbury's Laws of England incorporating one of the exceptions when the decision of an appellate court is not binding."

This Court is in respectful agreement with the view taken by learned Single Judge in **Committee of Management, DAV Intermediate College, Baghpat** (supra).

22. Counsel for the petitioners has placed reliance on another judgement of a learned Single Judge of this Court in **Harjinder Nagar Inter College and Another vs. State of U.P.**¹¹ in which the learned Single Judge held that the *ex-officio* members do not have a right to participate in a no-confidence motion against an office bearers as they also had no right to elect them. It has been held thus :-

"I have considered the submissions of the learned counsel for the parties. From a perusal of the Scheme of Administration, it will be seen that as per para 5 of the Scheme, the Committee shall consist of 15 members out of which the Principal and two teachers shall be the ex-officio members. The Note to para 5 clearly mentions that the ex-officio members shall not take part in the selection of office bearers. That being the position if the ex-officio members are specifically prohibited from participating in any meeting for selection of office bearers, they also cannot participate in any meeting, ordinary or Emergent for passing a motion of no confidence against an office bearer. If there is no right to select, there is no right to remove either and therefore, I am in agreement with the submission of Sri P.N. Saxena, learned senior counsel for the respondents that since the ex-officio members were prohibited from participating in any selections they also stood prohibited by logical interpretation from participating in any meeting held for consideration of a motion of no confidence against an office bearer."

23. It is brought to the notice of this Court that the judgement of the learned Single Judge was upheld with the dismissal of Special Appeal No. 1881 of 2012 by a Division Bench of this Court on 4.12.2012 and the aforesaid judgements were further upheld with the summary dismissal of Special Leave to appeal.

24. It is apposite to note that the judgement of the learned Single Judge in case of **Harjinder Nagar Inter College** (supra) again does not take into consideration the provisions of Section 16-A(1) of the Act. The Division Bench judgement in Special Appeal does not seem to agree with the view of the learned Single Judge that the *ex-officio* members were not entitled to participate in a meeting of no-confidence. But ultimately the judgement of the learned Single Judge was not interfered with on the ground that even in the absence of *ex-officio* members, more than 2/3 members being present, the no-

confidence motion was validly passed. The relevant observations made in this regard by the Division Bench in Special Appeal are as under :-

"Clause 5 of the Scheme provides for Constitution of the Committee. The note appended to Clause 5 provides that 3 ex-officio members as for example Principal and 2 teachers shall not take part in that item of the agenda of the Committee of Management by which it appoints an ad-hoc committee for selection of teachers. They shall also not take part in the selection of office bearers. Though prima facie it appears that the 3 ex-officio members are not prohibited from participating in a meeting in which a no-confidence motion is moved, from paragraph 7 of the Scheme it appears that an agenda of no-confidence motion has to be passed by 2/3rd majority of the members present in a particular meeting in which a notice of no-confidence motion against a particular office bearer has been given. Clause 7 does not provide that in case of a meeting for no-confidence motion, all the 15 members are required to be present. It only provides that such a motion has to be passed by 2/3rd of the members present in the meeting. In the present case, 9 members were present and they voted in favour of the motion. We are therefore, of the view that 2/3rd majority of the members present in the meeting having voted in favour of the motion, no illegality can be found in accepting the same."

(emphasis supplied)

25. The language of Section 16-A(1) is plain and unambiguous. In such a situation, the Supreme Court in **Lalappa Lingappa & Ors vs. Laxmi Vishnu Textile Mills Ltd.**¹² has held that the Court "*must give effect to it whatever may be the consequences, for, in that case, the words of the statute speak the intention of the legislature. When the language is explicit, its consequences are for the legislature and not for the Courts to consider. The argument of inconvenience and hardship is a dangerous one and is only admissible in construction where the meaning of the statute is obscure and there are two methods of construction. In their anxiety to advance beneficent purpose of legislation, the Courts must not yield to the temptation of seeking ambiguity when there is none*". Lord Brougham, J. in **Robert Wigram Crawford v. Richard Spooner**¹³, has cautioned the court in reading something in the statute which is not provided for, in the following words :- "*If the legislature did not intend that which it has not expressed clearly much more, if the legislature intended some thing very difficult, if the legislature intended some thing pretty nearly the opposite of what it said, it is not for the judges to invent something which they do not meet within the words of the text.*" Thus where the words are clear and explicit, the Courts should not fall into temptation of reading something which in their wisdom would make the provision more rational.

26. The logic which prompted the Division Bench in the case of **Ajab Singh** (supra) and the learned Single Judge in **Harjinder Nagar Inter College** (supra) in holding that the ex-officio members are not entitled to participate in no-confidence motion or in an election to fill up a casual vacancy, is based on premise that the *ex-officio* members are not supposed to indulge in the politics of the college. As a necessary corollary, they are also not entitled to participate in a no-confidence motion. It is noticeable that the Committee of Management and its office bearers, under the scheme are elected by the members of the Society from amongst themselves. At the time of election of the Committee of Management of an institution, the electoral college is thus the general body of the Society. The ex-officio members are concededly not the members of the general body and thus also have no role to play in such an election. However, once the election of the office bearers and the members of the Committee of Management had taken place, there comes into existence the body envisaged under clause 5 of the Scheme of

Administration viz. the Committee of Management which comprises of 15 members, namely, the 5 office bearers, 7 members and three *ex-officio* members i.e. the Principal and two teachers. Under clause 10 (cha) the decisions of the Committee of Management are taken on the basis of majority will whereas the decision for terminating service of an employee as well as for creating encumbrance over immovable property of the institution requires a majority of 2/3 members. Thus there may be a situation where a Manager or some other office bearer loses the confidence of majority of the members but remains in majority if *ex-officio* members are excluded, and likewise, a person is elected as office bearer against a casual vacancy without the involvement of the will of *ex-officio* members there is a likelihood that such office bearers may not enjoy the confidence of the majority of the members of the Committee of Management taken together. In such a scenario, the rival faction with the support of *ex-officio* members would be in a position to scuttle the proposals of the Management, thus paralysing the body invested with the management of the institution. This was never intended by the legislature. Thus, in the opinion of the Court, in case *ex-officio* members are permitted to vote in an election for filling up a casual vacancy of an office bearers, the person elected would enjoy the confidence of the majority of the members and would be in a position to run the institution in a more effective manner as compared to a person elected in their absence. The aforesaid instance is being cited only to demonstrate that the view that *ex-officio* members should not be permitted to participate in an election for filling up casual vacancy as it would result in their involvement in college politics, may have its flip side as well. In such an eventuality, the very idea of having a body better equipped to run the institution would stand defeated. Thus, once the legislature has chosen not to curtail the right of the *ex-officio* members to vote in an election for filling up a casual vacancy, it is not within the province of a Court to import rationality in the provision by reading into the statute something which was never intended. Thus, this Court has no hesitation in holding that the *ex-officio* members have full right to vote for filling up casual vacancy on the post of Manager and they were rightly permitted to vote.

27. The next question which arises for consideration is whether Ram Murti Singh, erstwhile Manager was rightly permitted to participate in the election. Under the Scheme of Administration, the Manager is directly elected by the general body. He does not get elected for the reason he is a member of the Committee of Management. Therefore, on his resignation from the post of Manager, he ceases to be part of the Committee of Management which constitutes the electoral college for filling up the casual vacancy.

28. Under Clause 8 of the Scheme, the Committee has to elect a successor to a vacant post for the remainder of the term. The office bearers and the members of the Committee of Management who are entitled to participate in the election are those who hold their respective posts as office bearers or member on the date election is held. The electoral college for filling up the casual vacancy on the post of Manager could not be the office bearers and the members originally elected in the year 2013 albeit having tendered resignation later on, as suggested by learned counsel for the fourth respondent. Thus, Ram Murti Singh having already resigned was not entitled to participate in the election.

29. This brings the Court to the next argument of learned counsel for the petitioners that the first petitioner having been elected as President in place of Babban Singh was entitled to participate in the election process, but was wrongly excluded therefrom. The claim of the first petitioner to participate in the

election was sought to be negated by suggesting that infact the first petitioner was never elected as President and in any case, his election as President was not recognised or approved by the educational authorities.

30. The case of the petitioners is that the first petitioner was continuing as President of the Managing Committee of the parent Society on the basis of elections held on 8.10.2013. Subsequently, when the post of President of the Committee of Management of the institution fell vacant on account of death of Babban Singh on 23.3.2014, he was also elected as President of the Committee of Management of the institution in a meeting of the Committee held on 8.6.2014. The resolution passed in this regard has been brought on record as Annexure 7 to the writ petition. A copy thereof was duly forwarded to the District Inspector of Schools for information and necessary action by the then Manager by letter dated 17.7.2014. The specific case of the first petitioner is that he had been working as President of the Committee of Management of the institution since then. There is nothing on record to indicate that any objection was raised from any quarter regarding the alleged claim of the first petitioner as President of the Committee of Management of the institution. On the contrary, from perusal of the order of the District Inspector of Schools passed on 6.11.2015 recognising the fourth respondent as Manager, it is clear that his own case was that the first petitioner as well as his son Vinay Kumar Singh, despite due notice and information remained absent from the proceedings held on 26.7.2015. It is the same meeting in which the fourth respondent claimed that the resignation of Ram Murti Singh was accepted and in his place he was authorised to work as Manager. In case the first petitioner was not the President, there was no other reason for calling him to participate in the said meeting. It may further be noted that in the notice dated 23.7.2015 sent to the office bearers and member of the Committee of Management regarding holding of emergent meeting on 26.7.2015, the first petitioner had been shown as President. Even in the proceedings dated 26.7.2015, on the basis of which the fourth respondent claimed to be entrusted with duties on the post of Manager, the first petitioner has been described as President though he was not present in the said meeting. Resolution No.2 passed in the said meeting specifically records that the first petitioner could not preside over the meeting on account of his illness. The fourth respondent, who is signatory to the proceedings and also a beneficiary of the resolution passed in the said meeting, cannot be permitted to take a contrary stand and contend that the first petitioner had never been elected as President.

31. Irrespective of what has been held above, this Court also cannot loose sight of the fact that the previous writ petition was filed by the first petitioner alongwith four others claiming himself to be the President. The writ petition aforesaid, as noted in the earlier part of the judgement, was disposed of with the consent of learned counsel for the parties. In case the first petitioner had never been elected as President, there does not appear any reason on record why such plea was not raised at that time and the writ petition was got disposed of on the basis of consensus for holding election for the post of Manager alone. In view of these facts, the Court is unable to accept the contention of learned counsel for the fourth respondent that the first petitioner had never been elected as President.

32. Learned counsel for the fourth respondent while placing reliance on various regulations framed under Chapter-I tried to contend that it is only the Committee of Management duly approved by the educational authorities which is entitled to function. It is urged that it is implicit in grant of recognition that election of each office bearer is approved. It is submitted that in the absence of approval by the educational

authorities to the election of the first petitioner, he was not entitled to participate in the election for filling up the casual vacancy.

33. Under Government Orders dated 19 December 2000 and 20 October 2008 the District Inspector of Schools recognises an election of the Committee of Management and in case of any legal impediment, recognition is granted by the Regional Level Committee constituted thereunder. The signature of the Manager of the Committee of Management is attested by the District Inspector of Schools in view of the fact that the Manager is empowered to operate the account of the institution jointly with the District Inspector of Schools and the Principal of the institution. However, there is no provision which requires a specific approval from the educational authorities in case a casual vacancy on a post other than that of Manager is filled up. The educational authorities may, in an eventuality where the filling up casual vacancy is in dispute be called upon to decide the same, but in normal course, no specific approval is required. All that is needed is communication of the proceedings to the educational authorities which had been done in the instant case. In view thereof, this Court holds that petitioner no.1 who was the President was wrongly excluded from the electoral college.

34. The question which still remains to be considered is the relief to which the petitioners are entitled to. Although it has been held that the *ex-officio* members were rightly permitted to participate in the election and thus undoubtedly, majority of vote were cast in favour of the fourth respondent but still this Court is of the opinion that inclusion of the erstwhile Manager in the election process as well as exclusion of the President (the first petitioner) from the election process was fatal to the entire election. In numerical terms, it may appear to be in inconsequential but an election held from an invalid electoral college, in the opinion of the Court, cannot be sustained. The presence of the first petitioner and exclusion of the ex-manager has the potentiality of making a material difference in the outcome of the election. The petitioners in response to the notice by the fourth respondent had preferred objection pointing out the manner in which the electoral college should be determined but the fourth respondent in great haste, oblivious of the fact that he himself issued notice inviting objections, illegally proceeded to hold the election from the list supplied by the fourth respondent. There is no gainsaying that a valid election cannot be held without a valid electoral college being determined before holding of the election.

35. In consequence and for the reason given above, this Court is unable to uphold the impugned election dated 16.2.2016 and the order of the District Inspector of Schools dated 27.2.2016 recognising the said election. Accordingly, the impugned order of the District Inspector of Schools dated 27.2.2016 shall stand quashed and the election held on 16.2.2016 is declared to be illegal. The District Inspector of Schools is now directed to convene another meeting for filling up casual vacancy on the post of Manager of the Committee of Management of the institution. In the said election, the first petitioner shall also be entitled to participate whereas the erstwhile manager Ram Murti Singh shall stand excluded from the electoral college which is to elect the Manager. All other terms and conditions as contained in the the previous order dated 11.12.2015 shall remain applicable in the election which is to be held.

36. The writ petition stands disposed of accordingly.

(2016) 8 ILRA 1209
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.08.2016

BEFORE

THE HON'BLE ABHAI KUMAR, J.

Application U/s 482 No.- 22167 Of 2016

Raju Chaturvedi @ Ram Prakash & Ors. ...Applicants
Versus
State Of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Shri Rajendra Singh Chauhan

Counsel for the Opposite Parties:
G.A.

Held –

Paragraph 1: The applicants filed an application under Section 482 Cr.P.C. seeking to quash Charge-sheet No. 76/14 (dated 28.09.2014) and the subsequent cognizance/summoning order (dated 26.04.2016) passed by the lower court under Section 379 IPC, Sections 3/70 of the Mines and Minerals Act, and Sections 4/21 of the Environment Protection Act, pertaining to P.S. Naraini, District Banda. They also prayed for a stay of the proceedings.

Paragraph 2: The counsel for the applicants submitted that the First Information Report (FIR) was lodged on 14.06.2014, alleging that the applicants were illegally removing and collecting mines and minerals from a riverbed. Following an investigation, the charge-sheet was submitted, and the lower court subsequently took cognizance and issued summons.

Paragraph 3: The applicants' counsel argued that because the Mines and Minerals (Development and Regulation) Act (MMDR Act) is a Special Act, it excludes the provisions of the general law (IPC). They vehemently contended that Section 379 IPC cannot be applied to illegal mining allegations, making the Magistrate's order taking cognizance under both the IPC and the MMDR Act illegal and liable to be quashed.

Paragraph 4 & 5 (Supreme Court Quote): To support this argument, the counsel relied on the Supreme Court judgment in *State (NCT of Delhi) Vs. Sanjay (2014)*. However, the quoted text establishes that the ingredients of an offence under the MMDR Act and the offence of theft under Section 378/379 IPC are distinct. The Supreme Court ruled that the MMDR Act does not debar the police from investigating the theft of public property (sand/minerals) and submitting a report under Section 173 Cr.P.C. for the Magistrate to take cognizance under the IPC.

Paragraph 6 & 7: The counsel also cited a Jharkhand High Court ruling (*Prasuram Bellani Vs. State of Jharkhand, 2015*). In that case, the High Court applied the *Sanjay* precedent to uphold cognizance taken under IPC sections (including Section 379), while setting aside the cognizance taken under the Special MMDR Act because it lacked a proper statutory complaint.

Paragraph 8: Based on these precedents, the Court observed that Section 379 IPC is not precluded in cases of illegal riverbed mining. The Court highlighted that unchecked illegal mining severely damages the ecosystem, compromises structural safety (like bridges), alters river hydrology, and depletes groundwater levels, necessitating strict state and police action.

Paragraph 9 (Supreme Court Quote): The Court highlighted Paragraph 70 of the *Sanjay* judgment, which clarifies the statutory bar under Section 22 of the MMDR Act. It explicitly states that a Magistrate can only take cognizance of offences *under the MMDR Act* upon a formal complaint by an authorized officer, not via a standard police report. However, this restriction does not apply to independent offences under the IPC.

Paragraph 10: The Court reiterated that while a formal statutory complaint is required for MMDR Act prosecutions, the police maintain full liberty to track, investigate, and charge individuals under Sections 378 and 379 IPC for clandestinely extracting and removing State-owned minerals without a license.

Paragraph 11 & 12: The Court concluded that the lower court's cognizance under the IPC was completely legal and valid. However, the cognizance taken directly under the MMDR Act on a police report was legally unsustainable. Consequently, the Court partially allowed the application, setting aside only the portion of the order dealing with the MMDR Act, directing the lower court to proceed with the remaining IPC charges, and disposing of the application.

List of Citations:-

1. State (NCT of Delhi) Vs. Sanjay, (2014) 9 SCC 772

2. Prasuram Bellani and others Vs. The State of Jharkhand, Criminal Revision No. 593 of 2000 (Decided on 31.03.2015 by the Jharkhand High Court, Ranchi)

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

1. This application under Section 482 Cr.P.C. has been filed with the prayer to allow this application and quash the impugned charge-sheet No. 76/14 dated 28.9.2014, Police Station Naraini, District Banda in connection with Case No. 328/IX/16, under Section 379 IPC, 3/70 Mines and Minerals Act & 4/21 Environment Protection Act, P.S. Naraini, District Banda on the basis of which learned Court below has taken cognizance on 26.4.2016 and issued summons to the applicants. It is further prayed that proceeding in the aforesaid case be stayed.

2. It is submitted by the learned counsel that respondent no. 2 lodged a First Information Report on 14.6.2014 against the applicants in Case Crime No. 87 of 2014, under Section 379 IPC, 3/70 Mines and Minerals Act and 4/21 of Environment Protection Act, Police Station Naraini, District Banda, on the basis, that applicants were removing the mines and minerals from the riverbed and collected on the field of the village. After investigation charge-sheet was submitted on 28.9.2014 and court below has taken cognizance and issued summons to the applicants on 26.4.2016.

3. It is submitted by the learned counsel that when offence under the Mines and Minerals (Development and Regulation) Act (hereinafter referred to as the "M.M.D.R. Act") excludes the provisions of Indian Penal Code, cognizance under both, Indian Penal Code as well as M.M.D.R. Act is illegal and it has been vehemently argued that M.M.D.R. in Special Act will prevail over general law that is IPC and consequently Section 379 IPC does not come into the picture when illegal mining is being alleged whereas learned Magistrate has taken cognizance on the police report under the Indian Penal Code as well as Mines and Minerals Act which is liable to be quashed.

4. In support the learned counsel has placed reliance upon the decision of the Hon'ble Apex Court in the case of *State (NCT of Delhi) Vs. Sanjay, (2014) 9 SCC 772* which was decided

alongwith the other criminal appeals. The observation made by the Hon'ble Apex Court is reproduced below:-

"71. From a close reading of the provisions of MMDR Act and the offence defined under Section 378, IPC, it is manifest that the ingredients constituting the offence are different. The contravention of terms and conditions of mining lease or doing mining activity in violation of Section 4 of the Act is an offence punishable under Section 21 of the MMDR Act, whereas dishonestly removing sand, gravels and other minerals from the river, which is the property of the State, out of State's possession without the consent, constitute an offence of theft. Hence, merely because initiation of proceeding for commission of an offence under the MMDR Act on the basis of complaint cannot and shall not debar the police from taking action against persons for committing theft of sand and minerals in the manner mentioned above by exercising power under the Code of Criminal Procedure and submit a report before the Magistrate for taking cognizance against such person. In other words, in a case where there is a theft of sand and gravels from the Government land, the police can register a case, investigate the same and submit a final report under Section 173, Cr.P.C. before a Magistrate having jurisdiction for the purpose of taking cognizance as provided in Section 190 (1)(d) of the Code of Criminal Procedure.

72. After giving our thoughtful consideration in the matter, in the light of relevant provisions of the Act vis-vis the Code of Criminal Procedure and the Indian Penal Code, we are of the definite opinion that the ingredients constituting the offence under the MMDR Act and the ingredients of dishonestly removing sand and gravel from the river beds without consent, which is the property of the State, is a distinct offence under the IPC. Hence, for the commission of offence under Section 378 Cr.P.C., on receipt of the police report, the Magistrate having jurisdiction can take cognizance of the said offence without awaiting the receipt of complaint that may be filed by the authorized officer for taking cognizance in respect of violation of various provisions of the MMRD Act. Consequently the contrary view taken by the different High Courts cannot be sustained in law and, therefore, overruled. Consequently, these criminal appeals are disposed of with a direction to the concerned Magistrates to proceed accordingly."

5. Further reliance placed by the learned counsel upon another decision of Jharkhand High Court, Ranchi in the case of **Prasuram Bellani and others Vs. The State of Jharkhand decided on 31.3.2015.**

6. Learned Judge of Jharkhand High Court also taking clue on the above referred Hon'ble Apex Court judgment came to the conclusion that there is no illegality in the impugned order dated 11.7.2001 passed by learned Additional Chief Judicial Magistrate, Pakur P.S. Case No. 311 of 2000, corresponding to G.R. No. 593 of 2000, so far it took cognizance for the offence under Sections 467, 468, 420 and 379 IPC against the petitioners. However, the cognizance of the offence under the Special Act relating to Mines and Minerals was found to be unsustainable in the eyes of law and that portion was set aside.

7. With the above observation of Jharkhand High Court as well as that of Hon'ble Apex Court, it is clear that Section 379 IPC is not precluded whenever any theft is being made in regard to mining in the riverbed that is damaging the Ecosystem and the safety of bridges. It also weakens river beds, fish breeding and destroys the natural habitat of many organisms. If these illegal activities are not stopped by the State and the police authorities of the State, it will cause serious repercussions as mentioned hereinabove. It will not only change the river hydrology but also will deplete the ground water levels.

8. Specific observation of the Apex Court in paragraph 70 of the judgment is necessary to be produced which runs as follows:

"70. There cannot be any dispute with regard to restrictions imposed under the MMDR Act and remedy provided therein. In any case, where there is a mining activity by any person in contravention of the provisions of Section 4 and other sections of the Act, the officer empowered and authorized under the Act shall exercise all the powers including making a complaint before the jurisdictional magistrate. It is also not in dispute that the Magistrate shall in such cases take cognizance on the basis of the complaint filed before it by a duly authorized officer. In case of breach and violation of Section 4 and other provisions of the Act, the police officer cannot insist Magistrate for taking cognizance under the Act on the basis of the record submitted by the police alleging contravention of the said Act. In other words, the prohibition contained in Section 22 of the Act against prosecution of a person except on a complaint made by the officer is attracted only when such person sought to be prosecuted for contravention of Section 4 of the Act and not for any act or omission which constitute an offence under Indian Penal Code."

9. As per observation of the Hon'ble Apex Court, police cannot insist the Magistrate for taking cognizance under the M.M.D.R Act and for that complaint is to be filed before the Magistrate by the competent authority. However, Paragraph 71 of the Judgemnt of the Hon'ble Apex Court gives liberty to the police in case of removal of mines and minerals against a person who is without any lease or licence or any authority entered into river and extracts sand, gravel and other minerals in removing or transporting these minerals in a clandestine manner with an intent to remove from the possession of the State and consequently is liable to be punished for committing such offence under Sections 378 and 379 IPC.

10. So far the cognizance taken by the learned trial court under the IPC is concerned, it cannot be said to be illegal or without authority but so far as the cognizance taken under the M.M.D.R. Act that is under the Special Act relating to mines and minerals is concerned, cannot be sustained in the eyes of law and accordingly only that portion of the impugned order is hereby set aside. So far as the cognizance under rest of sections is concerned that cannot be stayed or cannot be interfered and court below is directed to proceed accordingly.

11. The application under Section 482 Cr.P.C. is disposed of accordingly.

(2016) 8 ILRA 1213
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.08.2016

BEFORE

THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Application U/s 482 No.- 22817 Of 2016

Smt. Kamla Devi

...Applicant

Versus

State Of U.P. & Ors.

...Opposite Parties

Counsel for the Applicant:

Shri Surendra Singh

Counsel for the Opposite Parties:

G.A.

Held –

Paragraph 1: The Court heard the learned counsel for the applicant and the learned AGA, and thoroughly reviewed the case records. The applicant challenged an order dated 17.05.2016 passed by the 1st Additional Chief Judicial Magistrate, Banda, which registered her Section 156(3) Cr.P.C. application as a complaint case rather than directing the police to register an FIR.

Paragraph 2: The Court accepted the learned AGA's contention that the alleged offences took place privately inside the applicant's house and not in a public place or within public view. Consequently, the applicant's attempt to charge the accused under Section 3(1)(x) of the SC/ST Act was deemed legally inapplicable to the situation.

Paragraph 3: The Court observed that even if the allegations in the application were assumed to be true, all facts and evidence were already within the applicant's personal knowledge and control. Because there was no hidden evidence requiring a police investigation to uncover, the trial court appropriately treated it as a complaint case. The Court noted that the trial court's order relied on established precedents from both the High Court and the Supreme Court.

Paragraph 4 & 5 (Precedent Quote): The Court highlighted the decision in *Sukhwasi v. State of U.P.* (2007), which emphasizes that Section 156(3) Cr.P.C. should be exercised sparingly and only in extraordinary circumstances, such as to prevent a miscarriage of justice. The precedent clarifies that because an alternative remedy of filing a private complaint is readily available, Magistrates are under no legal mandate or obligation to automatically allow every Section 156(3) application.

Paragraph 6: The Court concluded that there was no illegality, impropriety, or jurisdictional error in the trial court's order. Finding no ground to invoke its inherent powers under Section 482 Cr.P.C., the Court dismissed the application.

List of Citations:-

Sukhwasi v. State of U.P., 2007 (59) ACC 739

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. Heard learned counsel for the applicant, learned AGA and perused the records.

2. The application under section 156 (3) Cr.P.C., moved by applicant regarding incident happened inside her house in her presence, was registered as complaint case by impugned order dated 17.5.2016 passed by 1st Additional Chief Judicial Magistrate, Banda. This order of registering the application as complaint is under challenge in present proceeding.

3. This contention of learned AGA appears not unacceptable that according to said application alleged overt acts were committed inside house, and not at any public place or in public view, but applicant had tried to implicate accused for offence under section 3(1) 10 SC/ST Act, which is not applicable in such matter.

4. If facts of application under section 156 (3) Cr.P.C. is taken to be true, in that case also everything relating to fact is within knowledge of applicant and every evidence relating to it is within her control. There is nothing new that can be exposed after investigation. The trial court has passed order of registering aforesaid application as complaint after considering several judgement of this Court and Apex Court, in which one judgement is of this Court namely, 'Sukhwasi v. State of U.P., 2007(59) ACC 739' in which it has been held as under:

"Applications under section 156(3) Cr.P.C. are coming in torrents. Provisions under section 156(3) Cr.P.C. should be used sparingly. They should not be used unless there is something unusual and extra ordinary like miscarriage of justice which warrants a direction to the Police to register a case. Such application should not be allowed because the law provides them with an alternative remedy of filing a complaint, therefore, recourse should not normally be permitted for availing the provisions of section 156(3) Cr.P.C.

The reference is, therefore, answered in the manner that it is not incumbent upon a Magistrate to allow an application section 156(3) Cr.P.C. and there is no such legal mandate".

5. There appears no illegality or impropriety in the impugned order to exercise inherent jurisdiction of this Court. Therefore this application is dismissed.

**(2016) 8 ILRA 1215
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.08.2016**

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 22996 Of 2016

Praveen @ Prince Raghav

...Applicant

Versus

State Of U.P.

...Opposite party

Counsel for the Applicant:

R.P.S. Chauhan, Pradeep Chauhan

Counsel for the Opposite Party:

G.A.

Held –

Paragraph 1 & 2: The applicant filed a bail application seeking release in Case Crime No. 265 of 2014, under Sections 302 (murder) and 328 (causing hurt by means of poison) of the IPC at Police Station Chhatari, District Bulandshahr. Advocate Shri Dheeraj Singh Bohra formally filed his power on behalf of the complainant, which was taken on record by the Court.

Paragraph 3 & 4: The Court heard the arguments presented by the learned counsel for the applicant, the learned counsel for the complainant, and the learned AGA, and thoroughly perused the case records.

Paragraph 5: The applicant's counsel submitted that the FIR was lodged late on 25.08.2014 via a Section 156(3) Cr.P.C. application for an incident that occurred on 16.08.2014. The prosecution alleged that the applicant and a co-accused took the deceased to an isolated place, forced him to drink alcohol mixed with poison, and then brought him back to his house in a dying condition. While the initial cause of death was unknown, a subsequent viscera report confirmed poisoning.

Paragraph 6: The applicant's counsel argued that this poisoning narrative was an afterthought developed through legal consultation. They emphasized that on the very day of the incident, the deceased's father had informed the police that his son had committed suicide at home, based on which the police arrived and conducted the inquest report.

Paragraph 7: The counsel highlighted that the subsequent FIR named the deceased's brother, Tota Ram, as an eyewitness who saw the accused forcing the deceased to drink and threatening him. However, in his statement to the police, Tota Ram completely abandoned this theory, stating instead that he and his parents learned of the death while working in the fields and were told that the deceased had committed suicide by hanging, leading them to dial 100.

Paragraph 8: The counsel contended that if the family had actually seen the deceased being forcibly poisoned and dumped at home, the father would never have reported it as a suicide. Furthermore, the deceased's sister, Sheetal, was present at the house when the accused allegedly dropped him off on a

motorcycle, confirming that the father's initial suicide report was based on immediate household facts, not wild conjecture.

Paragraph 9: The applicant's counsel drew attention to the inquest report, which noted the presence of semen on the deceased's garments, arguing that the exact circumstances of death remain highly ambiguous.

Paragraph 10: The counsel further argued that the prosecution's story was highly improbable, as a guilty person would flee the crime scene rather than risk public exposure by carrying a dying victim back to his own family on a motorcycle. They added that the applicant had been in jail since 18.04.2016, had no prior history of evading the law, and that the trial was unlikely to conclude early due to heavy pendency.

Paragraph 11: The learned AGA and the complainant's counsel strongly opposed the bail plea. They pointed to the post-mortem report, arguing that physical injuries on the deceased's feet indicated his legs were dragging on the ground while being carried on the motorcycle because he was already incapacitated by poison. However, when pointedly questioned by the Court, neither the AGA nor the complainant's counsel could offer a tenable explanation for the stark contradiction between this theory and the father's initial suicide report.

Paragraph 12: After evaluating the arguments, the nature of the evidence, the period of detention already undergone, the low likelihood of an early trial conclusion, and the lack of evidence suggesting the applicant would tamper with witnesses, the Court determined that the applicant was entitled to bail.

Paragraph 13 & 14: The Court ordered the release of the applicant, Praveen @ Prince Raghav, upon executing a personal bond and two local sureties, subject to strict conditions: he must not tamper with prosecution evidence and must personally appear on every trial date unless specifically exempted.

Paragraph 15 & 16: The Court clarified that any breach of these bail conditions would grant the lower court full liberty to cancel the bail. It further noted that the observations made in this order are strictly limited to the disposal of the bail application and will have no bearing on the final merits of the trial.

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. This application has been filed seeking the release of the applicant on bail in Case Crime No. 265 of 2014, u/s302, 328 I.P.C., Police Station-Chhatari, District-Bulandshahar.

2. Shri Dheeraj Singh Bohra, Advocate has filed his power on behalf of complainant today, which is taken on record.

3. Heard learned counsel for the applicant and learned counsel for the complainant as well as learned A.G.A.

4. Perused the record.

5. Submission of the counsel for the applicant is that the F.I.R. of the case was lodged on the basis of an application moved u/s 156(3) Cr.P.C.. The incident is said to have taken place on 16.8.2014 and the application was moved on 25.8.2014 and the prosecution case as has emerged out is that the applicant and co-accused had taken the deceased to some place where they made him drink Alcohol and also

administered poison to him. Subsequently the deceased was again brought by accused persons back to his house where he was left in a pitiable condition and died soon thereafter. Initially the cause of death could not be ascertained but subsequently the viscera report indicated that the deceased died as a result and effect of some poison. The contention of the counsel is that all this story of taking away the deceased by the accused persons and then compelling him to drink or administering some poison is just an after thought and has been developed through consultation and deliberations and this story does not contain any truth in the same. In this regard the counsel has laid emphasis upon the fact that the information first in point of time was given on 16.8.2014 i.e. on the day of incident itself by none else than the father of the deceased himself and it was on this information that the police had arrived and performed the inquest report of the deceased. The information that was furnished by the father was to the effect that his son (the deceased) had for some reason committed suicide in his house. Counsel has also drawn the attention of the court to the assertion made in the F.I.R. that was subsequently lodged in which the brother of the deceased namely Tota Ram has been made a witness of the fact that he had seen the applicant and co-accused making the deceased drink alcohol and when he asked his brother to go back he was not allowed to go back by accused. Even this was alleged in the subsequent version of F.I.R. that when Tota Ram, the brother of the deceased, insisted further then the applicant and co-accused gave threat him that he should run away otherwise he would also be killed. Counsel has further drawn the attention of the court to the statement of aforesaid Tota Ram in which the aforesaid allegation of compelling the deceased to drink alcohol has been given up and to the contrary, it was stated by the aforesaid Tota Ram that when he and his parents were in a field they got the information that his brother Sannu has committed suicide by hanging. It was further stated that after this an information on number 100 was given on which the police had arrived. Submission is that it is wholly unthinkable that if there had been any truth in the claim of the prosecution that the deceased was seen being administered the alcohol by force and then he was carried to his house and was dumped there in a nearly dead condition then there was absolutely no question for the father of the deceased to furnish the information that his son had committed suicide. In this regard it has also been pointed out by the applicant's counsel that the real sister of deceased namely Sheetal was also examined by the police and she also is said to have stated that she was in her house when the accused-applicant had brought the deceased on the motorcycle and had left him there in unconscious state and later on deceased Sannu died. The contention is that it is also clear that the aforesaid sister Sheetal was very much present in the house and therefore it cannot be said that information of commission of suicide was or could have been any wild conjuncture of the father. Submission is that actual story is some what very different from what is now being projected by the prosecution. Counsel has also drawn the attention of the court to the observation made by the police officer who performed the inquest in which he had noted that the garment of the deceased indicated the presence of semen. Counsel has tried to submit that it is very difficult to tell under what circumstance the deceased died. In addition it has also been submitted that if the applicant had actually administered the poison to the deceased and in case he actually committed the murder of the deceased then there was no justification as to why the accused should then take the trouble to take the dead body or the nearly dead deceased on motorcycle and bring him to his house again. The normal guilty conduct of any accused would be to make his escape good after commission of crime and not to expose him to the full public view and be seen by the all and sundry carrying the victim with them. Submission is that the story of taking the deceased on the motorcycle and bringing him back to the house of deceased after administering him poison is highly incredible story which hardly constitute any legitimate basis to prove applicant's complicity in the crime. Several other submissions in order to demonstrate the falsity of

the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required. It has also been submitted that the applicant is languishing in jail since 18.4.2016 and in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

6. Learned A.G.A. as well as learned counsel for the complainant who have opposed the prayer for bail. Attention of the court was drawn to the post mortem report and it has been pointed out that the features noted by the doctor indicate that the deceased while being carried on the motorcycle was not in a position to control himself and his legs were dragging all the way on the ground which resulted in corresponding injuries on his feet. Counsel has tried to show that when the deceased was brought back to his house he was virtually dead as a result of the poison that was administered to him by the accused. But despite being pointedly asked to explain the earlier version of the suicide given by the father, neither the informant's counsel nor learned A.G.A. has been able to proffer any explanation for the same which may be accepted as a tenable explanation with regard to the loud inconsistency in between the two versions.

7. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, this Court is of the view that the applicant may be enlarged on bail.

8. Let the applicant-Praveen @ Prince Raghav, involved in Case Crime No.265 of 2014, u/s 302,328 I.P.C., P.S.-Chhatari, District-Bulandshahar be released on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(1) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicant will personally appear on each and every date in the court and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

9. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

10. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merits of the case.

(2016) 8 ILRA 1219
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2016

BEFORE

THE HON'BLE PANKAJ MITHAL, J.

Writ A No.- 32311 Of 2014

Rajesh Kumar Gupta	...Petitioner
	Versus
Deepak Tandon & Anr.	...Respondents

Counsel for the Petitioner:

Shri Prakash Chandra, Shri Vishal Khandewal

Counsel for the Respondents:

Shri Puneet Agrawal, Shri Arvind Srivastava, Shri P.K. Keshri

Held –

Paragraph 1–3: Context of the Writ Petition

The tenant filed a writ petition challenging concurrent orders from lower courts that allowed the landlords' application to release a portion of House No. 18/15 Hastings Road, Tandon Quarters, Allahabad, under Section 21(1)(a) of the U.P. Act No. 13 of 1972. Before the High Court, the tenant's counsel raised a single legal issue: a residential building portion cannot legally be released to a landlord for commercial use.

Paragraph 4: Counterarguments by the Landlords

The landlords' Senior Counsel countered that this specific plea was never explicitly argued in the lower courts. He claimed the tenanted property was mixed-use ("residential-cum-commercial") which exempts it from the statutory bar. Furthermore, he argued that since the tenant had acquired alternative housing within the city, the tenant was legally barred from raising any objections against the release application.

Paragraph 5–6: Factual Property Description from the Pleadings

The High Court scrutinized Annexure-5 of the release application, which contained the landlords' own architectural and textual description of the premises in Hindi. The text explicitly listed the property as consisting of "one shop, three residential rooms, a courtyard, kitchen, toilet, bathroom, and drawing room." The Court noted this clearly proves that, except for a single shop unit, the vast majority of the tenanted property is strictly residential.

Paragraph 7: Acknowledgment of Mixed Tendency Use

In paragraph 5 of their initial application, the landlords acknowledged that after the death of the original tenant (the petitioner's father), the petitioner continued using the premises both as a shop and for residence. The Court deduced from this that the single shop room was utilized for business, while the remaining three rooms, drawing room, and amenities served as the family's home.

Paragraph 8–9: Establishing the Landlords' Commercial Intention

The landlords' pleadings revealed that they reside at a different address (33 Lookerganj) and require the disputed property solely to expand an existing computer business. Paragraph 20 of their application explicitly

stated that the first landlord needed the building to smoothly run his commercial trade. Taking the application as a whole, the Court established two facts: the landlords sought the eviction of a combined residential/commercial space, but their established bona fide need was entirely commercial.

Paragraph 10–11: The Statutory Bar in Section 21

The Court analyzed Section 21(1)(a) of the Act, highlighting its mandatory third proviso. The clause explicitly states that “no application... shall be entertained... in the case of any residential building, for occupation for business purposes.” The Court declared this provision mandatory, creating an absolute legal bar against releasing residential property for commercial intent.

Paragraph 12–14: Legal Duties of the Court and Lower Court Failures

The High Court ruled that preventing the release of residential space for business use is a pure question of law that goes to the root of a case’s maintainability. Even though the tenant had submitted written arguments and cited precedent (Husaini Dhobi) on this exact point before the lower appellate court, both lower courts completely failed to address the statutory bar, focusing only on the bona fide nature of the landlords’ need.

Paragraph 15–16: Application of Judicial Precedent

The Court relied on the precedent established in *Husaini Dhobi v. IIIrd Additional District Judge, Lucknow* (1986), which confirmed that a landlord is legally prohibited from seeking the release of residential premises to run a commercial business due to the third proviso of Section 21(1)(a). No contrary judicial view was presented by the landlords.

Paragraph 17–19: The Alternative Accommodation Trap

The lower courts had completely rejected the tenant’s defense because he had acquired a vacant residential house elsewhere in Allahabad, invoking Explanation (i) of the fourth proviso to Section 21(1). The High Court clarified that while this acquisition strips a tenant of their right to object, it does not relieve the court of its duty to assess the baseline legal maintainability of the landlords’ suit. Because the landlords’ own pleadings openly sought a residential area for business use, the application was facially unmaintainable regardless of the tenant’s status.

Paragraph 20–21: Final Orders and Modification of Release

The High Court concluded that the release of the three residential rooms, drawing room, and amenities for commercial computer operations was completely barred by law. Accordingly, the Court partially allowed the writ petition, quashing the orders of the Additional District Judge and Prescribed Authority to the extent that they released the residential spaces. However, the release of the singular shop unit was maintained. The lower court orders stood modified without any order as to costs.

Case Laws Cited:-

1. Husaini Dhobi Vs. IIIrd Additional District Judge, Lucknow and another, 1986 (2) ARC 251.

(Delivered by Hon'ble Pankaj Mithal, J.)

1. A portion of House No.18/15 Hastings Road, Tandon Quarters, Allahabad is involved in the dispute.

2. The respondent/landlords (hereinafter referred to as the landlords) applied for release of the above portion under Section 21(1)(a) of the U.P. Act No.13 of 1972 (in short 'Act'). The said release application after contest by the tenant has been allowed by the courts below.

3. Aggrieved by release of the portion in question, the petitioner/tenant (hereinafter referred to as the tenant) has invoked writ jurisdiction of this Court.

4. Sri Prakash Chandra, learned counsel for the tenant has argued only one point that the residential portion cannot be released for commercial purposes.

5. Sri Ravikant, learned Senior Counsel assisted by Sri Arvind Srivastava who appears for the landlords has submitted that no such specific argument was raised by the tenant in the courts below. The tenanted portion is residential-cum-commercial and, as such, the bar contemplated by proviso to Section 21 would not apply. The objections of the tenant in opposition to the release application are not required to be considered as he has acquired an alternative accommodation in the city itself.

6. The release application filed by the landlords is enclosed with the petition in the form of Annexure - 5. It at its foot describes the tenanted portion as under:

“विवरण भवन निजाई

एक दुकान, रहायशी तीन कमरे आंगन, रसोई घर, शौचालय, स्नानगृह, ड्राइंग रूम है जो भवन सं० 18/15 हेस्टिंग रोड। 1/5 न्याय मार्ग। टंडन क्वार्टर्स, इलाहाबाद, पर स्थित है, जिसकी मानचित्र संलग्न है तथा चौहद्दी निम्न है:-“

7. The description of the tenanted portion as given by the landlords themselves in the release application is one shop, three residential rooms with courtyard, kitchen, toilet, bathroom, drawing room forming part of house No.18/15 Hastings Road, Tandon Quarters, Allahabad. The aforesaid description clearly demonstrates that apart from one shop the entire other portion under tenancy is residential in nature.

8. The release application in paragraph 5 states that previously the father of the tenant late Kedar Nath Gupta was the tenant whereupon on his death the petitioner tenant is using the house as a shop and for residential purposes. The averments made in this paragraph also indicates that the landlords accept that the tenant is using the tenanted portion in part as a shop and for residential purposes. It by necessary implication means that a one room portion which has been described as shop is being used as a shop and the remaining three room portion with a courtyard, a kitchen, a toilet, a bathroom and a drawing room is being used for residential purposes. In other words, except for one room portion which is being used as a shop and the remaining portion is in use for residential purposes.

9. The pleadings of the release application further reveal that the case of the landlords is that they have no other place to do any business except for the portion in dispute. They are living with their family with Smt. Urmila Tandon in a house 33 Lookerganj, Allahabad. The landlord No.1 is doing computer business and his establishment is registered with the Labour Department. He requires the premises in dispute for his bonafide need to expand/start his computer business which will require a Computer Operator, an Accountant, three Salesman and an Assistant.

10. The need as established by the landlords in the release application for the tenanted portion is only for the business purposes of one of them which is clearly indicative on the complete reading of the release application, specially paragraph 20 which reads as under:

20. यह कि आवेदक सं० 1 को अपना व्यवसायी कारोबार करने के लिए प्रश्नगत भवन सं० 18/15 हेस्टिंग रोड। 1/5 न्याय मार्ग। टंडन क्वार्टर्स, इलाहाबाद, जिसमें विपक्षी किरायेदार के रूप में आबाद है, की उचित व सद्भावी आवश्यकता है जिसमें वह व्यापार को समुचित रूप से चला सकता है।"

11. A complete reading of the release application as filed by the landlords makes two things very clear. First the release has been sought of a shop and a three room residential portion with a drawing room, courtyard, kitchen, toilet and bathroom. Second the need for the aforesaid portion is for commercial purposes.

12. Section 21 of the Act which provides for release of the building under occupation of tenant on the ground of bonafide need of the landlord by its third proviso lays down that no application for release shall be entertained in case of any residential building for occupation for business purposes. The relevant clause of the third proviso to Section 21(1)(a) of the Act is quoted below:

"Provided also that no application under clause (a) shall be entertained -

(i)

(ii) in the case of any residential building, for occupation for business purposes;

(iii)"

13. The aforesaid provision is of a mandatory nature and provides that a residential building cannot be released for business purposes.

14. The question whether a residential building can be released for commercial purposes is a pure question of law and a duty is cast upon the courts to ensure that a residential portion is not released for business purpose.

15. The courts below in allowing the release application have not dealt with and considered the above aspect of the matter which goes to the root of the release application and its maintainability.

16. The written argument filed on behalf of the tenant before the appellate court below reveals that emphasis was laid upon the above aspect of the matter and a contention was raised that a residential building cannot be released for commercial purposes in respect of which **1986(2) ARC 251 Husaini Dhobi Vs. IIIrd Additional District Judge, Lucknow and another** was cited. However, despite the above the lower appellate court failed to consider the above argument and record any finding thereon. Both the courts below allowed the release application holding the need of the

landlord to be bonafide but without going into the question of releasing a residential portion for the purposes of business.

17. In *Husaini Dhobi (supra)* it has been held that the landlord is permitted to use the residential portion for business purpose and the landlord can not seek release of residential premises for commercial purpose in view of the bar contained in proviso third (ii) to Section 21(1)(a) of the Act.

18. No contrary view was placed before me.

19. The courts below in holding the need of the landlord to be bonafide have recorded a finding that the tenant has acquired a residential house at Bhagwan Ram Mandir Marg/Old Stretchy Road, Allahabad. In view of the said finding it has been argued that the tenant cannot object to the release application.

20. Explanation (i) to the fourth proviso to Section 21(1) of the Act stipulates that where the tenant or any member of his family has built or has otherwise acquired in a vacant state or has got vacated after acquisition a residential building in the same city, municipality, notified area or town area, no objection by the tenant against an application under this sub-section shall be entertained. In other words, it provides that if a tenant of a residential premises has acquired another residential premises in vacant state he would not be entitle to raise any objection against the release application.

21. The aforesaid provision only debars the tenant from raising objection against the release application but it does not debars the court from considering the maintainability of the release application on the pleadings made in the release application itself. Thus, notwithstanding any objection to the release application by the tenant the release application on the face of it was not maintainable in so far as it seeks the release of a residential portion for business purposes.

22. In the above circumstances, as the landlords sought release of three rooms residential portion with a drawing room, courtyard, kitchen, toilet and bathroom for business purposes, the release application to that effect was barred by clause (ii) to third proviso to Section 21(1) of the Act.

23. Accordingly, the judgments and orders dated 30.5.2014 passed by the Additional District Judge, Court No.10, Allahabad and dated 10.1.2013 passed by the Prescribed Authority, Allahabad in so far as they direct for release of the residential portion of the House No.18/15 Hastings Road, Tandon Quarters, Allahabad for commercial purposes is quashed and the release of the shop alone which forms part of the tenanted portion is maintained. The judgment and orders of the courts below stand modified to the extent indicated above.

24. The writ petition is partly allowed as above with no orders as to costs.

(2016) 8 ILRA 1224
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.08.2016

BEFORE

THE HON'BLE MRS. VIJAY LAKSHMI, J.

Application U/s 482 No.- 38560 Of 2011

Manisha Ajariya

**...Applicant
Versus**

State Of U.P. & Anr.

...Opposite Parties

Counsel for the Applicant:

Shri Kashif Zaidi

Counsel for the Opposite Parties:

G.A., Ms. Ruchita Jain

Held—

Introduction & Invocation: The applicant approached the High Court under Section 482 of the Criminal Procedure Code (Cr.P.C.) seeking to quash a chargesheet dated January 24, 2010, pending in the Court of the Additional Chief Judicial Magistrate (A.C.J.M.), Mahrauli, Lalitpur. The chargesheet alleged offenses under Sections 498-A, 323, 504, 506 of the Indian Penal Code (IPC) and Sections 3/4 of the Dowry Prohibition (D.P.) Act.

Notice and Counsel's Instructions: The case was taken up as a mentioned matter. Although directed to inform the opposite party No.2 (the complainant/wife), her counsel stated at the bar that she had received no further instructions from her client for a long time.

Nature of Dispute & Personal Status: The applicant's counsel submitted that the core matrimonial discord between the husband and wife had been amicably settled, and they are now living together peacefully. The applicant is not a family member but merely a business partner of the husband. She was roped into the case by the wife out of sheer suspicion regarding her relationship with the husband.

Investigation Anomalies: The Investigating Officer (I.O.) explicitly noted in the chargesheet that the applicant does not fall under the legal definition of a "relative of the husband." Despite this finding, the I.O. submitted the chargesheet against her, and the Magistrate mechanically took cognizance without considering this fact.

Acquittal of Main Accused: The husband, mother-in-law, and father-in-law were already acquitted by the trial court on July 28, 2012, following the compromise. The case against the applicant remained pending solely because of an interim stay order granted by the High Court back on November 28, 2011.

State's Opposition: The learned Additional Government Advocate (A.G.A.) representing the State opposed the quashing application but could not produce any facts or evidence to contradict the applicant's submissions. **Legal Analysis of Section 498-A IPC:** The Court analyzed Section 498-A IPC, emphasizing that the text strictly

penalizes cruelty by the "husband or relative of the husband." The statutory definition does not extend to business partners or friends.

Final Order: Finding that the applicant is not a relative under Section 498-A IPC, and noting that the husband and in-laws have already been acquitted, the High Court allowed the application. The entire criminal proceeding and the underlying chargesheet against the applicant were officially quashed.

List of Citations :-

1. Criminal Case No. 174 of 2010 (A.C.J.M. Mahrauli, Lalitpur).

2. Judgment dated 28.07.2012 passed by A.C.J.M. Mahrauli (acquitting the co-accused).

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. Heard learned counsel for the applicant and learned A.G.A. representing the State Perused the records.

2. The applicant, by means of this application under Section 482 Cr.P.C., has invoked the inherent jurisdiction of this Court with prayer to quash the impugned charge sheet dated 24.01.2010 submitted in Criminal Case No.174 of 2010 under Sections 498-A, 323, 504, 506 IPC and 3/4 D.P. Act, Police Station Mahrauli, District Lalitpur pending in the Court of Additional Chief Judicial Magistrate, Mahrauli, Lalipur.

3. This case has been taken up today as a mentioned case. The learned counsel for the applicant making mention was directed to inform the learned counsel for the opposite party no.2 that this case shall be taken up at 12.00 noon. Learned counsel has stated at bar that when he informed Ms. Ruchika Jain, learned counsel opposite party No.2, she stated that she had no further instructions from her client i.e.opposite party No.2 since long.

4. Learned counsel for the applicant has submitted that it is a dispute arising out of matrimonial discord and now, the husband and wife have amicably settled this dispute. Now, they are living peacefully together, whereas the applicant, who has absolutely no concern with this matrimonial dispute and, who is merely a business partner of the husband of opposite party No.2 is unnecessarily being harassed due to the criminal case lodged against her by opposite party No.2 under Sections 498-A, 323, 504, 506 IPC and 3/4 D.P. Act Police Station Mahrauli, District Lalitpur, only in order to settle her grouse based on suspicion about the relationship between her husband and the applicant.

5. Learned counsel for the applicant has drawn the attention of this Court to the impugned charge sheet filed by the Police in which the I.O. has even clearly mentioned that the applicant does not come under the definition of "relative of husband", but despite this, he has submitted charge sheet against the applicant without proper investigation and the learned Magistrate too, without even considering this fact, has mechanically taken cognizance on the said charge sheet. Learned counsel for the applicant has submitted that in view of the fact that husband and wife are living together, opposite party No.2 (wife) will never appear before the court concerned and will try to keep the matter to remain pending, which is already pending since 2011. While drawing the attention of this Court to the Judgment dated 28.07.2012 passed by A.C.J.M. Mahrauli, District Lalitpur in the same case, learned counsel for the applicant submitted that in

the aforesaid matter all the other co-accused persons including even the husband, mother-in-law, father-in-law have already been acquitted on the ground of compromise, but the criminal proceedings against the applicant are still pending due to an interim stay order dated 28.11.2011 passed by this Court with regard to applicant.

6. On the aforesaid grounds, learned counsel for the applicant has submitted that the entire proceedings in pursuance of the said charge sheet filed under Sections 498-A, 323, 504, 506 IPC and 3/4 D.P. Act be quashed.

7. Learned A.G.A. has opposed the same, but he has not pointed out any relevant fact contradictory to the aforesaid submissions.

8. Section 498-A of I.P.C., which is reproduced below envisages in unequivocal terms about cruelty and harassment by husband or his relatives. It nowhere provides about harassment by friends of the husband.

Section 498A in The Indian Penal Code

498A. Husband or relative of husband of a woman subjecting her to cruelty.?Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.--For the purpose of this section, "cruelty" means?

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

9. Thus, it is clear that the applicant does not come within the purview of Section 498-A of IPC. The husband and his family members (in-laws), who were the main accused, have already been acquitted by the learned trial court itself. However, the case of applicant remained pending only due to an interim order of this Court.

10. Considering all these facts and circumstances, this application deserves to be allowed and is hereby allowed. The entire proceedings against the present applicant in pursuance of the said charge sheet filed under Sections 498-A, 323, 504, 506 IPC and 3/4 D.P. Act are hereby quashed.

(2016) 8 ILRA 1227
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.08.2016

BEFORE

THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE DR. VIJAY LAXMI, J.

Special Appeal No.- 351 Of 2016

Laxmi Narain Tewari (Inre 16917 S/S 2016) ...Appellant
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Appellant:

Om Prakash Misra, Rakesh Kumar Singh

Counsel for the Respondents:

C.S.C Pankaj Kumar Shukla, Ramesh Pandey

Education Law — *Ad hoc* appointment of Principal — Section 18, U.P. Secondary Education Services Selection Board Act, 1982 — Scope — Vacancy of Principal to be filled on *ad hoc* basis by promoting senior-most qualified teacher of institution — Appointment must be from within institution and in accordance with prescribed qualifications — Held, appointment of a Principal from another institution on officiating basis is alien to statutory scheme and impermissible.

Education Service — Ad hoc promotion — Eligibility and seniority — Determination — Senior-most teacher to be given charge unless ineligible — Disputes regarding seniority and qualification to be adjudicated by competent authority — Until such determination, existing arrangement cannot be disturbed arbitrarily.

Administrative Law — Natural justice — Violation — Ex parte order — District Inspector of Schools passed order replacing officiating Principal without notice or opportunity — Held, such order violative of principles of natural justice and unsustainable — Mere pendency of enquiry or direction for lodging FIR not sufficient to justify adverse ex parte action.

Administrative Law — Exercise of power — Malice in law — Order passed ignoring earlier approval of competent authority and pending disputes — Action influenced by extraneous considerations — Held, exercise of power arbitrary and vitiated by malice in law.

Education Service — Interim arrangement — Judicial directions — Limits — Court cannot direct appointment of outsider Principal from another institution as interim arrangement — Such direction beyond statutory framework and without jurisdiction.

In Result: Special Appeal allowed; order of District Inspector of Schools set aside; impugned directions of Single Judge (to extent of interim arrangement) quashed; directions for determination of seniority and qualification upheld.

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.
&
Hon'ble Dr. Vijay Laxmi, J.)

1. The appeal questions the correctness of the judgment of the learned Single Judge dated 26.7.2016 in relation to the *ad hoc* appointment and continuance of a Principal on officiating basis in an aided privately managed Intermediate College governed by the provisions of Intermediate Education Act, 1921 and the U.P. Secondary Education Services Selection Board Act, 1982 and the Regulations framed thereunder.

2. The legal battle ensued for the post of Principal in Janta Inter College, Babhnan, Gonda which is duly recognized under the 1921 Act when it's regular Principal Mr. Ram Prakash Mishra died in a road accident on 15.12.2011. On the occurrence of such a vacancy *ad hoc* arrangement has to be made which is permissible under Section 18 of the 1982 Act. Section 18 of 1982 Act reads as under:-

"18. *Ad hoc* Principals or Headmasters -- (1) Where the Management has notified a vacancy to the Board, in accordance with sub-section (1) of Section 10 and the post of the Principal or the Headmaster actually remained vacant for more than two months, the management shall fill such vacancy on purely *ad hoc* basis by promoting the senior-most teacher.

(a) in the lecturer's grade in respect of a vacancy in the post of the Principal.

(b) in the trained graduate's grade in respect of a vacancy in the post of the Headmaster.

(2) Where the Management fails to promote the seniormost teacher under sub-section (1) the inspector shall himself issue the order of promotion of such teacher and the teacher concerned shall be entitled to get his salary as the Principal or the Headmaster, as the case may be, from the date he joins such post in pursuance of such order of promotion.

(3) Where the teacher to whom the order of promotion is issued under sub-section (2) is unable to join the post of the Principal or the Headmaster, as the case may be, due to any act or omission on the part of the management, such teacher may submit his joining report to the Inspector, and shall thereupon be entitled to get his salary as the Principal or the Headmaster, as the case may be, from the date he submits the said report.

(4) Every appointment of an *ad hoc* Principal or Headmaster under sub-section (1) or sub-section (2) shall cease to have effect from when the candidate recommended by the Board joins the post."

3. It may be clarified at the outset that such *ad hoc* arrangement is to be made from amongst the senior-most teachers of the highest grade in the institution and the appointment has to

be made of an individual who possesses the qualification to occupy the post of a Principal in terms of the Appendix appended to the Regulations framed under Chapter - III of the 1921 Act read with the Regulations framed under the 1982 Act. There cannot be a dispute that the Principal of an Intermediate College has to have a post-graduate degree with the experience as prescribed under the said Appendix for being appointed as a Principal. The senior-most person has to be given charge unless he is ineligible or otherwise incapable and the seniority has to be determined in terms of the Rules that provide for fixation of seniority under the Regulations and the Act. According to the appellant, he is the senior-most Teacher in the highest grade and his name had also appeared at Sl. No. 1 in the seniority list dated 21.11.2012 and as such, he was entitled for being appointed. According to the appellant, the name of Sri Krishna Dev Tripathi was shown at Sl. No.2 whereas name of Sri Satyadeo Tiwari was shown at Sl. No.11. This seniority is however being disputed by the respondent No.6. The respondent No.6 also disputes the eligibility of the appellant of not being possessed of a Post-Graduate Degree on the date when he came to be given charge on officiating basis treating him to be the senior-most Teacher of the Institution. According to the respondent No.6, since the appellant did not possess the requisite qualification he could neither have been given charge nor can he be promoted on *ad hoc* basis as a Principal of the Institution.

4. This process of appointment on *ad hoc* basis on the post of Principal of the Institution commenced with a resolution of the Committee of Management passed on 25.1.2012, whereby the said proposal was forwarded to the Regional Joint Director (Education), Faizabad. A letter dated 27.1.2012 was sent by the District Inspector of Schools to the Joint Director of Education informing him that the appellant possessed only a Graduate Degree (B.A., B.Ed.) but in view of the impending Board Exams of students the arrangement on the post be made at the earliest. The Joint Director of Education on 15.2.2012 passed an order to the effect that Sri Krishna Dev Tripathi was the senior-most Teacher who was qualified and eligible, but since his work and conduct was not satisfactory and he was involved in a criminal case having been bailed out therein, the appellant/Laxmi Narain Tewari was rightly proposed for being appointed on *ad hoc* basis and accordingly, the Joint Director of Education approved of the *ad hoc* promotion of the appellant through the said order dated 15.2.2012, a copy whereof is Annexure -2 to the appeal. The District Inspector of Schools, Gonda vide order dated 26.2.2012 attested the signatures of the appellant as the officiating Principal of the Institution to function till a regularly selected Principal by the Board arrives to join in the Institution.

5. At this juncture, it may be relevant to point out that till date there is nothing on record to indicate the regular selection/appointment of the Principal in the institution for the past four years.

6. The issue of seniority vis-à-vis the Teachers in the Institution also appears to have been raised before the District Inspector of Schools and Joint Director of Education and the District Inspector of Schools vide letter dated 7.9.2012 called upon the submission of the seniority list before him. A copy of the said letter is Annexure - 4 to the appeal. The Committee of Management of the Institution through it's Manager forwarded the seniority list vide letter dated 22.11.2012.

7. The respondent No.6 Satyadeo Tiwari being an aspirant for the post of Principal on the aforesaid allegations appears to have approached the local Member of Legislative Assembly (MLA) who on 18.10.2012 made a recommendation to the Director of Education for appointing the respondent No.6 as the officiating Principal of the Institution. The Director of Education in turn forwarded the said letter to the District Inspector of Schools and acting thereon, the District Inspector of Schools on 12.11.2012 despatched a letter directing the Manager of the Institution to appoint the respondent No.6 as the officiating Head of the Institution and also forward papers for the attestation of his signatures. The District Inspector of Schools informed the Manager vide letter dated 16.1.2013 that the aforesaid recommendation and the letter written by him on 12.11.2012 shall be considered only after the decision of seniority which is pending before the Regional Joint Director (Education).

8. In between, the appellant had filed a Writ Petition No.6977 (SS) of 2012 challenging the direction of the District Inspector of Schools dated 12.11.2012 which had been issued at the instance of the MLA and the Director of Education. The said writ petition is still pending, but it appears that no action was taken as the District Inspector of Schools himself passed the order 16.1.2013 that the same shall be considered after the seniority dispute is decided by the Joint Director of Education as is evident from the letter dated 16.1.2013. Practically, the said petition appears to have become redundant in the wake of subsequent developments.

9. The respondent No.6 then adopted another course of method approaching the district authorities including the District Magistrate, Gonda alleging that the appellant had managed to procure Post-Graduation Certificates in the meantime, but since they were forged an enquiry should be conducted into the matter. The District Inspector of Schools on 6.2.2014 wrote a letter to the management calling upon it to provide the copies of the marks sheets and certificates of the Master's Degrees that came to be acquired by the appellant in between these transactions.

10. The respondent No.6 appears to have pestered the M.L.A. who again might have called upon the District Inspector of Schools, who in turn issued a letter dated 6.5.2015 calling upon the Management to explain as to why charge of ad hoc/officiating Principal has not been given to the respondent No.6. This indicates that the respondent No.6 has questioned the seniority as well as the eligibility of the appellant at the time of his appointment and even thereafter about his qualification of Post-Graduation that have been acquired later on which he had described to be fake. Not only this, this persuasion further appears to have taken shape when the respondent No.6 moved a complaint before the District Magistrate, who on the administrative side directed the Station Officer of the Police Station concerned to lodge an F.I.R. vide order dated 16.5.2016 which order finds endorsed on Annexure - 16 to the affidavit. This order has been passed on the application presented during "Janta Darshan" of the District Magistrate. The Management appears to have refused to act upon any such complaints or the direction of the District Inspector of Schools vide letter dated 20.7.2016 clearly stating therein that unless it is found that the appellant is otherwise guilty of any misconduct he cannot be removed and no charge can be given to some other person. It has also been stated by the Management that the respondent No.6/Satyadeo Tiwari has not been able to perform his teaching job satisfactorily and even otherwise he had suffered from a paralytic attack

about a year ago as a result whereof it is not possible for him to maintain discipline amongst the students in the classes. The letter of the Management also indicates that a recommendation had been made for his compulsory retirement and for that purpose, he can be medically examined.

11. It is in this background that all of a sudden without any notice or opportunity to the appellant, the District Inspector of Schools on 30.6.2016 passed an order, that keeping in view the enquiry on the complaint made by the respondent No.6 which is pending and the direction of the District Magistrate to lodge an F.I.R., till the enquiry is concluded, respondent No.6/Satyadeo Tiwari is directed to be appointed as officiating Head of the Institution. A copy of the letter was sent to the Manager of the Institution to execute the same and to forward the signatures of respondent No.6 for attestation.

12. It is this order dated 30.6.2016 that came to be challenged by the appellant through the Writ Petition No.16917 (SS) of 2016 that has given rise to this appeal contending that firstly, the impugned order is in violation of principles of natural justice as no notice or opportunity was given to the appellant and secondly, the pendency of an enquiry cannot be a basis for his substitution as the Head of the Institution by the appointment of the respondent No.6 that too even after four years of his continuing as such and thirdly, the appellant possesses the Master's Degree in two subjects which came to be obtained in the years 2012 and 2013 respectively. It was further urged on behalf of the appellant that the original order by which the appellant was recognized by the authorities as the officiating Head of the Institution, namely the order dated 15.2.2012 of the Joint Director of Education and the consequential order of the District Inspector of Schools dated 22.2.2012 has neither be rescinded nor cancelled and as such, the District Inspector of Schools on his own cannot annul the effect of the highest authorities, namely, Regional Director of Education.

13. The respondent No.6 filed a short counter affidavit before the learned Single Judge and brought on record the letter dated 27.1.2012 of the District Inspector of Schools that was addressed to the Joint Director of Education indicating therein that the appellant/Laxmi Narain Tiwari was possessed of the qualification of B.A., and B.Ed., only, but in view of the impending practical examinations of the students to be conducted by the U.P. Board, a decision should be taken in relation to the appointment of the Head of the Institution.

14. A supplementary affidavit was filed by the appellant before the learned Single Judge stating therein that he had post-graduated in the subject of English through the distance learning education of Sikkim University in January, 2011 in a course that ran between January, 2011 to December, 2011 and the marks sheet of the final year was issued on 25.9.2012. A copy of the said mark sheet was also filed alongwith the supplementary affidavit. It was also alleged therein that subsequently, the appellant passed the Post-Graduate Examination in Hindi as well from Acharya Narendra Dev Kisan Post-Graduate College, Babhnan, Gonda in 2013 as a private student and this certificate was appended alongwith the supplementary affidavit which course he had pursued with due permission granted in this regard. He also indicated his claim of seniority over and above the respondent No.6. It was also alleged therein that no complaint was there against him about his capacity and conduct as Head of the Institution since 2012 and in this background, it was prayed

that the order of the District Inspector of Schools dated 30.6.2016 being *mala fide* deserves to be quashed.

15. We have heard Sri Rakesh Kumar Singh, learned Counsel for the appellant, Sri Ramesh Pandey, learned counsel for the respondent No.6 and the learned Standing Counsel for the respondent Nos.1 to 4.

16. Learned counsel for the said respondents clearly stated that they do not propose to file any further affidavit apart from what has already been filed before the learned Single Judge and therefore, the matter be disposed of finally at this stage itself.

17. Learned counsel for the appellant Sri Singh has submitted that there was a contest between the appellant and the respondent No.6 for the post in question. The learned Single Judge has committed a manifest error by proceeding to make a provision by directing that the function of the post of Principal in the Institution shall be discharged by a regularly appointed Principal of some nearby recognized aided Intermediate College in the vicinity of the appellant's institution. Sri Singh submits that this direction is contrary to law and the Principal of another institution cannot be supplanted in the appellant's institution either under any provision of the 1921 Act or under the 1982 Act or the Rules and Regulations framed thereunder. Such a direction therefore cannot be implemented and it amounts to appointing somebody totally outside the cadre of the Institution for which the provisions do not make any exception and therefore, such an exercise cannot be undertaken through a Mandamus under Article 226 of the Constitution of India. He therefore submits that this part of the order being totally without jurisdiction the same deserves to be set aside.

18. It would be appropriate to deal with this part of the direction at the very outset with regard to which the submission of Sri Ramesh Pandey, learned counsel for the respondent No.6 is that even if it is assumed that this direction could not be given, but the same can be saved by modifying it to the extent that any other Teacher of the same Institution including the respondent No.6 can be given charge once it is established that the appellant did not possess the minimum qualifications on the date when he came to be proposed by the Committee of Management on 25.1.2012 and even when the orders were passed by the Joint Director of Education and the District Inspector of Schools on 15.2.2012 and 22.2.2012 respectively.

19. We have considered the aforesaid submissions and the issue with regard to the qualification of appellant will be dealt with here-in-after but so far as the aforesaid direction of the learned Single Judge to make an interim arrangement by giving charge of the office of Principal to a regular Principal of some other Institution is totally foreign to the concept of an *ad hoc* Principal as envisaged under Section 18 of the 1982 Act. The senior-most Teacher of the same Institution has to be given charge unless he is otherwise incapable of holding the same. Sri Ramesh Pandey therefore is right to the extent that if the senior-most Teacher is not qualified then the baton has to pass on to the next senior-most Teacher provided he is qualified and eligible. Thus, a Principal of another College cannot be introduced as an In-charge on officiating basis of the present Institution.

The said direction of the learned Single Judge therefore being beyond law cannot be sustained. One private aided institution is a separate entity from another private aided institution. There cannot be any imposition on officiating basis in the manner aforesaid as neither the 1982 Act nor the 1921 Act or the Rules and Regulations framed thereunder envisages any such arrangement.

20. Coming to the issue of this sudden change brought about by the order of the District Inspector of Schools dated 30.6.2016, the learned Single Judge himself has arrived at the finding that the impugned order is in violation of principles of natural justice and has been passed without any notice or opportunity to the appellant. Neither Sri Ramesh Pandey for the respondent No.6 nor the learned Standing Counsel for the State could dispute the fact that the order dated 30.6.2016 of the District Inspector of Schools was passed without notice and opportunity to the appellant. Thus, the same being in violation of principles of natural justice cannot be sustained more so in the background when the appellant had been continuing and officiating as the Head of the Institution for the past four years without any complaint about his administrative capacity on the post.

21. There was no justification for passing an ex parte order and it also appears to have been passed not bona fide, inasmuch as the pretext of passing of the order is the pendency of an enquiry against the appellant both with regard to the seniority and also with regard to the status of his Certificates for which a direction had been issued to lodge an F.I.R. Such a pretext cannot be made the basis of an ex parte order unless there is a final outcome of any such enquiry or even prima facie evidence before a Criminal Court to substantiate the same. An F.I.R. was directed to be lodged by the District Magistrate who had no authority to entertain a complaint with regard to such a matter which was already engaging the attention of the educational authorities, that too even in a "Janta Darshan". The District Inspector of Schools has not correctly appreciated or appears to have not been informed about the entire background of this litigation. A mere lodging of an F.I.R. would therefore not be a basis to dispense with the inbuilt mechanism of providing an opportunity before passing an order adverse to the appellant.

22. Sri Ramesh Pandey has urged that if the order is interfered with the same would amount to restoring the appellant who does not possess the minimum qualifications and is also alleged to be in possession of fake Certificates of Post-Graduation. This may only be at best a presumptuous material which is subject to any enquiry and is clearly rebuttable which proceedings were pending before the educational authorities. There is no final outcome of the same. Simultaneously, the issue of seniority which has already been raised is still pending before the Joint Director of Education. Thus, to presume everything against the appellant at this very stage and to non-suit him would be exercising an erroneous authority on the basis of a mere presumption without final proof.

23. There is yet another aspect of the matter. The impugned order of the District Inspector of Schools dated 30.6.2016 has been passed directly by the District Inspector of Schools to appoint the respondent No.6 and give him officiating charge of the Institution. There is no resolution of the Committee of Management nor is there any final verdict on the dispute between the appellant and the respondent No.6 either about the qualifications or the seniority matter. The District Inspector of Schools was therefore right in dispatching the letter on 16.1.2013 informing the Manager that any decision on

the complaint of the respondent No.6 or otherwise would be taken after a decision is taken by the Joint Director of Education. The District Inspector of Schools has pre-empted this by the impugned order dated 30.6.2016 without the order of the Joint Director of Education dated 15.2.2012 having been either withdrawn or rescinded which is in favour of the appellant. This being the position the District Inspector of Schools clearly appears to have acted upon the persuasion of the respondent No.6 and the earlier correspondence as noted above where the M.L.A. had also intervened at the instance of the respondent No.6. The order of the District Inspector of Schools therefore also suffers from malice in law. This aspect has also been overlooked by the learned Single Judge while refusing to come to the aid of the appellant and adopting a procedure which is totally alien to the provisions of the Act and Rules and introducing a third person as a Principal from outside even though the learned Single Judge has noticed the fact that the matter requires a decision by the Joint Director of Education that has been explained by him at item Nos.1, 2 and 3 of the directions issued in the impugned judgment.

24. In view of what has been stated above, the direction Nos.4, 5 and 7 of the impugned judgment cannot be sustained. Accordingly, we find that the learned Single Judge even though had rightly issued the directions for an early decision in the matter by the Director and the Joint Director of Education, had erred in exercising discretion by proceeding to make an interim arrangement by non-suiting the appellant or even for that matter against the respondent No.6 who were staking their claims in the institution.

25. From what has been brought on record, it is evident that the appellant was continuing in the institution pursuant to the orders referred to here-in-above for the past four years and therefore, the abrupt decision to dislodge the same without any decision on the merits of the claim by the competent authority by the District Inspector of Schools was clearly an erroneous exercise of power. The District Inspector of Schools ought not to have overreached the order of the Joint Director of Education dated 15.2.2012 and his own order dated 16.1.2013 in such a hasty manner which is also in violation of principles of natural justice.

26. Consequently, for all the reasons aforesaid, the order of the District Inspector of Schools dated 30.6.2016 is quashed and the directions given by the learned Single Judge being direction Nos.4, 5 and 7 are set aside.

27. The other directions with regard to seniority and with regard to the enquiry into the Master's Degree of the appellant are upheld. The Joint Director of Education shall proceed with the matter of seniority and so far as the issue of the Certificates of the appellant is concerned, the same shall be decided by the Director of Secondary Education as directed by the learned Single Judge within the time period prescribed therein. The final orders to be passed by the Director of Secondary Education would therefore govern the fate of the parties as per the direction of the learned Single Judge.

28. Subject to any further challenge being raised to the same, the Special Appeal is accordingly **allowed** with the aforesaid directions.

(2016) 8 ILRA 1235
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.08.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

Writ Tax No.- 831 Of 2015
&
Connected With Other Cases

Dr. Arun Kumar & Ors.

...Petitioners

Versus

Nagar Nigam Bareilly Through Municipal Commissioner & Anr.

...Respondents

Counsel for the Petitioners:

Manish Goyal, Ankita Jain

Counsel for the Respondents:

Shivnath Singh, Satyam Singh

Municipal Law — Property tax — Determination of annual value — Compliance with statutory procedure — Challenge to rent list and determination of annual value under S. 174, U.P. Municipal Corporation Act, 1959 read with Rules, 2000 — Held, fixation of annual value and rental rates must strictly follow procedure prescribed under Act and Rules including preparation, publication, invitation and disposal of objections — Non-compliance vitiates entire exercise.

Municipal Law — Assessment list — Illegality — Violation of Rules 4-A & 4-B — Final rent list published prior to proper disposal of objections and without adherence to prescribed procedure — Exercise conducted by officers without due authority and without following statutory requirements — Held, impugned determination illegal and unsustainable.

Statutory Interpretation — Mandatory procedure — Doctrine of "manner prescribed" — Where statute requires an act to be done in a particular manner, it must be done in that manner alone or not at all — Any deviation renders action void — Principle reiterated.

Writ Jurisdiction — Interference — Remand for fresh action — Where statutory procedure admittedly not followed, High Court justified in quashing impugned action — Liberty granted to authority to undertake fresh exercise in accordance with law.

In Result: Writ petitions allowed; impugned rent list and annual value determination set aside; liberty granted to Nagar Nigam to proceed afresh in accordance with statutory provisions.

Cases cited:

1. Nazir Ahmad Vs. King-Emperor AIR 1936 PC 253
2. Dhananjaya Reddy Vs. State of Karnataka 2001 (4) SCC 9
3. Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala 2002 (1) SCC 633
4. Captain Sube Singh & others Vs. Lt. Governor of Delhi & others 2004 (6) SCC 440
5. Competent Authority Vs. Barangore Jute Factory & others 2005 (13) SCC 477
6. State of Jharkhand & others Vs. Ambay Cements & another 2005 (1) SCC 368
7. Daya Shankar Singh Vs. State of U.P. and others 2008(2) ESC 1220

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Manish Goyal and Sri Vishnu Pratap Singh, learned counsel for petitioners and Sri Satyam Singh, Advocate for Nagar Nigam.

2. Rent list dated 30th May, 2015 published by Nagar Nigam determining rate under Section 174(1)(b) of Nagar Nigam Adhiniyam, 1959 (hereinafter referred to as 'Act, 1959') read with Rule 4A & 4B of Uttar Pradesh Municipal Corporation (Property Taxes) Rules, 2000 (hereinafter referred to as "Rules, 2000") for assessment of annual value of buildings for determining House Tax and Water Tax has been challenged on the ground that said determination has been made in violation of procedure prescribed in the Rules read with Section 174 of Act, 1959.

3. With the consent of parties, for the purposes of reference of pleadings, Writ Tax No. 831 of 2015 is taken as the leading case.

4. Brief facts sated therein are that petitioners are residents of Bareilly. Respondent, Nagar Nigam, Bareilly is a Municipal Corporation constituted under Act, 1959 and governed by various provisions there under.

5. Under Section 173 Nagar Nigam is empowered to levy different kinds of "Property Tax" enumerated therein vide sub section (1) as under : -

"(a) a **general tax** on a graduated scale;

(b) **water tax** in areas where water is supplied by Corporation;

(c) **drainage tax** in areas provided with sewer system by Corporation;

(d) a **conservancy tax** in areas in which Corporation undertakes collection, removal and disposal of excrementitious and polluted matter from privies, urinals and cesspools."

(emphasis added)

6. Sub section (2) of Section 173, states that taxes under sub section (1) shall be levied on "annual value" of building or land as the case may be. A proviso inserted in sub section (2) by U.P. Act No.17 of 1999 provides minimum and maximum rate of taxes leviable by Corporation and reads as under : -

" Provided that the ***aggregate of the property taxes shall in no case be less than 22 per cent and not more than 32 per cent of the annual value of the building or land or both assessed to such taxes, so however, that the general tax shall not be less than 10 per cent and not***

more than 15 per cent, the water tax shall not be less than 7.5 per cent and not more than 12.5 per cent, the drainage tax shall not be less than 2.5 per cent and not more than 5 per cent and the conservancy tax shall not be more than 2 per cent of the annual value."
(emphasis added)

7. Since "Property Tax" under Section 173 is founded on "annual value" of buildings or land, Section 174, defines "annual value" and reads as under.

"174. Definition of "annual value". -(1) "Annual value" means –

(a) *in the case of railway stations, colleges, schools, hostels, factories, commercial buildings, and other non-residential buildings, a proportion not below 5 per cent, to be fixed by rule made in this behalf of the sum obtained by adding the estimated present cost of erecting the building less depreciation at a rate to be fixed by rules, to the estimated value of the land appurtenant thereto; and*

(b) *in the case of a building or land not falling within the provisions of clause (a), twelve times the value arrived at on multiplying the carpet area of the building, or the area of the land, by the applicable minimum monthly rate of rent per square foot of the carpet area in the case of building or the applicable minimum monthly rate of rent per square foot of the area in the case of land, as the case may be, and for this purpose the minimum monthly rate of rent per square foot shall be such as may be fixed once in every two years by the Municipal Commissioner on the basis of the location of the building or the land, nature of the construction of the building, the circle rate fixed by the Collector for the purposes of the Indian Stamp Act, 1899 and the current minimum rate of rent in the area for such building or land and such other factors, and in such manner, as may be prescribed:*

Provided that where the annual value of any building would, by reason of exceptional circumstances, in the opinion of the Corporation, be excessive if calculated in the aforesaid manner, the Corporation may fix the annual value at any less amount which appears to it equitable.

Explanation.- For the purpose of calculation of annual value the carpet area shall be calculated as under: -

(ii) Covered Verandah - full measurement of internal dimension;

(iii) Balcony, Corridor, Kitchen and Store-50 per cent measurement of internal dimension;

(iv) Garage - one-fourth measurement of internal dimension;

(v) Area covered by **bathroom, latrines, portico and staircase shall not form part of the carpet area.**

Explanation II.-The standard rent, the agreed rent or the reasonable annual rent of a building for the purposes of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 shall not be taken into account while calculating the annual value of that building.

(2) Where the **Corporation so resolves**, the annual value for the purpose of assessment of property taxes shall –

(a) in the case of land and **owner-occupied residential building which is not more than ten years old, be deemed to be 25 per cent less** and if it is more than ten years but not more than twenty years old, be deemed to be 32.5 per cent less, and if it is more than twenty years old, be deemed to be 40 per cent less than the annual value determined under clause (b) of subsection (1); and

(b) in the case of residential building let on rent, which is not more than ten years old, be deemed to be 25 per cent more, and if it is more than ten years but not more than twenty years old, be deemed to be 12.5 per cent more than the annual value determined under clause (b) of subsection (1), and if it is more than twenty years old, be deemed to be equal to the annual value determined under clause (b) of sub-section (1).

8. Section 174 provides two methods to compute "annual value", one in respect of non residential, commercial or such building as are used for public purposes and another for those which are residential building. Section 174(1)(a) deals with method of determining "annual value" in respect of railway stations, colleges, schools, hostels, factories, commercial buildings and other non residential buildings. The methodology applied by Legislature for determining annual value for property covered by Section 174(1)(a) is that firstly, estimated present cost of erecting the building shall be determined, and rate of depreciation shall be applied to such building. Depreciation rate would be fixed by Rules. The reduced cost of erecting building i.e. which comes after reducing depreciation at the rate fixed by Rules, it shall be added to the admitted value of land. 'Annual value' would be 5 per cent or such as fixed by Rule of the value arrived at above. We may demonstrate annual value of property governed by Section 174(1)(a) as under.

"Present cost of erecting building - (depreciation at a rate fixed by Rule) + estimated value of land appurtenant to property = whatever value comes, 'annual value' would be 5 per cent or such higher as fixed by Rules."

9. Similarly, Section 174(1)(a) applies to building or land not covered by clause (a) of sub-section (1) of Section 174. In this category annual value would be determined, firstly, by working out carpet area of building or where it is land; area of land, multiplied by minimum monthly rate of rent per square foot of the carpet area in case of building, or minimum monthly rate of rent per

square foot of the area of land. Whatever value comes, it shall be twelve times thereof would be 'annual value'. In other words, the determination may be demonstrated as under.

"(a) For Building - Carpet area of building x minimum monthly rate of rent per square foot x 12

(b) Land - area of land x monthly minimum rate per square foot."

10. With respect to monthly minimum rate of rent per square foot under Section 174(1)(b), statute requires that it shall be fixed once in every two years by Municipal Commissioner on the basis of (a) location of building or land, (b) nature of construction of building, (c) circle rate fixed by Collector for the purpose of Indian Stamp Act, 1899, (d) the current minimum rate of rent in the area for such building or land, and (e) such other factors, as the case may be.

11. Explanation 1 of Section 174 gives details as to how annual value of carpet area shall be calculated and Explanation-II makes it clear that agreed rent, standard rent or reasonable annual rent of a building for the purposes of Uttar Pradesh Urban Buildings (Regulations of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as "Act, 1972") shall not be taken into account while calculating annual value of that building.

12. Sub-Section (2) further provides that Corporation so resolves, annual value for the purposes of assessment of property taxes shall be in the case of land and owner occupied residential building which is not more than ten years old, be deemed to be 25 per cent less and if it is more than ten years but not more than twenty years old, be deemed to be 32.5 per cent less and if it is more than twenty years old, be deemed to be 40 per cent less than the annual value determined under clause (b) of sub-section (1). Further in case of residential building let on rent, which is not more than ten years old, it can be deemed to be 25 per cent more, and if it is more than ten years but not more than twenty years old, be deemed to be 12.5 per cent more than the annual value determined under clause (b) of sub-section (1), and if it is more than twenty years old, be deemed to be equal to annual value determined under clause (b) of sub-section (1).

13. For the purposes of preparation of assessment and levy of property tax, procedure has been prescribed in Sections 207 to 213. Section 207 contemplates preparation of an assessment list by Municipal Commissioner determining area wise rental rates in accordance with manner prescribed in the rules. Section 207-A gives an option to owner or occupier of property to self assess property of tax and deposit the same and for that himself determine annual value of building in accordance with Section 174 and deposit property tax so assessed by him in such manner, together with a statement of such self assessment, in such form, as may be prescribed.

14. Section 207-B provides that every owner or occupier of house or land shall submit a property return for the purposes of annual rental value up to a date as may be prescribed. Sub-section (2) makes failure of submitting such return, penal, which is compoundable in view of Section (3) of Section 207-B. Section 208 obliges Municipal Commissioner to publish list prepared

under section 207 in accordance with the manner prescribed in the rules. Section 209 obliges Municipal Commissioner or an Officer authorized by him to dispose of objections against assessment list prepared under section 207 in the manner prescribed in the rules. Section 211 contemplates new assessment list ordinarily in every two years in exercise of power under Sections 174 to 207-A and 221-B of Act, 1959,

15. Competent Authority i.e. State Government has framed rules, namely, Uttar Pradesh Municipal Corporation (Property Taxes) Rules, 2000 (hereinafter referred to as "Rules, 2000"). The aforesaid rules exclude the area which has been included in the city within last ten years and a building constructed on a plot of land measuring 30 square meter or having a carpet area of 15 square meter, if the owner of the building does not possess any other building in the city. These rules came into force from the date of publication in gazette i.e. 22nd April, 2000.

16. Nagar Nigam, Bareilly under took exercise for determination of rent in terms of Section 174 read with Rules 2000 for the period :-

(i) 2001 upto 2003

(ii) 2003 upto 2005

(iii) 2007 upto 2009.

17. Petitioners did not dispute aforesaid fixation and paid house tax in terms of determination of annual value for the aforesaid period, either through self assessment form or on the basis of bills raised by Nagar Nigam, Bareilly.

18. Rent list was published for 2010-12, and objections were decided. It was decided that proposed list, would be effective from 1-4-2011 and shall be published in two local newspapers, but rental value was arbitrarily enhanced without objections and publications.

19. By resolution dated 12-2-2014, Nagar Nigam discarded rent list for 2011-12 but instead of implementing said list, a new proposal was made for revision of rent based upon per square foot for carpet area in the case of building and per square foot of the area in the case of land by publication of another list dated 10-4-2015. Objections were filed by various persons including petitioners. Personal hearing was afforded on 31-5-2015 and final list was published on 31.5.2015.

20. It is said that finalization of rent rate list is illegal and contrary to rule 4A (1)(ii) of Rules, 2000. Final list was published on 31st May, 2015 while objection was decided on 16-6-2015 and July, 2015 which was in violation of Rule 4B of Rules, 2000. It is also said that entire exercise has been done by officers of Nagar Nigam and not by Municipal Commissioner who is authorized under Act, 1959 and Rules 2000. Further no decision could have been taken by Municipal Commissioner without any resolution of Board. From paras 37 to 42, of writ petition with reference

to various provisions in Act, 1959 and Rules, 2000 it has been sought to demonstrate that in making final assessment, procedure prescribed in Rules has not been followed by Respondents.

21. Nagar Nigam has filed a counter affidavit but therein contents of paras 33 to 38 of writ petition, though denied, but there is no averment and any material to show that procedure laid down in various provisions as discussed and referred above, was followed by Nagar Nigam.

22. Learned counsel appearing for respondent, Nagar Nigam, after some arguments, fairly did not dispute that in determining rates under Section 174, which are impugned in the writ petition, Nagar Nigam has failed to follow the procedure prescribed in various provisions of Act, 1959 as referred to above.

23. When law requires something to be done in a particular manner anything done otherwise will be void and illegal. This principle was recognized in **Nazir Ahmad Vs. King-Emperor AIR 1936 PC 253** and, thereafter it has been reiterated and followed consistently by Apex Court in a catena of judgements, which we do not propose to refer all but would like to refer a few recent one.

24. In **Dhananjaya Reddy Vs. State of Karnataka 2001 (4) SCC 9** in para 23 of the judgment the Court held :

"It is a settled principle of law that where a power is given to do a certain thing in a certain manner, the thing must be done in that way or not at all."

25. In **Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala 2002 (1) SCC 633**, it was held :

"It is a normal rule of construction that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself."

26. The judgments in **Anjum M.H. Ghaswala (supra)** and **Dhananjaya Reddy (supra)** laying down the aforesaid principle have been followed in **Captain Sube Singh & others Vs. Lt. Governor of Delhi & others 2004 (6) SCC 440**.

27. In **Competent Authority Vs. Barangore Jute Factory & others 2005 (13) SCC 477**, it was held :

"It is settled law that where a statute requires a particular act to be done in a particular manner, the act has to be done in that manner alone. Every word of the statute has to be given its due meaning."

28. In **State of Jharkhand & others Vs. Ambay Cements & another 2005 (1) SCC 368** in para 26 of the judgment, the Court held:

"It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way."

29. In effect a similar question was considered by Division Bench of this Court [in which I was also a member with Hon'ble S.R. Alam, J., (as His Lordship then was)] in **Daya Shankar Singh Vs. State of U.P. and others, 2008(2) ESC 1220** and this Court has observed:

"A modification, amendment etc., therefore, is permissible by exercising the power in the like manner and subject to like sanction and conditions in which the main provision was made initially. Since, Staff Regulations were framed admittedly with the previous sanction of the State Government and by publication in the official Gazette, same can be amended only following the same procedure and not otherwise. Therefore, the proposal/resolution passed by the Board of Directors, UPSWC by no stretch of imagination can be said to have the effect of either amending Regulation 12 of Staff Regulations or to bind UPSWC and its employees to be governed by such resolution/proposal which are inconsistent with the existing provisions contained in Staff Regulations."

30. In that view of the matter, we find that impugned final rate list and list of Rental Value cannot be sustained.

31. In view of the above stand of respondents and considering the fact that non observance of procedure prescribed in Act, 1959 is virtually admitted, this writ petition is allowed. Impugned final rate list 30.5.2015 issued by respondent-1 and list of Rental Value, dated 10.4.2015 are hereby set aside. However, this judgment will not preclude respondents from proceeding afresh to determine Annual Value in accordance with Section 174, after following procedure prescribed in Act, 1959 and Rules 2000.

32. No costs.

(2016) 8 ILRA 1243
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.08.2016

BEFORE

THE HON'BLE BHARAT BHUSHAN, J.
THE HON'BLE ALOK KUMAR MUKHERJEE, J.

Criminal Appeal No.- 1492 Of 1983
&
Criminal Appeal No.- 1587 Of 1983

Durab

...Appellant
Versus

State Of U.P.

...Respondent

Counsel for the Appellant:

G.P.Mathur, G.P. Dixit, T.Rathore

Counsel for the Respondent:

A.G.A., Rajrshi Gupta

Penal Code, 1860 — Ss. 302/34 — Murder — Conviction based on ocular evidence — Reliability of related witnesses — Prosecution case based on eyewitness account of related witnesses supported by medical and documentary evidence — Held, testimony of related/inimical witnesses cannot be discarded solely on that ground if found credible and trustworthy — Presence of eyewitnesses at spot natural and proved — Minor discrepancies or absence of independent witnesses not fatal — Conviction sustainable.

Evidence — Ocular vs medical evidence — Appreciation — Alleged inconsistencies between medical and ocular evidence — Held, unless medical evidence completely rules out prosecution version, ocular evidence has primacy — In present case, medical evidence corroborated prosecution story regarding firearm injury and cause of death — No material contradiction affecting core prosecution case.

Criminal Trial — FIR — Evidentiary value — Delay in forwarding to Magistrate and absence of signature — FIR lodged promptly — Mere absence of informant's signature on written report or delay in forwarding FIR to Magistrate not fatal in absence of evidence of fabrication or ante-timing — FIR held genuine and reliable.

Criminal Trial — Defective investigation — Effect — Lapses or irregularities in investigation do not vitiate prosecution case where credible ocular evidence is available — Courts required to assess evidence independently of such defects.

Criminal Trial — Motive — Proof — Existence of prior enmity established — Motive not essential where direct evidence is available — Enmity may act as double-edged weapon but in present case supported prosecution version.

In Result: Appeal dismissed; conviction and sentence under S. 302/34 IPC affirmed; appellant directed to surrender and serve remaining sentence.

Cases cited:

Ishvarbhai Fuljibhai Patni Vs. State of Gujarat[1995 Supreme Court Cases (Crl) 222]
 Lal Mandi, Appellant v. State of West Bengal, Respondent[1995 Cri.L.J.2659 (Supreme Court), 2659]
 Shyam Babu Vs. State of U.P.,AIR 2012 SC 3311
 Shyamal Ghosh Vs. State of WB,AIR 2012 SC 3539
 Dhari & others Vs. State of U.P.,AIR 2013 SC 308
 Shanmugam and another Vs. State of TN(2013) 12 SCC 765
 Nand Kumar Vs. State of Chhatishgarh2015 Cri. L.J. 381
 Gajoo Vs. State of Utterakhand,2012 (9) SCC 532
 Sadhu Saran Singh Vs. State of U.P. and others(2016) 4 SCC 357
 Darbara Singh Vs. State of Punjab(2012) 10 SCC 476
 Susanta Das Vs. State of Orissa(2016) 4 SCC 371
 Gulzari Lal Vs. State of Haryana(2016) 4 SCC 583
 State of Karnataka Vs. Suvarnamma,(2015) 1 SCC 323
 Hema Vs. State,2013 (81) ACC 1 (SC) (Three Judge Bench)
 C. Muniappan Vs. State of TN,2010 (6) SCJ 822
 Amar Singh Vs. Balwinder Singh and others2003 Cri. L.J. 1282
 Allarakha K. Mansuri Vs. State of Gujarat(2002) 3 SCC 57
 Prithvi Vs. Mamraj and others(2004(13) SCC 279
 State of U.P. Vs. Jagdeo and others(2003) 1 SCC 456
 Dharmendrasinh alias Mansing Ratansinh Vs. State of Gujrat(2002) 4 SCC 679
 Bishundeo Poddar and others Vs. State of Bihar,2003 Cri.L.J. 1558
 V.K. Mishra and another Vs. State of Uttarakhand and another(2015) 9 SCC 588
 Vikram Singh and others Vs. State of Punjab(2010) 3 SCC 561
 Rana Pratap and others Vs. State of Haryana1983 (3) SCC 327
 Thangaiya Vs. State of Tamil Nadu(2005) 9 SCC 650

(Delivered by Hon'ble Alok Kumar Mukherjee, J.)

1. Since both these appeals have been preferred against a common judgment and order dated 24.6.1983, passed by the VIII Additional Sessions Judge, Agra in S.T. No.414 of 1982 (State Vs. Dalbir Singh and another) arising out of Crime No. 130 of 1982, P.S. Firozabad (North), District Agra, convicting the appellants under section 302 read with section 34 IPC and sentencing them to undergo imprisonment for life, both these appeals were connected and heard together.

2. It is relevant to mention that while hearing these appeals, it has been noticed by us that the sole accused-appellant Durab has died during pendency of Criminal Appeal No. 1492 of 1983 (Durab Vs. State of U.P.), therefore, his appeal stands abated vide order dated 21.1.2016 of Coordinate Bench of this Court, as such connected Criminal Appeal No. 1587 of 1983 (Dalbir Singh Vs. State of U.P.) is being disposed of by this judgement.

3. The appellant/accused Dalbir Singh has filed this appeal against the aforementioned judgement and order dated 24.6.1983 on the ground that the learned trial court below has erred in

believing the prosecution case and the evidence examined in support thereof. The conviction of the appellant is against the weight of evidence on record.

4. Brief facts of the prosecution case are that on 23.04.1982 at about 1.00 P.M. Gafoor Khan gave a written report at police station Firozabad (North), District Agra, stating therein that he belonged to village Virthua falling within the police circle Barnahal in district Mainpuri and was employed in the State Electricity Board, Firozabad as a security guard. The deceased Anwar Khan, too, was working as a labourer in that town in the Public Works Department. They had some enmity with one Shishu Pal and his brother Sonpal Singh, with whom a litigation regarding some landed property was going on. One Niranjan, who is alleged to be another assailant in this case, was related to Sonpal, being the son of his wife's brother. Informant and the deceased were witnesses in two cases under sections 399 and 402 of Indian Penal Code against Niranjan and one Brahma. Accused Durab also bore some enmity against the deceased. Accused Dalbir Singh is the son of Sonpal, mentioned above, against whom the informant and the deceased were litigating.

5. On 23rd April, 1982 at about 8 or 9 in the morning one Munshi Khan (P.W.-2), another cousin of Gafoor Khan (P.W.-1) came to invite him to a marriage. He stayed with the informant for some time and then he alongwith Gafoor Khan proceeded towards P.W.D. Godown in mohalla Prem Nagar, P.S. Firozabad North, District Agra, for extending invitation to Anwar. When they reached near the said P.W.D. Godown at about 11.15 A.M., suddenly they saw that accused-appellant Durab and Niranjan were holding Anwar by his arm and the accused-appellant Dalbir Singh was standing in front of Anwar Khan with a countrymade Pistol and before they could raise an alarm, Dalbir Singh fired at Anwar, who fell down dead on the stairs leading to the Chabutra in front of the said P.W.D. Godown. Thereafter, the assailants ran away towards the west. In the meantime, a number of persons gathered at the spot. Leaving Munshi Khan with the dead body of Anwar, Gafoor Khan went to the concerned police station where he handed over a written report (Ext.Ka-1), scribed by one Bashir Ahmad (P.W.-3) on his dictation.

6. Subsequently an FIR was registered as case Crime No.130 of 1982 under section 302 IPC, which was entered in the General Diary. Investigation was entrusted to the then Circle Officer. After concluding the investigation charge-sheet was submitted by him against the accused persons including the present appellant. Accused Niranjan absconded hence could not be arrested. After procuring the attendance of the present appellant, the case was committed to the Court of Session, where he was charged under Section 302 IPC. The accused-appellant denied the charge and pleaded not guilty. He further stated that he had been falsely implicated in this case due to enmity and claimed to be tried.

7. In order to prove the charge, besides other papers, prosecution has filed written report (Ext. Ka-1), inquest report (Ext.Ka-2), recovery memo of currency recovered from the body of the deceased (Ext. Ka-3), sketch of the dead body (Ext.Ka-4), challan of the dead body (Ext.Ka-5), recovery memo of blood stained and plain earth (Ext. Ka-6), site plan (Ext.Ka-7), reports of State Forensic Science Laboratory (Ext.Ka-8 and Ext.Ka-9), Charge-sheet (Ext.Ka-10), Post Mortem

report of the deceased (Ext. Ka-11), paper sent by the doctor (Ext.Ka-12), chik FIR (Ext. Ka-13) and General Diary (G.D.) No.28 dated 23.04.1982 (Ext.Ka-14) on record.

8. Prosecution also examined P.W.-1 complainant Gafoor Khan, P.W.-2 Munshi Khan, P.W.-3 Bashir Ahmad, P.W.-4 S. I. Narendra Kumar, I.O. P.W.-5 Dr. Vinay Kumar Yadav and P.W.-6 Constable Ram Dutt during oral evidence.

9. Statements of accused-appellant under section 313 Cr.P.C. were recorded after closing of the prosecution evidence. No oral evidence was given in defence, only two certified copies of judgments and two copies of statements of the witnesses were filed. After hearing the arguments of the parties the learned trial Judge by the impugned judgement and orders convicted the present appellant along with another appellant since deceased and sentenced them as above. Being aggrieved by the aforesaid judgment and order of the trial court, this appeal has been preferred by the appellant Dalbir Singh.

10. We have heard Sri Rajarshi Gupta, learned counsel for the appellant and Sri Rajeev Kumar Mishra, learned A.G.A, and carefully perused the evidence on record.

11. It has been argued on behalf of the appellant that the prosecution has utterly failed to prove the alleged motive, the prosecution story as well as the charge framed against the appellant-accused beyond reasonable doubt. The prosecution has also failed to examine independent witnesses, whose presence was natural at the scene of the crime rather, examined interested as well as inimical witnesses, whose presence at the site of the crime was wholly doubtful, unnatural and improbable as such they are not worthy of reliance. It is also contended by the learned counsel for the appellant that sudden arrival of the scribe of the written report (Ext.Ka-1) (on which admittedly there is no signature of the informant) at the place of occurrence is also doubtful.

12. It is further submitted by the learned counsel for the appellant that actually after the information of murder of the deceased Anwar, entire prosecution story was cooked up by the witnesses with the help of the local police. However, the learned counsel for the appellant has not disputed factum of murder of the deceased as well as the date, time and place of the incident in question but has contended that it appears from the evidence on record that the deceased Anwar was murdered by some unknown person/persons and the original written report which was filed against unknown person/persons, on which there was signature of the informant, was changed with a view to rope in the accused persons due to previous long standing enmity between the parties, and in place thereof the fabricated written report (Ext. Ka-1) was substituted with the help of the local police, which lacks the signature of the informant Gafoor Khan (PW-1).

13. It has also been contended that there is material inconsistency between the ocular and the medical evidence; the entire investigation in the case is faulty as well as against the rules and procedure prescribed by law. Prosecution has failed to prove as to what prompted the accused persons to commit this murder. Counsel for appellant has wondered that under what circumstances only all the related eyewitnesses (P.W.-1 and P.W.-2) were present at the same date, time and place

to see this incident of murder. He has submitted that the entire prosecution story is concocted and presence of the eyewitnesses, as mentioned above, is highly doubtful, improbable and unnatural, therefore, the appellant accused is entitled to get benefit of doubt.

14. Refuting all the arguments advanced by the side of the appellant, Sri Rajeev Kumar Mishra, learned A.G.A. has submitted that mere absence of signature on the written report (Ext. Ka-1) is not sufficient to repel all the trustworthy oral and documentary evidence of the prosecution, which have corroborated the written report (Ext. Ka-1). He further argued that this is a day light incident of murder. The unshaken testimonies of the trustworthy eyewitnesses (P.W.-1 Gafoor Khan and P.W.-2 Munshi Khan) coupled with medical and other reliable prosecution evidence, can not be brushed aside. Presence of the said eyewitnesses at the time and place of the incident has been proved by them and the reason for their presence is quite natural and probable. Also there is no material on record which creates doubt about their presence.

15. The learned AGA further contended that the previous enmity/motive has been stated in the FIR and proved by the witnesses, which the defence has also admitted, FIR was lodged promptly by the brother of the deceased. It is also submitted by the learned A.G.A. that the prosecution by placing cogent oral and documentary evidence has proved the incident in question and the charge framed against the appellant/accused, beyond reasonable doubt. All the witnesses are trust-worthy; their testimonies are natural and no material contradictions, embellishments or exaggerations are present in their testimonies, as such there is no substance in the arguments of the learned counsel for the appellant. The contradictions, as alleged by the learned counsel for the appellant, in the ocular and medical evidence are misconceived. The learned Sessions Judge has convicted the appellant/accused alongwith other co-accused (since deceased) by a reasoned judgement and order hence, there is no scope for interference by this Appellate Court in the impugned judgement and order.

16. Before entering into the merits of the appeal, we would like to recall the observation made by the Apex Court in the case of **Ishvarbhai Fuljibhai Patni Vs. State of Gujarat [1995 Supreme Court Cases (Crl) 222]** whereby duties of the appellate court have been outlined. Para-4 of the judgment reads as under:

"4. Since, the High Court was dealing with the appeal in exercise of its appellate jurisdiction, against conviction and sentence of life imprisonment, it was required to consider and discuss the evidence and deal with the arguments raised at the bar. Let alone, any discussion of the evidence, we do not find that the High Court even cared to notice the evidence led in the case. None of the arguments of the learned counsel for the appellant have been noticed, much less considered and discussed. The judgment is cryptic and we are at loss to understand as to what prevailed with the High Court to uphold the conviction and sentence of the appellant. On a plain requirement of justice, the High Court while dealing with a first appeal against conviction and sentence is expected to, howsoever briefly depending upon the facts of the case, consider and discuss the evidence and deal with the submissions raised at the bar. If it fails to do so, it apparently fails in the

discharge of one of its essential jurisdiction under its appellate powers. In view of the infirmities pointed out by us, the judgment under appeal cannot be sustained."

17. In the case of **Lal Mandi, Appellant v. State of West Bengal, Respondent [1995 CRI.L.J.2659 (Supreme Court), 2659]**, the Apex Court in para-5 of the report has given the caution to the High Court reminding its duty in the matter of hearing of appeal against conviction. It would be gainful to reproduce the observation made in para-5 of the report, extracted below:

"5. To say the least, the approach of the High Court is totally fallacious. In an appeal against conviction, the Appellate Court has the duty to itself appreciate the evidence on the record and if two views are possible on the appraisal of the evidence, the benefit of reasonable doubt has to be given to an accused. It is not correct to suggest that the "Appellate Court cannot legally interfere with" the order of conviction where the trial court has found the evidence as reliable and that it cannot substitute the findings of the Sessions Judge by its own, if it arrives at a different conclusion on reassessment of the evidence. The observation made in Tota Singh's case, which was an appeal against acquittal, have been misunderstood and mechanically applied. Though, the powers of an appellate court, while dealing with an appeal against acquittal and an appeal against conviction are equally wide but the considerations which weigh with it while dealing with an appeal against an order of acquittal and in an appeal against conviction are distinct and separate. The presumption of innocence of accused which gets strengthened on his acquittal is not available on his conviction. An appellate court may give every reasonable weight to the conclusions arrived at by the trial court but it must be remembered that an appellate court is duty bound, in the same way as the trial court, to test the evidence extrinsically as well as intrinsically and to consider as thoroughly as the trial court, all the circumstances available on the record so as to arrive at an independent finding regarding guilt or innocence of the convict. An Appellate Court fails in the discharge of one of its essential duties, if it fails to itself appreciate the evidence on the record and arrive at an independent finding based on the appraisal of such evidence."

18. Therefore, it is the settled proposition of law that the High Court, while exercising appellate jurisdiction in criminal appeal, is expected to appraise the credibility of evidence available on record and to draw the inference on the basis of material available on record and has not to be guided by the finding of acquittal or conviction recorded by the learned court below, bearing in mind the basic principle of criminal law regarding innocence of the accused.

19. Firstly, we would like to have a glance at the medical evidence, which is in the form of statement of Dr. Vinay Kumar Yadav P.W.5 and postmortem report Ext. Ka-11. Though on behalf of the defence death/murder of Anwar has not been disputed, we are duty bound to examine whether any offence was committed and if so, by whom.

20. Dr. Vinay Kumar Yadav P.W.5, in his statement has stated that he was posted as Medical Officer, S.N.M. Hospital, Firozabad on 24.4.1982. On that date at about 12.45 P.M. he conducted the post-mortem examination on the corpse of Anwar, whose age was about 48 years.

There was single fire wound- 1 cm. X 1 Cm. X cavity deep on the upper and medial side of left nipple with blackening all around it on the dead body. This was an anti-mortem injury. Underneath this injury, the left lung, the pleura, the membrane of the heart were punctured and the left 4th rib was broken. One metallic shot was found in the chest cavity which was full of blood. The abdomen had semi-digested food and the large intestine had faecal matters. According to the doctor this one fire wound was sufficient for causing the death of the deceased and the death had occurred due to the shock and excessive bleeding caused by this injury. Further, according to this witness the death of Anwar had occurred about 24 hours before the post-mortem examination. He proved the postmortem report Ext. Ka-11.

21. We have gone through the deposition of Dr. Vinay Kumar Yadav, it appears that he was cross-examined only on two points, first, the direction and the seat of injury and as to whether the pistol was fired directly from the front of the deceased and the time of the death of the deceased. This witness replied to these questions saying that the direction of the seat of injury was from the bottom to above and the fire shot was inflicted from the left side and not from the front. He also admitted in cross examination that tattooing and blackening was present in the wound, it means the fire arm shot was inflicted from a very close range, i.e., within 4 to 6 feet. He opined that the death of the deceased Anwar could have occurred one day before the post mortem examination and only single fire arm wound found on the body of the deceased Anwar, was enough to cause death. He also opined that three hours variation is possible on either side regarding time of death of the deceased recorded by him and not more than that, which corroborates the incident in question and the entire ocular and documentary evidence adduced by the prosecution.

22. Therefore, except for suggestion that the gun shot was inflicted from left side and not from the front, other facts stated by Dr. Vinay Kumar Yadav were not disputed on behalf of the appellant. The testimony of this witness remained unshaken and duly corroborated by the postmortem report Ext. Ka-11 and relying thereon in totality we hold that the above-mentioned ante mortem injury was inflicted upon Anwar on the date and time by a country made pistol, which resulted in his death.

23. Now, we deal with the ocular version of the occurrence. In this regard, we would like to refer to the statements of two eyewitnesses P.W.-1 Gafoor Khan and P.W.-2 Munshi Khan.

24. Corroborating his written report Ext.Ka-1 P.W.-1 Gafoor Khan has stated that old enmity was prevailing at the time of the incident between the appellants and the informant's family. He also corroborated the date, time and place of occurrence in his statement. In his statement, he further narrated the prosecution story that in the morning, at about 8 a.m. or 9 a.m., on the date of the incident in question, one Munshi Khan (P.W.-2), another cousin of Gafoor Khan (P.W.-1) came to invite him in connection with marriage of his grandson. He also wanted to invite the brother of the witness (P.W.-1)/deceased Anwar Khan, so after staying for a while he (P.W.-1) alongwith Munshi Khan (P.W.-2) proceeded to invite Anwar (deceased), who at that time was working at a cement godown of P.W.D.. When they were nearing the godown they saw that the deceased was standing on a 'Chabutra' of the godown and two accused persons Niranjana and Durab were holding

Anwar by his arms and accused appellant Dalbir Singh was standing in front of Anwar Khan with a country made pistol and before they could raise an alarm, Dalbir Singh fired upon Anwar which caused gun shot wound on the left side of his chest and he fell down dead on the stairs leading to the said chabutra. On raising alarm, accused persons fled away towards the west. Thereafter, several persons of the locality gathered on the spot.

25. P.W.-1 Gafoor Khan has also proved the written report Ext.Ka.-1. He stated that the scribe Bashir Ahmad arrived at the scene of occurrence and he had written the report Ext.Ka-1 on his dictation. Thereafter, he approached the police station and lodged the FIR. The witness was cross-examined by the defence at length but in his entire cross-examination there appears to be no material contradiction, regarding the incident in question and the reason for his presence at the spot at the time of incident, which affect the root of the prosecution story.

26. Similarly, P.W.-2 Munshi Khan has supported the entire prosecution case in his statement by showing the reason for his presence at the spot alongwith Gafoor Khan (P.W.-1). According to this witness he had visited the informant's place to invite him to the marriage of his grandson on the date of the occurrence. When he alongwith the informant Gafoor Khan went to invite the deceased and were about to reach the place of incident, they saw from a distance of about 10-15 steps that deceased Anwar was standing on the aforementioned 'Chabutra' and two accused persons Durab and Niranjana were holding Anwar by his arms. The accused appellant Dalbir Singh with a country made pistol fired a shot towards Anwar and on alarm raised by them, accused persons ran away towards the west, and the deceased Anwar fell down and died on the spot. Thereafter, persons of the locality came at the spot. Leaving him to watch the dead body the informant alongwith Bashir Ahmad (P.W.-3) went to lodge First Information Report. This witness has also been cross-examined at length but his statement is also unshaken on the material points of the incident, tallied with the testimony of Gafoor Khan (P.W.-1) as well as medical and other documents of the prosecution available on record.

27. P.W.-1 Gafoor Khan and P.W.-2 Munshi Khan are both ocular witnesses of the incident. They supported the entire prosecution case. They also deposed about the litigation which was going on between them and the appellant's family. They also stated that Durab had illicit relations with the wife of Shubrati, one of the sons of the deceased Anwar. P.W.-1 Gafoor Khan also stated that he had given an application to S.P., Mainpuri that he was being threatened by Shishu Pal Singh and Sonpal Singh, (uncle and father, respectively of appellant Dalbir Singh) and Niranjana accused because they wanted him not to appear as a witness against accused Niranjana and his associate Brahma in a criminal case. During cross-examination P.W.-1 Gafoor Khan was fair enough to admit that he had not signed the written report Ext.Ka-1, however, he admitted having got it written by Bashir Ahmad. Both the witnesses P.W.-1 Gafoor Khan and P.W.-2 Munshi Khan have proved the motive, date, time, place of occurrence, manner of assault, weapon used in the crime, reason for their presence at the spot, seat of injury, individual role of each accused person, long standing animus between the families of the informant and the accused persons and the manner of preparation of written report Ext.Ka.-1. There is no material contradiction in their statements which goes to the root of the prosecution case. They have proved that the place of

occurrence is on the stairs leading to the chabutra of the Godown of PWD, situated in front of the house of Hub Lal in Mohalla Prem Nagar, P.S. Firozabad North, District Agra. P.W.-1 Gafoor Khan also admitted that Shishupal Singh, an uncle of Dalbir Singh had prosecuted the deceased, deceased's son Shubrati and Shubrati's wife in a theft case prior to the incident in question. On the suggestion of the defence that they were not present at the spot, both the witnesses have denied the same, therefore, on analyzing their evidence with due care and caution, as per the principle of law laid down for appreciation of evidence of related and inimical witnesses, we found that the unshaken testimonies of the ocular witnesses appear to be natural and their presence at the place of occurrence is established. They are trustworthy witnesses.

28. We have also carefully examined all materials on record and believe that there was no occasion for P.W.-1 Gafoor Khan to falsely implicate the accused persons for the murder of his brother and let go the real cuprits. The ocular testimonies of P.W.-1 Gafoor Khan and P.W.-2 Munshi Khan are in consonance with the testimony of P.W.-5 Dr. Vinay Kumar Yadav and the postmortem report of the deceased (Ext.Ka-11) as well as inquest report (Ext.Ka-2) proved by the investigating officer Narendra Kumar (PW-4), which reinforces the prosecution story as well as corroborates the written report (Ext.Ka-1)/chic FIR (Ext.Ka-13). Minor discrepancies in the statements of eye- witnesses and the medical evidence are not enough to reject the testimony of direct ocular evidence. The presence of both the eyewitnesses near the place of occurrence is absolutely natural and established. Despite minor contradictions, their evidence is trustworthy, natural and conformity with normal human conduct. We have tested and scrutinized their testimonies on the touchstone of credibility and the principles laid down by the Hon'ble Apex Court for appreciation of evidence and we are of the view that both the eyewitnesses cannot be disbelieved merely because they are related to the deceased or that no other independent eye witness was examined by the prosecution. Moreover, as stated by the investigating officer Narendra Kumar (PW-4), except for these two eyewitnesses no independent eye witness of the occurrence was found during his investigation/spot inspection.

29. In his statement P.W.-3 Bashir Ahmad, who is the scribe of the written report (Ext.Ka-1) has admitted that he prepared the same on the dictation of the informant Gafoor Khan (P.W.-1). He admitted the relationship with Gafoor Khan and said that he reached the place of occurrence accidentally on hearing that a murder had taken place and after scribing the report (Ext.Ka-1) he left for Andhra Pradesh, as he is a truck driver. He also verified the report (Ext.Ka-1) and told that after writing the report he read out the same to Gafoor Khan. He admitted that he has written his name as writer on Ext.Ka-1.

30. P.W.-4 Narendra Kumar, Investigating Officer has also been examined by the prosecution. According to him, he reached the spot at about 1 p.m. or 1.30 p.m. and recorded the statements of the eyewitnesses of this incident. Then he inspected the corpse and prepared the inquest report (Ext.Ka-2) and the related police papers from (Ext.Ka-3 to Ext.Ka-5). Thereafter, he sent the dead body for postmortem examination in a sealed cover. He also proved that he took in his possession the blood stained earth and plain earth from the place of occurrence (Ext.Ka-6) and prepared a site plan (Ext.Ka-7) as well as sent the clothes found on the corpse for chemical

examination. He further stated that after receiving the postmortem report, the chemical examiner's report (Ext.Ka-8) and the serologist report (Ext.Ka-9), he filed the charge-sheet (Ext.Ka-10) against both the appellants (surviving and deceased) because accused Niranjan was absconding. He proved the charge-sheet (Ext.Ka-10). He had also been cross-examined but in his cross-examination he proved the entire investigation proceedings. He also stated that no independent eye witness was available on the place of occurrence. No material contradiction has been shown in his statement which discredits the main prosecution case as a whole or lead to the inference of tainted investigation.

31. Lastly, the prosecution has examined P.W.-6 Ram Dutt, who proved chik report (Ext.Ka-13), prepared on the basis of the written report (Ext.Ka-1) and corresponding entry in the G.D. (Ext.Ka-14), as a secondary evidence stating that these documents were in the handwriting of Constable Prakash Chandra, who was working with him and with whose signatures he was familiar.

32. In this case, FIR was lodged promptly on the same day at 1.00 p.m. It contains the names of the accused persons, the motive (*animus*) for the crime, the weapon used in the incident, date, time and place of the occurrence, names of the witnesses who were present at the time of the incident, seat of injury and also the description of the incident. The statements of the ocular witnesses, P.W.-1 Gafoor Khan and P.W.-2 Munshi Khan, support the entire version written in the FIR. No material contradiction is found in the statements of the said witnesses and the description contained in the FIR, therefore, the FIR also corroborates the version of the prosecution story.

33. The statement of P.W.-5 Dr. Vinay Kumar Yadav and the postmortem report (Ext.Ka-11) also establish the fact that the deceased died of only one fire shot injury, which hit the left side of his chest and his death was neither natural nor accidental. Even one metal shot was recovered in the chest cavity of the deceased. According to the doctor the said fire arm wound was sufficient for causing the death of the deceased. Similarly, all the police papers (Ext.Ka-3 to 5,6,8,9,10 and 12), site plan (Ext.Ka-7), inquest report (Ext.Ka-2) the ocular evidence of the eyewitnesses and the evidence of the Investigating Officer coupled with first information report (Ext.Ka-13) and the corresponding G.D. (Ext.Ka-14), leave no room for doubt that the death of the deceased was caused on the same place of occurrence, i.e., staircase leading to the Chabutra situated in front of the P.W.D. Godown, as per the prosecution story, wherefrom the corpse of the deceased Anwar was recovered by the police.

34. The ocular testimony of two witnesses, i.e., P.W.-1 Gafoor Khan and P.W.-2 Munshi Khan is natural, unshaken and trustworthy. It is true that they have admitted their *inter-se* relationship as also relationship with the deceased and also the enmity which exists between the deceased and the eyewitnesses (P.W.-1, P.W.-2) on one hand and the accused persons on the other hand prior to this incident, but their veracity cannot be doubted on this score alone. Only requirement is to adopt a careful approach before accepting their testimonies. The medical evidence corroborates ocular evidence and there is no material contradiction between the medical evidence and the ocular witnesses' account. The incident occurred in broad daylight, therefore, possibility of any mistake in identification of the accused is out of question. In the light of the present facts and

circumstances of the case, it is also not possible that the brother of the deceased/informant would spare the real assailants and implicate the accused persons to settle/for the sake of old enmity.

35. On in depth analysis of the entire evidence of the prosecution with due care and caution, the possibility of false implication of the accused persons is entirely ruled out.

36. Now, we deal with the arguments advanced by the learned counsel for the appellant. It is contended by the learned counsel for the appellant that the prosecution has failed to examine independent eyewitnesses and has examined the related, inimical witnesses, whose presence was doubtful at the scene of the crime. The position has now been settled that the witnesses of the family cannot be discarded merely because the witness is a relative or family member of the victim. In such a case, the court has to adopt a careful approach in analyzing the evidence of such witnesses and if the testimony of the related witness is otherwise found credible, the accused can be convicted on the basis of the testimony of such related witness. The above ratio of law has been laid down by the Hon'ble Apex Court in the cases of **Shyam Babu Vs. State of U.P., AIR 2012 SC 3311, Shyamal Ghosh Vs. State of WB, AIR 2012 SC 3539, Dhari & others Vs. State of U.P., AIR 2013 SC 308, Shanmugam and another Vs. State of TN (2013) 12 SCC 765 and Nand Kumar Vs. State of Chhatishgarh 2015 Cri. L.J. 381.**

37. There is no doubt that the prosecution has not been able to produce any independent witness but the prosecution case cannot be doubted on this ground also. People are generally insensitive to come forward to give any statement in respect of any criminal offence. Unless it is inevitable, people normally keep away from the Court as they feel it to be distressing and stressful. Though this kind of human behaviour is indeed unfortunate, it is a normal phenomenon. We cannot ignore this handicap of the investigating agency (as per the admission of the investigating officer (PW-4) in his cross-examination) in discharging their duty. Therefore, we cannot derail the entire case on the mere ground of absence of independent witnesses as long as the evidence of the ocular witnesses, though related or inimical is trustworthy.

38. Next argument that has been advanced by the side of the appellant is that there is material contradiction in the medical and the ocular evidence. In this respect, learned counsel for the appellant has drawn the attention of the court to the one line statement of the P.W.-4 Dr. Vinay Kumar Yadav in the cross-examination, in which he has opined that there is more possibility that the assailants had assaulted the deceased from the left side and not from the front. Said statement of Dr. Yadav cannot be read in isolation. It must be read in totality with his entire statement as well as the postmortem report Ext.Ka-11, which the doctor has proved in toto and from the perusal of the record shows that ocular witnesses also proved that the appellant had fired the shot from the front of the deceased at an arm's length, i.e., very close range, standing on a low lying road when the deceased was apprehended by other two accused persons on the Chabutra, situated above the staircase, which hit the left side of the chest of the deceased, which, in fact, is in conformity with the medical evidence.

39. Witnesses cannot be expected to state facts with mathematical precision. It also depends upon the place and the distance from where they have observed the incident and have individually perceived it. If in this case, the place from where they had seen the occurrence is taken into consideration, their observation that the main assailant/appellant was standing in front of the deceased and fired his shot from there is absolutely correct. The seat of injury, its direction, presence of tatooing and blackening in the wound, time of death and recovery of only one metallic shot from the chest cavity, which reflects the nature of fire arm used by the appellant, all corroborates the statement of the eyewitnesses, which in turn proves that there is no inconsistency in the ocular and medical evidence. Therefore, this argument has no force.

40. For the sake of discussion, if it is presumed that there is any variation even then as principle laid down by the Apex Court in **Gajoo Vs. State of Utterakhand, 2012 (9) SCC 532**, that while appreciating the variation between the medical evidence and ocular evidence, primacy is given to the oral evidence of the witnesses. The Apex Court in the case of **Sadhu Saran Singh Vs. State of U.P. and others (2016) 4 SCC 357** has reiterated the principle of law laid down by the Supreme Court in the decision of **Darbara Singh Vs. State of Punjab (2012) 10 SCC 476**, wherein the Court has held:-

".....So far as the question of inconsistency between the medical evidence and the ocular evidence is concerned, the law is well settled that, unless the oral evidence available is totally irreconcilable with the medical evidence, the oral evidence would have primacy. In the event of contradictions between medical and ocular evidence, the ocular testimony of a witness will have greater evidentiary value vis -a -vis medical evidence and when medical evidence makes the oral testimony improbable, the same becomes a relevant factor in the process of evaluation of such evidence. It is only when the contradiction between the two is so extreme that the medical evidence completely rules out all possibilities of the ocular evidence being true at all, that the ocular evidence is liable to be disbelieved."

41. However, in this case, there is no variation between the medical evidence and the ocular evidence, and once they are conjointly read, it does not falsify either the statement of the witnesses or the postmortem report. In fact, both of them must be read as complimentary to each other. Even if for the sake of argument it is assumed that there is some variation, still, it would be too immaterial and inconsequential to give any benefit to the accused.

42. Learned counsel for the appellant has also argued that the prosecution has utterly failed to prove the alleged motive (animus). We are not inclined to accept this argument. The prosecution from the very beginning of the case, i.e., written report Ext.Ka-1/FIR Ext.Ka-13 till the oral evidence, has categorically proved the existence of previous strong enmity between the family of informant and the accused persons. Enmity is a double-edged weapon. In this case, the entire evidence on record indicates that due to the said enmity the accused persons had assaulted the deceased. There is no iota of evidence which points towards the false implication of the accused persons due to the said enmity, as alleged by the appellant.

43. It has also been argued on behalf of the appellant that there is no clinching evidence which prompted all the three accused persons to make up their mind to do this coherent act of murder in question with a common intention. This argument is misconceived. The entire evidence on record shows that appellant Dalbir Singh and Durab (since deceased) are of the same village and absconding accused Niranjana is the relative of appellant Dalbir Singh. It further shows that they all had strong animus against the deceased and his family which is also proved by their collective presence on the spot, collective participation as well as individual role in committing the ghastly crime. However, crime is not a logical act; it is an aberration of the mind. Ordinarily it cannot be logically established for which reason crime was committed, mostly it can only be presumed.

44. Moreover, from the statements of P.W.-1 Gafoor Khan and P.W.-2 Munshi Khan coupled with the written report Ext.Ka-1, the motive alleged by the prosecution stands proved. The court is not required to see whether the motive was adequate or inadequate, trivial or substantial because it is a subjective thing which lies in the mind and heart of the accused persons. Therefore, we would like to conclude on this point by saying that the prosecution with the help of the aforementioned witnesses have proved the motive of the crime in detail, part of which is alleged in the FIR also as well as all the ingredients which constitute the common intention of the accused persons to murder the deceased Anwar in the present case, beyond reasonable doubt. Thus, in the light of the above discussion, it can be safely held that the accused appellant had strong motive to commit the offence against the informant party.

45. It has also been argued on behalf of the appellant that admittedly there is no signature of the informant on the written report (Ext.Ka-1) whereas P.W.-3 Bashir Ahmad, Scribe has stated that it was signed by the informant, which creates doubt that probably the actual written report, which was filed against unknown persons was changed by the present written report (Ext.Ka-1), by the aid and advice of the local police, with a view to implicate accused persons due to previous enmity. In our opinion, the suspicion cannot take the place of proof. The statements of P.W.-1 Gafoor Khan, P.W.-3 Bashir Ahmad scribe, P.W.-2 Munshi Khan and also P.W.-6 Constable Ram Dutt coupled with first information report (Ext.Ka-13) as well as copy of G.D. No.28 dated 23.04.1982 (Ext.Ka-14) unerringly prove that the written report (Ext.Ka-1) is the same which was filed only once in the police station concerned, on the basis of which FIR (Ext.Ka-13) of this case was lodged.

46. Moreover, mere absence of signature of the traumatised informant (whose brother was murdered before him) over written report (Ext.Ka-1) would not affect the sanctity of the written report as well as FIR. Section 154 Cr.P.C. provides that FIR can be lodged orally as well. In this case, the scribe (P.W.-3) has proved on oath that he had prepared the written report (Ext.Ka-1) on the spot on the dictation of the informant and had written his name as a writer. Further, the FIR was lodged without any inordinate delay. The statement of the scribe in this regard is a matter of his own observation and memory. Nevertheless, P.W.-1 Gafoor Khan has admitted its content and has also stated that it is the same report which he had dictated to Bashir Ahmad (PW-3), therefore, there is no scope of any doubt on this score.

47. Learned counsel for the appellant has further pointed out that there was delay in sending copy of the first information report to the Magistrate, as reflected from an endorsement made on the first information report that it was sent to the concerned Magistrate few days after the occurrence, therefore, the FIR should be looked into with suspicion. We are not inclined to agree with this argument. The occurrence had taken place at about 11.30 a.m. The distance between the place of occurrence and the police station concerned was 3 Kms. Hence, the FIR was lodged promptly on the same day at about 1.00 p.m. Similarly, investigation in the case was also started promptly, inquest report (Ext.Ka-2) and other police papers (Ext.Ka-3 to 6) were quickly prepared and the body was sent for postmortem. Therefore, in view of the above facts and circumstances of the case, it cannot be said that the FIR was ante timed or can treated with suspicion.

48. The genuineness of the FIR is also proved by another glaring circumstance. Scribe PW-3 himself had left for Andhra Pradesh in the same night on the date of the occurrence with a consignment of bangles in his truck. Further, a report of cognizable offence under section 25 of the Arms Act was also lodged on the same day at 2.15 p.m. as reflected from the perusal of the copy of G.D. No.28 (Ext.Ka-14). The copy of the FIR (chik) was annexed with the inquest report Ext.Ka-2 in which crime number is mentioned and also sent to the doctor with the request for postmortem examination. In view of the above, in this case, there was no chance of tampering, antedating, antetiming or replacing the original FIR by a fabricated one and also there is no material on record to show or suggest that the FIR was tampered with or it was fabricated at a later date or time by antedating or antetiming. The evidence on record unerringly prove that the written report Ext.Ka-1/FIR Ext.Ka.-13 was in existence on the date and time shown in the official records.

49. Mere delay in sending copy of the FIR to the Magistrate/Special report or placing the same before the Magistrate for signing by him is not so very vital so as to doubt the case of the prosecution or to treat the document with suspicion in view of the aforementioned facts and circumstances of the case. Our view gets fortified by the observation made by the Apex Court in the case of **Susanta Das Vs. State of Orissa (2016) 4 SCC 371**. The relevant portion of the said decision is quoted herein below:-

"In so far as the alleged delay in forwarding the FIR to the Magistrate, we find that the High Court was conscious of the said fact and has made a specific reference to the said fact in paragraph 24 of the impugned judgment wherein, it ultimately held that there was no material on record to show or suggest that the FIR was tampered or it was fabricated at a later date by antedating it or the delay in sending the FIR by P.W.-3 or the delay in placing it before SDJM by the Sub Inspector of Police or the delay in signing the FIR by SDJM on 06.04.1996 was so very vital to doubt the case of the prosecution. We fully concur with the said view expressed by the Division Bench."

50. It has been argued by the learned counsel for the appellant that P.W.-3 Bashir Ahmad (scribe) has stated that he left for Andhra Pradesh in the night of the occurrence and came back after fifteen days. Whereas the Investigating Officer (P.W.-4) Narendra Kumar has stated that he had recorded the statement of the scribe (PW-3) on 26.4.1982, which shows the designed,

perfunctory and faulty investigation in this case. It is also contended that there has been inordinate delay in recording the statement of Munshi Khan (PW-2) by the Investigating Officer, because as per the Investigating Officer (PW-4) he was examined on 23.4.1982 in the hospital whereas on the date of occurrence he was available on the spot and was keeping watch over the dead body of Anwar when the I.O. visited the spot for investigation. It has further been pointed out that the Investigating Officer did not record the statement of the local persons who were present on the spot or residing in the vicinity, as such the entire investigation is tainted and biased. We do not find any force in this argument also. The scribe (PW-3) in his statement has clarified that he had returned from Kalpi in District Jalaun next day to Firozabad in order to obtain some document regarding his consignment, left inadvertently at Firozabad, therefore, it is possible that he was examined by the Investigating Officer during his brief stay at Firozabad.

51. From the perusal of the statement of Investigating Officer (PW-4) and the police papers, it is evident that the inquest proceedings were initiated on the date of occurrence at 2.00 p.m. Inquest report Ext.Ka-2 also corroborates the credibility of the prosecution proceedings as well as the prosecution story. In his cross-examination the Investigating Officer P.W.-4 has stated that except P.W.-1 Gafoor Khan and P.W.-2 Munshi Khan, he did not find other eye- witness of the occurrence. Mere delay in recording evidence or not getting independent witnesses or other minor omission or commission of the Investigating Officer (P.W.-4) during investigation would not adversely affect either the root of the prosecution story or discredit the otherwise credible direct evidence of the eyewitnesses.

52. Defective investigation and lapses on the part of the Investigating Officer would not necessarily be fatal for the prosecution, in case reliable and cogent direct evidence is available. The law on this point of defective investigation has been considered by the Supreme Court time and again and it has been categorically laid down by the Supreme Court that any minor fault, irregularity, defect or deficiency in investigation would not be a ground for rejection of the direct and trustworthy ocular testimonies. The only requirement is use of extra caution in evaluation of such evidence. For the fault of the investigator alone, the perpetrators of such a ghastly crime cannot be allowed to go scot-free. A defective investigation cannot be fatal to prosecution where ocular testimony is found credible and cogent and had a ring of truth in it as held in cases of **Gulzari Lal Vs. State of Haryana (2016) 4 SCC 583**, **State of Karnataka Vs. Suvarnamma, (2015) 1 SCC 323**, **Hema Vs. State, 2013 (81) ACC 1 (SC) (Three Judge Bench)** and **C. Muniappan Vs. State of TN, 2010 (6) SCJ 822**, **Amar Singh Vs. Balwinder Singh and others 2003 Cri. L.J. 1282**, **Allarakha K. Mansuri Vs. State of Gujarat (2002) 3 SCC 57**, **Prithvi Vs. Mamraj and others (2004) 13 SCC 279**, **State of U.P. Vs. Jagdeo and others (2003) 1 SCC 456**, **Dharmendrasinh alias Mansing Ratansinh Vs. State of Gujrat (2002) 4 SCC 679**.

53. In the case of **C. Muniappan Vs. State of TN 2010 (6) SCJ 822**, the Apex Court has made following observation in this regard:-

"The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or

to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence de hors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation."

54. The Apex Court in **Amar Singh Vs. Balwinder Singh and others, 2003 Cri. L.J. 1282** has held that every failure or omission of Investigating Officer cannot render prosecution case doubtful or unworthy of belief. The Hon'ble Patna High Court in its judgement **Bishundeo Poddar and others Vs. State of Bihar, 2003 Cri.L.J. 1558** has held:

"Be that as it may, the fate of the case does not depend on what the Investigating Officer or the prosecutor ought to have done and the evidence ought to have been led. The fate depends on the evidence which is on record."

55. The learned counsel for the appellant has further contended that detailed motive and the manner of occurrence as stated by the eyewitnesses (P.W.-1 Gafoor Khan and P.W.-2 Munshi Khan) have not been mentioned in the FIR. It has only been stated in the FIR that some prior enmity was there and all the three accused persons/assailants had run away after firing at the deceased Anwar Khan and one of the assailants Dalbir Singh was carrying a pistol, but at the time of recording of evidence in the court the eyewitnesses (P.W.-1 and P.W.-2) have placed their improved version by stating the detailed description of motive (animus) against the individual accused persons and further that two of the assailants Niranjana and Durab were holding Anwar (deceased) by his arms from either side and third assailant/appellant Dalbir Singh with a country made pistol had fired at Anwar from the front. It is also argued that this improvement is neither natural nor probable because it might have caused injury to the assailants who were holding the deceased by the hand. Our attention has further been drawn to the description of the dead body (Panchayatnama) Ext.Ka-2 where it was found that the face of the dead body was downward towards the ground and both his hands were under his thigh. According to the learned counsel for the appellant, Anwar would not have fallen in this way had his arms were caught hold of by two assailants as alleged. In our opinion, the contention of the learned counsel for the appellant is misconceived. FIR is not to be treated as encyclopedia, in which each and every detail of the occurrence should have been written. Our above view is fortified by the observation made by the Apex Court in the case of **V.K. Mishra and another Vs. State of Uttarakhand and another (2015) 9 SCC 588**. The relevant part of para-13 is quoted herein below:-

"13. FIR is not meant to be an encyclopaedia nor is it expected to contain all the details of the prosecution case. It may be sufficient if the broad facts of the prosecution case are stated in the FIR.....Unless there are indications of fabrication, prosecution version cannot be doubted merely on the ground that FIR does not contain the details."

56. In the statement before the court the eyewitnesses have given the entire manner of occurrence as well as assault. The entire record shows that the appellant Dalbir Singh had fired on the deceased from a very close range, i.e., from an arms length. There was tatooing and blackening present around the wound; one metallic shot was recovered from the chest cavity of the deceased, which reflects the nature of fire arm used by the appellant/main assailant, therefore, it cannot be presumed that the shot fired by the appellant Dalbir Singh could have injured Durab and Niranjana, who were holding the hands of the deceased. Even though the hands of the deceased were caught by the assailants at the time, shot was fired, the dead body of the deceased would have fallen on the staircase in the same posture, which was found during the inquest proceeding. There appears to be no material anomaly. The argument of the learned counsel for the appellant in this regard is not acceptable. eyewitnesses P.W.-1 Gafoor Khan and P.W.-2 Munshi Khan have vividly described the entire incident in their statement, which are in consonance with the medical as well as other documents of the prosecution. Therefore, their credible testimonies cannot be discarded on this ground alone.

57. It has also been argued by the learned counsel for the appellant that there is no clear motive for the appellant to commit this ghastly crime. We have considered this argument and in our opinion, when there is direct convincing evidence of occurrence existence of motive may or may not be proved by the prosecution. However, in this case admittedly there was some sort of bad blood between the deceased's family and the accused persons, which was proved by the prosecution with cogent evidence. Even the accused persons have admitted the enmity with the deceased family in their statement under section 313 Cr.P.C. Therefore, it cannot be argued that the appellant or the accused persons did not have cogent motive to commit the crime in this case. Sometimes crimes are committed for insignificant motives or for no motive at all. In the case of the appellant Dalbir Singh there is evidence on record to show the strong motive. He is the main assailant.

58. Learned counsel for the appellant has drawn our attention towards some discrepancies and contradictions as well as improvements in the statement of the eyewitnesses as well as the scribe (PW-1 to PW-3) but in our opinion the slight discrepancies, contradictions, improvements and inconsistencies in the statement of the witnesses as well as in the prosecution case would not make their testimony unacceptable. This kind of shortcoming is always there in a criminal case. It is not possible to reject entire credible testimonies of eye-witnesses, on this ground alone because the type of discrepancies, contradictions, improvements and inconsistencies shown by the learned counsel for the appellant in their testimonies do not go to the root of the prosecution case to make it unworthy of credence.

59. It has also been submitted by the learned counsel for the appellant that both the eyewitnesses are 'chance witnesses', their presence on the spot at the time of said incident is quite unnatural and improbable. We do not endorse this argument. The presence of both the eyewitnesses near the spot at the time of the incident is proved by the prosecution with cogent evidence, starting from written report(Ext.Ka-1)/FIR (Ext.Ka-13), during investigation and till the evidence recorded on oath before the court. Their conduct was natural and both their presence near the spot at the time of the incident and reason for their presence as well as their witnessing the incident are proved

beyond doubt. There is nothing unnatural in it. The Supreme Court in the case of **Vikram Singh and others Vs. State of Punjab (2010) 3 SCC 561** based on the decision in **Rana Pratap and others Vs. State of Haryana 1983 (3) SCC 327** and **Thangaiya Vs. State of Tamil Nadu (2005) 9 SCC 650** has observed about the word 'chance witness'. The relevant portion of para-8 is as follows:-

"8.....The expression 'chance witness' is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter explaining their presence."

60. After careful examination of material on record and in view of the direct evidence of crime against the present appellant by the ocular testimony rendered by the highly credible prosecution witnesses, whose presence on the spot has been established, which inturn is in consonance with the medical and other prosecution evidence/documents available on record, we are of the opinion that prosecution has been able to prove its case beyond all reasonable doubt and has been able to bring home the guilt of the accused appellant by credible and trustworthy evidence. Therefore, the learned Additional Sessions Judge has rightly believed the prosecution story and also rightly recorded the finding of guilt against the present appellant. Hence we do not find any ground to differ from the finding of guilt recorded by the learned Additional Sessions Judge. The judgement and order dated 24.6.1983 passed by the VIII Additional Sessions Judge, Agra in S.T. No. 414 of 1982 (State Vs. Dalbir Singh and another) arising out of Crime No. 130 of 1982, P.S. Firozabad (North), District Agra does not require any interference.

61. In view of the above, the appeal preferred by the surviving appellant Dalbir Singh lacks merit and it is, accordingly, dismissed. The conviction and sentence awarded by the learned Additional Sessions Judge against the accused appellant Dalbir Singh are confirmed. The accused/appellant Dalbir Singh is directed to serve out the remaining part of the sentence awarded by the learned trial court in the impugned judgement. Surviving accused appellant Dalbir Singh is on bail. He shall surrender before the trial court for serving out the sentence within 15 days from the date of this judgement, failing which trial court shall ensure his arrest and shall send him to jail for serving out the remaining sentence in accordance with law.

62. The copy of the judgement and entire record be transmitted back to the concerned trial court through Sessions Judge, Agra for compliance within ten days. The concerned court will thereafter report the compliance to this Court within a month.

(2016) 8 ILRA 1261
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.08.2016

BEFORE

THE HON'BLE PRATYUSH KUMAR, J.

Criminal Appeal No.- 2555 Of 2009
&
Criminal Appeal No.- 2797 Of 2009

Virendra

**...Appellant
Versus**

State Of U.P.

...Respondent

Counsel for the Appellant:

Qazi Wakil Ahmad

Counsel for the Respondent:

Govt. Advocate

Penal Code, 1860 — Ss. 363, 366 & 376 — Kidnapping and rape of minor girls — Conviction — Appreciation of evidence of prosecutrix — Two minor victims abducted on false pretext and taken to another State where they were subjected to repeated sexual assault — Testimony of victims consistent, cogent and trustworthy — Held, conviction can be based on sole testimony of prosecutrix if it inspires confidence — Minor discrepancies or absence of medical corroboration not fatal.

Penal Code, 1860 — S. 376 — Consent — Meaning — Victims taken away by deception and subjected to sexual assault under threat — Submission under fear or coercion does not amount to consent — Plea of consent rejected.

Criminal Trial — Age of victim — Determination — Age disputed — Medical and radiological evidence vis-à-vis oral testimony of father considered — In absence of documentary proof under statutory rules, testimony of parent regarding age can be relied upon — Victims held to be minors — Consequently, question of consent immaterial.

Evidence — Rape — Medical evidence — Absence of injuries or spermatozoa — Medical opinion inconclusive regarding rape — Held, absence of injuries or spermatozoa does not discredit prosecution case where testimony of victim is reliable — Ocular evidence prevails.

Criminal Trial — Delay in FIR — Explanation — Delay in lodging FIR satisfactorily explained — Not fatal to prosecution case.

In Result: Appeals dismissed; conviction and sentences affirmed; appellant on bail directed to surrender; appellant in custody to serve remaining sentence.

Cases cited:

Ishvarbhai Fuljibhai Patni Vs. State of Gujarat[1995 Supreme Court Cases (Crl) 222]
Lal Mandi, Appellant v. State of West Bengal, Respondent[1995 Cri.L.J.2659 (Supreme Court), 2659]
State of Punjab Vs. Gurmit SinghAIR (1996), SC 1399
State of H.P. vs. Mango Ram(2000) 7 SCC, 224
Narayanamma vs. State of Karnataka(1994) 5 SCC, 728

Shri Narain Saha vs. State of Tripura(2004) SCC 775

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

1. The aforesaid appeals filed on behalf of the accused-appellants are directed against the judgment and orders dated 21st April, 2009 passed in Sessions Trial No.496 of 2007 (State vs. Mahesh & others) arising out of Case Crime No.411 of 2005, they have been heard together and decided by a common order.

2. In the aforesaid **Criminal Appeal No.2555 of 2009**, the appellant Virendra has been convicted and sentenced as under:-

u/s 376 I.P.C. : 10 years RI with fine of Rs.10,000/-

3. If the said fine was not deposited, the appellant Virendra would undergo six months further RI.

4. In Criminal Appeal No.**2797 of 2009**, the appellant Mahesh has been convicted and sentenced as under:-

u/s 363 I.P.C. : 5 years RI with fine of Rs.5,000/-.

u/s 366 I.P.C. : 10 years RI with fine of Rs.10,000/-.

U/s 376 I.P.C. : 10 yeas RI with fine of Rs.10,000/-

5. If the said fines were not deposited, the appellant Mahesh would further undergo three months rigorous imprisonment on first count and rigorous imprisonment of six months separately on both other counts.

6. Heard Sri Qazi Vakil Ahmad and Sri P.K.Vishnoi, learned counsel for the appellants and Sri Shailendra Singh Rathore, learned AGA for the State-respondent and perused the record.

7. That on 29th October, 2005 at 10.05 a.m. on the basis of written report dated 27th October, 2005 of Kaderam addressed to Senior Superintendent of Police, District Bareilly, check FIR was scribed, Case Crime No.411 of 2005 under sections 363, 366 IPC was registered and investigation was entrusted to S.I. Vinod Kumar. In his application Kaderam has stated that on 16th October, 2005, his wife fell ill. He brought her to Beg Hospital, Bareilly for treatment. He left his six children with his mother Ramdei at the house. His eldest daughter victim no.1 aged about 14 years and younger daughter victim no.2 aged about 12 years were taken by accused Mahesh on 18th October, 2005 on the pretext that they were called by their father at Bareilly. His mother telephonically informed him on that day at 5.00 p.m. that when she returned from the field after taking fodder for the goat, youngest daughter Parvati aged about eight years informed her about the incident. His mother searched for both the girls but neither Mahesh nor the girls could be traced by his mother. After search was over his mother came to know from Mohanlal that Mahesh was seen

taking victim no.1 and victim no.2 at 10.00 a.m. on that day and when he enquired, Mahesh informed him that their father had called them to Bareilly. On 19th October, 2005, he informed the police of police station Sahi but they had not registered his report nor tried to arrest the accused. He apprehended that his daughters might be sold or murdered.

8. S.I. Vinod Kumar, started the investigation, examined the witnesses, recovered victim no.1 and victim no.2 in village Vikam. Girls were medically examined. During investigation section 376 I.P.C was added. Name of Virendra came into light from the statement of the girls. Thereafter investigation was transferred to S.I. Om Prakash, who submitted the chargesheet.

9. The appellants stood for trial before the Court of Session where they were charged under sections 363, 366, 376(2)(g) I.P.C. They denied the charges and claimed to be tried. They were tried, convicted and sentenced, as above.

10. Feeling aggrieved, these appeals have been separately filed by the accused appellants. On behalf of the appellants, the learned counsel have submitted that the learned trial Judge has not appreciated the evidence in proper perspective for the reasons indicated below:-

(a) Medical evidence does not support the commission of rape.

(b) There are contradictions in the statements of victims on material points.

(c) Recovery memo Exhibit Ka-14 and account of recovery given by Shakuntala and Premwati are at variance.

(e) Victims were major at the time of occurrence. They were consenting parties. They had not raised any alarm during journey up to Punjab and during their stay at Punjab.

11. On the strength of these facts, learned counsel for the appellants submit that prosecution could not prove charges against the present appellants beyond doubt and the learned trial judge has recorded erroneous findings of fact which are liable to be set aside.

12. On behalf of the State-respondents, these arguments have been repelled and it has been submitted that evidence has been properly appreciated. Findings recorded by the trial Judge are well substantiated from the record. Cogent reasons have been given in support thereof. The appeals have no substance, they deserve to be dismissed.

13. In reference to my obligation as an appellate court hearing appeal against conviction, I would like to refresh my mind by recalling the observation made by the Apex Court in the case of **Ishvarbhai Fuljibhai Patni Vs. State of Gujarat [1995 Supreme Court Cases (Crl) 222]**. Para-4 of the judgment reads as under:

"4. Since, the High Court was dealing with the appeal in exercise of its appellate jurisdiction, against conviction and sentence of life imprisonment, it was required to consider and discuss the evidence and deal with the arguments raised at the bar. Let alone, any discussion of the evidence, we do not find that the High Court even cared to notice the evidence led in the case. None of the arguments of the learned counsel for the appellant have been noticed, much less considered and discussed. The judgment is cryptic and we are at loss to understand as to what prevailed with the High Court to uphold the conviction and sentence of the appellant. On a plain requirement of justice, the High Court while dealing with a first appeal against conviction and sentence is expected to, howsoever briefly depending upon the facts of the case, consider and discuss the evidence and deal with the submissions raised at the bar. If it fails to do so, it apparently fails in the discharge of one of its essential jurisdiction under its appellate powers. In view of the infirmities pointed out by us, the judgment under appeal cannot be sustained."

14. In the case of **Lal Mandi, Appellant v. State of West Bengal, Respondent [1995 CRI.L.J.2659 (Supreme Court), 2659]**, the Apex Court in para-5 of the report has given caution to the High Court reminding its duty in the matter of hearing of appeal against conviction. It would be gainful to reproduce the observation made in para-5 of the report, extracted below:

"5. To say the least, the approach of the High Court is totally fallacious. In an appeal against conviction, the Appellate Court has the duty to itself appreciate the evidence on the record and if two views are possible on the appraisal of the evidence, the benefit of reasonable doubt has to be given to an accused. It is not correct to suggest that the "Appellate Court cannot legally interfere with" the order of conviction where the trial court has found the evidence as reliable and that it cannot substitute the findings of the Sessions Judge by its own, if it arrives at a different conclusion on reassessment of the evidence. The observation made in Tota Singh's case, which was an appeal against acquittal, have been misunderstood and mechanically applied. Though, the powers of an appellate court, while dealing with an appeal against acquittal and an appeal against conviction are equally wide but the considerations which weigh with it while dealing with an appeal against an order of acquittal and in an appeal against conviction are distinct and separate. The presumption of innocence of accused which gets strengthened on his acquittal is not available on his conviction. An appellate court may give every reasonable weight to the conclusions arrived at by the trial court but it must be remembered that an appellate court is duty bound, in the same way as the trial court, to test the evidence extrinsically as well as intrinsically and to consider as thoroughly as the trial court, all the circumstances available on the record so as to arrive at an independent finding regarding guilt or innocence of the convict. An Appellate Court fails in the discharge of one of its essential duties, if it fails to itself appreciate the evidence on the record and arrive at an independent finding based on the appraisal of such evidence."

15. Before entering into the merits of the arguments, it would be gainful to place on record the evidence adduced during trial by the parties.

16. **Kaderam, P.W.-1**- He is the first informant and father of the victims. He has reiterated the facts mentioned in his written report Exhibit Ka-1 and proved it.

17. **Mohan Lal, P.W.-2**- He has stated that two years before at about 10-11 a.m., he had seen Mahesh taking two daughters of Kaderam, victim no.1 and victim no.2. When he had asked Mahesh about them, Mahesh replied that their mother was ill, he was taking them to the hospital. Two sisters of Mahesh have been married in his village.

18. **Victim No.2, P.W.-3** has stated that two years before in the month of '*Quwar*' she and her sister victim no.1 were in the house, her mother was ill and hospitalized at Bareilly. Her father was with her mother. Mahesh came to her house and told her and her sister that their father telephonically asked him to bring them to Bareilly. She and her sister left the house with him and reached *Ghaneta Phatak* where Mahesh had made them, eat *chat*, *pakauri*, thereafter she felt drowsiness and fell unconscious. When she regained consciousness, she was travelling in a train. On asking Mahesh told her that he was taking them to their mother. On that pretext, he took them to Punjab. In Punjab nephew of Mahesh Virendra used to sell *chat*. Mahesh kept them in the room of Virendra. Virendra had committed rape on her. When she protested, he used to threatened her by showing country made pistol. She has proved her statement recorded by the magistrate under section 164 Cr.P.C. Exhibit Ka-2.

19. **Victim No.1, P.W.-4** has reiterated the facts stated by her younger sister. According to her, she was kept in the room of Virendra where by showing country made pistol, Mahesh committed rape on her for 15 days. She was kept in confinement and Mahesh committed rape on her repeatedly during that period.

20. **Dr. Vinita Chaturvedi, P.W.-5** has stated that on 9th November, 2005 at 12.05 p.m, she medically examined victim no.2. According to her, neither any external mark of injury nor any injury on her private parts were found. Hymen was old torned. On the same day at 12.15 p.m. she medically examined victim No.1 with the same result. She has proved medical examination report Exhibit Ka-5, medical examination report of victim no.1, Exhibit Ka-5 pathology reports Exhibits Ka 6 and 7. Supplementary reports of victim No.2 Exhibit Ka-8 and of the victim no.1 Exhibit Ka-9.

21. In the supplementary report, the doctor has opined that no definite opinion about rape could be given and age of the victim no.2 would be about 16 ½ years. In reference to victim no.1, she has opined that no definite opinion about rape could be given. Age of the victim no.1 could be 18 years.

22. **H.M.Madan Pal Singh, P.W.-6** is the scribe of check FIR. He has proved check FIR Exhibit Ka-10, copy of the report of general diary Exhibit Ka-11.

23. **S.I. Vinod Kumar Anand, P.W.-7** is the investigating officer. He gave details of the steps taken in the course of investigation. He has proved site plans Exhibits Ka- 12 & Ka-13, recovery memo of the girls Exhibit Ka-14.

24. **Dr. Arvind Gupta, P.W.-8** was the senior radiologist. X-ray examination of the victims were conducted in his supervision. He has identified x-ray plates material Exhibits 1 and 2. He has also proved x-ray reports Exhibits Ka-15 & Ka-16.

25. **S.I. Om Prakash, P.W.-9** is the second investigating officer. He has proved chargesheets Exhibits Ka-17 & Ka-18.

26. The case of the defence before the trial court was of simple denial. According to appellants, victim had given false evidence on account of pressure of their parents.

27. Appellant Virendra in his statement recorded under section 313 Cr.P.C.n has denied the facts stated by the prosecution witnesses and claimed false implication due to his relationship with Mahesh. Appellant Mahesh also denied the correctness of the facts stated by the prosecution witnesses in his statement recorded under section 313 Cr.P.C. and reiterated the defence version. In the defence, no evidence was given.

28. The trial Judge has found the statements of the victims worthy of reliance. He has concluded that in the present case, delay in FIR has been satisfactorily explained by the prosecution. On the basis of observation of the Hon'ble Apex Court laid in the case of **State of Punjab Vs. Gurmit Singh; AIR (1996), SC 1399**, he has rejected the argument that not raising of alarm by the victim was evidence of their consent. He found both the victims minor and recorded findings of guilt against the present appellants.

29. Appreciation of evidence by the trial court has been criticized on behalf of the appellants. Since appellant Mahesh has been convicted under section 363 IPC, I am required to re-examine and re-assess the prosecution evidence in reference to age of the victims. In the medical evidence, both have been found to be above 16 years of age. However, their parent Kaderam, P.W.-1 has deposed victim no.1 to be aged about 14 years and victim no.2 to be aged about 12 years. In the x-ray reports, Dr. Arvind Kumar, P.W.-8 has recorded the following findings:-

Victim No.1-

- (a) Right elbow all four epiphysis were fused.
- (b) Right knee epiphysis are partly fused, partly not fused.
- (c) Right wrist ulna end of radius (sic) not fused vide Exhibit Ka- 16.

Victim No.2-

- (a) Right elbow all four epiphysis were fused.
- (b) Right knee epiphysis are not fused.
- (c) Right wrist ulna end of radius (sic) not fused vide Exhibit Ka- 15.

Count of teeth

Victim No.1- 14/14

Victim No.2- 14/14

30. According to Dr. Modi, eruption of second molars takes place between 12 to 14 years. Though on average, such eruption has been noticed from the age of 11.79 years on average. Eruption of third molars begins from 17th years. Thus, count of teeth indicates both the victims to be below 17 years of age. Dr. Modi has also given in a tabular form indication of age on the basis of fusion of some epiphysis. Though from the opinions of different authorities, evidence obtained by ossification tests also depend on geographical situation, eating habits and status of family. The victims belong to Bareilly district. They are residents of village. They belong to poor family but all the authorities appeared to be unanimous that all the joints are fused up to the age of 18 in any case. When we take the radiological findings into consideration alongwith the background of the victims, it would become clear none of the victims could be held to be 18 years of age. Considering their family background, poverty, their ages have been over estimated by the doctor.

31. This is a grey area and I would not like to base my finding on such criteria. In the present case, on the point of age, statement of father of the victim Kaderam, P.W.-1 during cross examination, remained intact. In absence of any evidence envisaged in Rule-12 of the Juvenile Justice Rules, 2007, I feel statement of the father of the victim on the point of age of the victim commands respect and it can be safely relied on. Thus, on the basis of statement of Khaderam, P.W.-1, I hold victim No.1 to be aged about 14 years and victim No.2 aged about 12 years at the relevant time. Arguments contrary to this, are rejected.

32. As soon as it is established that victims were minor at the relevant time, not raising alarm by them loses its importance. With these observations, arguments advanced on behalf of the appellants in this regard is, rejected.

33. At this juncture, I would like to re-examine and re-assess the evidence of victim nos. 1 and 2 in the light of the contradictions pointed out on behalf of the appellants. Victim no.1, P.W.-4 has not made any contradictory statement on the point of her kidnapping, on the point of her confinement, about the place of confinement, in the manner she was subjected to rape. She withstood the test of cross examination successfully.

34. Same is the case with the statement of victim no.2.

35. Before I proceed further, I would like to take counsel on the point; how the evidence of the victim should be evaluated in case of rape. Hon'ble Apex Court in the case of **State of Punjab vs. Gurmit Singh (supra)** has made the following observations:-

"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.....The testimony of the victim in such cases is vital unless there are compelling reasons which necessitate looking for corroboration of her statement, the

courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable.The evidence of a victim of sexual assault stands almost on par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding."

36. Thereafter, I would like to refer some cases wherein the Hon'ble Apex Court has laid down guidelines on various points raised before me in reference to appreciation of evidence of the victim.

(1) In the ***State of H.P. vs. Mango Ram ; (2000) 7 SCC, 224***, in this case, the Hon'ble Apex Court has observed that submission of body in fear or terror does not amount to consent.

(2) In ***Narayanamma vs. State of Karnataka ; (1994) 5 SCC, 728***, the Hon'ble Apex Court has held that non-finding of spermatozoa in the vaginal smear would not falsify the version of the prosecutrix.

(3) ***Shri Narain Saha vs. State of Tripura; (2004) SCC 775***- in this case, Hon'ble the Apex Court has held that if the testimony of the prosecutrix is reliable, conviction on the basis thereof is permissible.

37. In this case, Hon'ble Apex Court has also observed that minor discrepancies in evidence were of no consequence.

38. In the light of the legal position, as gathered from the above mentioned cases, arguments advanced by the learned counsel for the appellants, the victims were consenting parties, contradictions in their statements and variance between their statements and recovery memo about their recovery have no substance, hence, they are rejected. Statements of the victims also receives corroboration from the statement of Khaderam, P.W.-1 and statement of Mohanlal, P.W.-2.

39. Thus, no argument against the correctness of the conviction of the appellants survive. On behalf of the appellants, it has been submitted that lenient view may be taken on the point of sentence. Considering the seriousness of the offence, I do not think any ground is made out to reduce the sentences to which the appellants have been punished with.

40. Therefore, appeals have no substance, consequently they are ***dismissed***. Appellant Virendra is in jail. He shall serve out his remaining sentence. Appellant Mahesh is on bail. He is directed to surrender before the trial court within 30 days failing which the presiding Judge of the trial court is directed to take appropriate steps to procure his presence and send him to jail to serve out his sentences.

41. Office is directed to communicate this order to the court concerned and to send back the record to the court below.

(2016) 8 ILRA 1269
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.08.2016

BEFORE

THE HON'BLE VIPIN SINHA, J.

Criminal Revision No.- 3119 Of 2003

Raghvendra Singh
State Of U.P. & Ors.

...Revisionist Versus ...Respondents

Counsel for the Revisionist:
Prabhakar Tripathi, S.P.S. Raghav

Counsel for the Respondents:
Govt. Advocate, Manish Tiwari

Criminal Procedure Code, 1973 — Ss. 397 & 401 — Revisional jurisdiction — Scope — Interference with acquittal — Revision filed against acquittal — Held, High Court in revisional jurisdiction does not act as appellate court and cannot re-appreciate evidence — Interference permissible only in exceptional cases involving manifest illegality, perversity or miscarriage of justice — No such infirmity found in impugned judgment.

Criminal Trial — Appreciation of evidence — Contradictions and delay in FIR — Trial court recorded findings of material contradictions in prosecution evidence and unexplained delay in lodging FIR — Such findings justified acquittal — No perversity or illegality warranting interference.

Criminal Procedure Code, 1973 — Revisional power — Limitation — Conversion of acquittal into conviction — High Court cannot convert acquittal into conviction in revision — At best, in exceptional cases, retrial may be ordered — Revisional power to be exercised sparingly.

In Result: Revision dismissed; order of acquittal upheld.

Cases cited:

State of Kerala Vs. Putthumana ILLath Jāthavedan Namboodiri,AIR 1999 SC 981
State Of Karnataka vs. Appa Balu Ingale and others,AIR 1993 SC 1126
Jagannath Chaudhary Vs. Ramayan Singh,AIR 2002 SC 2229
Munna Devi Vs. State of Rajasthan and others,AIR 2002 SC 107
K. Chinnaswamy Reddy vs. State of Andhra Pradesh and anr.AIR 1962 SC 1788
Vimal Singh v. Khuman Singh and others,JT 1998 (7) SC 98

(Delivered by Hon'ble Vipin Sinha, J.)

1. Heard Sri Prabhakar Tripathi, the learned counsel for the revisionist and the learned AGA for the State.

2. The present revision has been filed against the judgment and order dated 1.9.2003 passed by Civil Judge, (S.D.) Kannauj acquitting the accused in case no. 746 of 2002; State v. Pal Singh and others.

3. Learned counsel for the revisionist submits that the court below has wrongly appreciated the evidence and has totally ignored the eye-witness account as well as injury and the gravity of the offense while acquitting the accused-opposite party nos. 2 to 5.

4. I have perused the injure reports, perusal of which shows that there were only two injuries on the victim, which are as follows:

“1—कटा हुआ घाव 5 ग 1सेमी0 खाल तक गहरा बाये हाथ के नीचे वाली कलाई से 8 सेमी0 उपर।

2—दाहिनी कलाई पर दर्द की शिकायत किन्तु उस पर मैने कोई सूजन या चोट का निशान नहीं पाया।”

5. It may also be appreciated at the very outset that the incident is of the year 1991 being 25.2.1991. The court below has recorded a categorical finding with regard to the incident that the incident took place on 25.2.1991 at 6 pm in the evening and the FIR has been lodged in the morning at about 9.30 am on 26.2.1991 whereas the distance of place of occurrence from the police station is only about 13 km and there is no explanation with regard to the delay in the lodging of the FIR. The court below has also recorded the discrepancy and the contradiction in the statement of PW1 and PW2. A categorical finding has been recorded in this regard, which is as under:

“वादी ने घटना स्थल अपने घर के दरवाजे पर होने का उल्लेख किया है जबकि साक्षी पी0डब्लू-1 ने अपने सशपथ कथन में घटना स्थल महेन्द्र के दरवाजे पर होने का कथन किया है। नक्शा नजरी के अनुसार वादी के मकान से महेन्द्र के मकान की दूरी बहुत अधिक है। घटना स्थल के संबंध में साक्षी पी0डब्लू-2 ने भी घटना स्थल अपने दरवाजे के सामने होने का उल्लेख किया है। इस प्रकार साक्षी पी0डब्लू-1 व पी0डब्लू-2 के सशपथ कथन में विरोधाभास पाया जाता है।”

6. Keeping in view the aforesaid discrepancy, the court below has recorded a finding to the following effect:

“यदि प्रथम सूचना रिपोर्ट में अंकित घटना स्थल तथा साक्षीगण द्वारा बताए गये घटना स्थल में किसी प्रकार को कोई विरोधाभास पाया जाता है तो ऐसी स्थिति में यह एक गंभीर मामला है तथा यह अभियोजन कथानक को संदेहास्पद बनाता है। अतः प्रतिरक्षा पक्ष के विद्वान अधिवक्ता के इस तर्क में भी बल पाया जाता है।”

7. Thus, on the basis of the aforesaid, the court below has concluded that there contradictions in the statements and has noted as under :

“साक्षी पी0डब्लू-1 व 2 का कथन है कि अभियुक्त ने पीछे से फरसा मारा था जबकि साक्षी पी0डब्लू-3 ने अपने सशपथ कथन की प्रति परीक्षा में स्वीकारोक्ति की है कि सामने से कोई हथियार चलाने पर यह चोटें आ सकती हैं क्योंकि चोटें ऐसी स्थिति में हैं। इस प्रकार साक्षी पी0डब्लू-3 के कथनानुसार चोटें सामने से पहुंचाई गई हैं, जबकि साक्षी पी0डब्लू-1 व 2 के कथनानुसार चोटें पीछे से फरसा मारकर पहुंचाई गई हैं। अतः साक्षीगण के सशपथ कथन में चोटें पहुंचाने के संबंध में विरोधाभास पाया जाता है।”

8. Even with regard to the injury, the court below has recorded a categorical finding as under :

“जहां तक चोटों की अवधि के तथ्य का संबंध है तो साक्षी पी०डब्लू-3 डा० एस०बी० द्विवेदी ने अपने सशपथ कथन में कहा है कि मुआइने के समय चोट का रंग लाल था तथा चोट 6 से 12 घंटे पुरानी थी जबकि चिकित्सीय परीक्षण के अवलोकन से ज्ञान होता है कि मजरूवी का चिकित्सीय परीक्षण दिनांक 26-2-91 को समय करीब एक बजे दोपहर किया गया था। जबकि घटना दिनांक 25-9-91 को सांय 6 बजे की है इस प्रकार लगभग 19 घंटे की चोट पुरानी है।”

9. In exercise of the revisional jurisdiction, it will be beyond Court's power and jurisdiction to re-assess the evidence. Appraisal of the evidence is not permissible in revision petition. Hon'ble Supreme Court in **"State of Kerala Vs. Putthumana ILLath Jathavedan Namboodiri," AIR 1999 SC 981**, has held that the High Court while hearing revisions does not work as an Appellate court and will not re-appreciate the evidence, unless some glaring feature is pointed out which may show that injustice has been done.

10. Hon'ble the Apex Court in **"State Of Karnataka vs. Appa Balu Ingale and others", AIR 1993 SC 1126**, has held that generally speaking, concurrent findings of fact arrived at by two courts below are not to be interfered with by the High Court in absence of any special circumstances or if same are not perverse in any manner. It should be kept in mind that Section 125 Cr.P.C. is enacted for social justice and specially to protect woman and children and also old and infirm parents and falls within the constitutional sweep of Article 14(3), re-enforced by Article 39 of the Constitution of India. The provision gives effect to the natural and fundamental duty of a man to maintain his wife, children and parents so long as they are unable to maintain themselves.

11. Hon'ble the Apex Court in **"Jagannath Chaudhary Vs. Ramayan Singh", AIR 2002 SC 2229**, has held that revisional jurisdiction is normally to be exercised only in exceptional cases where there is a glaring defect in the procedure or there is a manifest error or point of law and consequently there has been a flagrant miscarriage of justice. In **"Munna Devi Vs. State of Rajasthan and others" AIR 2002 SC 107**, it has been further held that while exercising the revisional power the High court has no authority to appreciate the evidence in the manner as the trial and the appellate courts are required to do.

12. It may further be appreciated that the legal position as to the powers of the High Court in revision in the matter of interference with the order of acquittal is no longer res integra, as the law in this regard is very well settled. Suffice it to refer in this regard a decision of this Court in **K. Chinnaaswamy Reddy vs. State of Andhra Pradesh and anr. (AIR) 1962 Sc 1788** wherein it was held, thus :

"It is true that it is open to a High Court in revision to set aside an order of acquittal even at the instance of private parties, though the State may not have thought fit to appeal by the jurisdiction should be exercised by the High Court only in exception the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. Sub-section (4) of Section 439 forbids a High Court from converting a finding of acquittal

into one of conviction and that makes it all the more incumbent on the High Court to see that it does not covert the finding of acquittal into one of conviction by the indirect method of ordering retrial, when it cannot itself directly convert a finding of acquittal into a finding of conviction. This places limitations on the power of the High Court to set aside the finding of acquittal in revision and it is only in exceptional cases that this power should be exercised...

13. Reference may also be had to the decision of the Supreme Court rendered in the case of **Vimal Singh v. Khuman Singh and others; JT 1998 (7) SC 98**, wherein it has been held as under:

"Coming to the ambit of power of High Court under Section 401 of the Code, the High Court in its reversional power does not ordinarily interfere with judgment of acquittal passed by the trial court unless there has been manifest error of law or procedure. The interference with the order of acquittal passed by the trial court is limited only to exceptional cases when it is found that the order under revision suffers from glaring illegality or has caused miscarriage of justice or when it is found that the trial court has no jurisdiction to try the case where the trial court has illegally shut out the evidence which otherwise ought to have been considered or where the material evidence which clinches the issue have been overlooked. These are the instances where the High Court would be justified in interfering with the order of acquittal. Sub-section (3) of Section 403 mandates that the High Court shall not convert a finding of acquittal into one of conviction. Thus, the High Court would not be justified in substituting an order of acquittal into one of conviction even if it is convinced that the accused deserves conviction. No doubt, the High Court in exercise of its reversional power can set aside an order of acquittal if it comes within the ambit of exceptional cases enumerated above, but it cannot convert an order of acquittal into an order of conviction. The only course left to the High Court in such exceptional cases is to order retrial."

14. Moreover, learned counsel for the revisionist has not been able to point out any illegality or perversity with the finding as recorded by the court below in the order impugned.

15. Thus, in view of the aforesaid and also in view of long lapse of time, the instant revision is dismissed.

(2016) 8 ILRA 1273
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.08.2016

BEFORE

THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Criminal Revision No.- 3491 Of 2014

Jagdish

...Revisionist

Versus

State Of U.P. & Anr.

...Respondents

Counsel for the Revisionist:

Anil Kumar Mishra

Counsel for the Respondents:

Govt. Advocate, Surendra Tiwari

Cases Cited

Dashrath Rupsinh Rathod v. State of Maharashtra and another, U.P. Criminal Rulings, Vol. XLV, 2014 (2), 630.

Negotiable Instruments Act, 1881 – Ss. 138 and 145(2) – Criminal Procedure Code, 1973 – Ss. 177, 178, 179, 182 and 184 – Territorial jurisdiction – Complaint under S. 138 – Cheque dishonoured by drawee bank situated outside territorial jurisdiction of Magistrate – Complaint maintainable only before Court within whose territorial jurisdiction cheque was dishonoured – Proceedings not having reached stage contemplated under S. 145(2), complaint liable to be returned for presentation before competent Court – Complaint re-presented within thirty days of return to be treated as within limitation, provided original complaint was not time-barred – Revision arising from summoning order passed by ACJM. Following *Dashrath Rupsinh Rathod v. State of Maharashtra*, held, the Court at Sonebhadra lacked territorial jurisdiction as the cheque had been dishonoured by the drawee bank at Mirzapur. Since the case had not reached the stage of recording evidence under S. 145(2) of the Act, the complaint was directed to be returned to the complainant for presentation before the competent Court, with protection regarding limitation in terms of the decision in *Dashrath Rupsinh Rathod*.

In Result :- Criminal revision disposed of. Interim order, if any, vacated.

(Delivered by Hon'ble Prabhat Chandra Tripathi, J.)

1. Heard Sri Anil Kumar Mishra, learned counsel for the revisionist, Sri Surendra Tiwari, learned counsel for the opposite party no.2 and the learned A.G.A. for the State and perused the record.

2. This criminal revision has been filed against the order dated 23.8.2014 passed by the learned Additional Chief Judicial Magistrate, Sonebhadra in Case No.1038 of 2014 (Anand Sagar v. Jagdish) by which the learned Magistrate has summoned the revisionist, Jagdish under Section

138 of the Negotiable Instruments Act, 1881 and directed the complainant, opposite party no.2, Anand Sagar to take steps within 10 days under Section 204 Cr.P.C.

3. Brief facts in narrow compass are narrated as follows:-

4. Revisionist, is a registered contractor in the name and style of M/s J.K. Construction Company, Tilaulikalan, Police Station and Tehsil Robertsganj, District Sonebhadra. As per the complaint, a cheque bearing no.043055 was issued on 4.4.2014 in favour of opposite party no.2, Anand Sagar which was dishonoured by the drawee bank i.e. Bank of India, Mirzapur Branch, Wellesley Ganj, District Mirzapur.

5. Since, the blank cheque was missing, information in this regard was furnished by the revisionist to the bank on 4.4.2014 and thereafter, the concerned bank stopped the payment of the cheque. However, the concerned cheque was presented by the opposite party no.2 on 11.4.2014 before the concerned bank and the same was returned with remark "Payment stopped by the drawer".

6. The court of the learned Additional Chief Judicial Magistrate, Sonebhadra did not have territorial jurisdiction to summon the revisionist, Jagdish in view of Sections 177, 178, 179, 220 (1), 182 and 184 Cr.P.C.

7. Reliance has been placed by the learned counsel for both the parties on the judgement of the Supreme Court in **Dashrath Rupsinh Rathod v. State of Maharashtra and another [U.P. Criminal Rulings, Vol. XLV 2014 (2), 630]**. Para-20 of the judgement is quoted as below:-

"20. We are quite alive to the magnitude of the impact that the present decision shall have to possibly lakhs of cases pending in various Courts spanning across the country. One approach could be to declare that this judgment will have only prospective pertinence, i.e. applicability to complaints that may be filed after this pronouncement. However, keeping in perspective the hardship that this will continue to bear on alleged accused/respondents who may have to travel long distances in conducting their defence, and also mindful of the legal implications of proceedings being permitted to continue in a Court devoid of jurisdiction, this recourse in entirety does not commend itself to us. Consequent on considerable consideration we think it expedient to direct that only those cases where, post the summoning and appearance of the alleged Accused, the recording of evidence has commenced as envisaged in Section 145(2) of the Negotiable Instruments Act, 1881, will proceeding continue at that place. To clarify, regardless of whether evidence has been led before the Magistrate at the pre-summoning stage, either by affidavit or by oral statement, the Complaint will be maintainable only at the place where the cheque stands dishonoured. To obviate and eradicate any legal complications, the category of Complaint cases where proceedings have gone to the stage of Section 145(2) or beyond shall be deemed to have been transferred by us from the Court ordinarily possessing territorial jurisdiction, as now clarified, to the Court where it is presently pending. All other Complaints (obviously including those where the accused/respondent has not been properly served) shall be returned to the Complainant for filing

in the proper Court, in consonance with our exposition of the law. If such Complaints are filed/refiled within thirty days of their return, they shall be deemed to have been filed within the time prescribed by law, unless the initial or prior filing was itself time barred."

8. Having considered the facts mentioned as above and the observations made by the Supreme Court in **Dashrath Rupsinh Rathod (supra)**, the complaint being Case No.1038 of 2014 (Anand Sagar v. Jagdish), under Section 138 of the Negotiable Instruments Act, 1881 instituted before the court of the learned Additional Chief Judicial Magistrate, Sonebhadra, Police Station Karma, District Sonebhadra is returned to the complainant Anand Sagar for filing in the proper court (if he wishes to do so) in consonance with the exposition of the law expressed by the Supreme Court in **Dashrath Rupsinh Rathod (supra)**. If such complaint is filed within thirty days of its return, it shall be deemed to have been filed within the time prescribed by law, unless the initial or prior filing was itself time barred.

9.The criminal revision is accordingly **disposed of**.

10. Interim order, if any, is vacated.

(2016) 8 ILRA 1276
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.08.2016

BEFORE

THE HON'BLE AMAR SINGH CHAUHAN, J.

Criminal Appeal No.- 3598 Of 2011

Satish Verma

...Appellant
Versus

State Of U.P.

...Respondent

Counsel for the Appellant:

Radhey Shyam, Mukesh Kumar, Suresh Chandra Verma

Counsel for the Respondent:

Govt. Advocate

Penal Code, 1860 — Ss. 304 & 336 — Culpable homicide — Distinction between murder and culpable homicide not amounting to murder — Reduction of sentence — Accused assaulted deceased with brick during sudden quarrel under influence of liquor — No premeditation or intention to cause death — Single blow inflicted — Held, case falls under S. 304 Part II IPC (culpable homicide of third degree) and not under graver category — Conviction altered in terms of sentencing; sentence reduced.

Penal Code, 1860 — S. 304 Part II — Ingredients — Knowledge vs intention — Where act done with knowledge that it is likely to cause death but without intention to cause death, offence falls under Part II — Sudden fight, absence of repeated blows and intoxication relevant factors.

Criminal Law — Sentencing — Mitigating circumstances — Factors such as absence of pre-planning, single blow, intoxication and sudden altercation justify reduction of sentence — Ends of justice met by reducing sentence from ten years to six years.

In Result: Appeal partly allowed; conviction under Ss. 304 and 336 IPC maintained; sentence under S. 304 IPC reduced to six years while fine maintained.

Cases cited:

State of M.P. Vs. Deshraj, AIR 2004 SC 2764

State of Punjab Vs. Guru Charan, AIR 1998 SC 3115

Kandaswamy Vs. State of Tamil Nadu, 2008(62) ACC 969

Reg Vs. Govinda, 1876 ILR 1876 Bom 342

(Delivered by Hon'ble Amar Singh Chauhan, J.)

1. This Criminal appeal has been filed against the judgement and order dated 27.4.2011 passed by the Additional Sessions Judge, Court No. 7, Farrukhabad in ST No. 280 of 2007 arising out of case crime No. 10 of 2007, under sections 304 and 336 IPC, PS Kamalganj, district Farrukhabad whereby the learned Judge convicted and sentenced the appellant to three months' simple imprisonment under section 336 IPC, ten years RI under section 304 IPC and a fine of Rs. 25,000/- with default stipulation.

2. The brief facts giving rise to the present appeal are that a written report was handed over on 20.1.2007 by the complainant Bhagwan Singh to the SO, police station Kamalganj, district Farrukhabad to the effect that his son Mahaveer, the deceased aged about 25 years, who was handicapped, was taken away by Satish, the appellant for the purpose of drinking liquor. When Satish and Mahaveer were returning, there had been altercation between them. Smt. Ram Dulari came for rescue. At that time the appellant hit the head of the deceased with brick, who fell on the ground. On hearing the noise of Ram Dulari, the complainant and others reached at the spot, but due to serious injuries, the deceased succumbed to the injuries. The appellant taking advantage of darkness, ran away in the field.

3. On the basis of the aforesaid written report, a case was registered at case crime No. 10 of 2007, under sections 336, 304 IPC at PS Kamalganj, district Farrukhabad (Ext. Ka-4), which was entered into GD vide Report No. 28 at 23.00 hours. After the registration of the FIR, the investigation of the case was entrusted to SI Rahimuddin Khan, who prepared Panchayatnama (Ext. Ka-8). He also prepared letter for CMO (Ext. Ka-9), Challan Laash (Ext. Ka-10) and photo laash (Ext. Ka-11). He also inspected the spot and prepared site plan (Ext. Ka-6). Thereafter the investigation of the case was transferred to SI T. R. Verma, PW 3, who after completing the remaining investigation, submitted the charge sheet against the appellant under sections 336, 304 IPC (Ext. Ka-7).

4. To bring home the guilt of the appellant, the prosecution has examined as many as five witnesses.

5. PW 1, Bhagwan Singh is the complainant of the case. He reiterated the versions given in the FIR. He further deposed that his son was taken away by the appellant on the pretext of drinking liquor. When his son did not return, then at about 8.00 PM he along with his other son Manoj went in search of his son-Mahaveer. When he was searching his son, he saw Satish, the appellant running away. When the complainant asked the appellant that there are blood on his shirt and pant, then the appellant replied that go and save your son, *Kanjad* are beating him. He saw the blood in the light of torch. When he reached the spot, he found his son dead. Thereafter he lodged the report, which he proved as Ext. Ka-1.

6. PW 2, Manoj is the son of the complainant and brother of the deceased. He deposed that at 6.00 PM, Satish Verma took his brother Mahaveer on the pretext of drinking liquor and said that they will return within an hour or two. When he did not return, then he went for his search. When he reached near pond outside village, some altercation was going on between them. Ram Dulari *Kanjad* was cooling the matter down. When he intervened, then the appellant threw the lathi on the deceased and hit his brother with brick with the intention to kill him. His brother fell down and there was bleeding from the head. The appellant ran away from the spot. On his cry, several persons of the village rushed to the spot. They were

searching for the conveyance, but no conveyance was found. In the meantime, his brother succumbed to the injuries. He further deposed that his father lodged the report.

7. The evidence of PW 3, T.R. Verma has already been discussed above.

8. PW 4 is Dr. Kuldeep Kumar Yadav. He deposed that on 21.1.2007 he was entrusted the work of post-mortem. On that date at 8.30 PM he conducted the post mortem on the body of the deceased, who was brought by constable Anurudh Singh. The deceased was of average built. His both the eyes were closed. Mouth was also closed. Doctor found the following anti-mortem injuries on the person of the deceased:

1. Lacerated wound 3 cm x 1.5 cm x skin deep left side back at head 8 cm behind left ear. Fracture of bone underneath injury. Membrane was also torn.

2. Lacerated wound 2.00 cm x 1 cm skin deep left side behind left ear. There was clotting on the head.

In the opinion of the doctor, the death was caused due to the anti-mortem injuries received by the deceased

9. PW 5 is Parokar Phool Chand. He deposed that Panchayatnama was prepared by SI Rahimuddin on 21.1.2007, who was posted as SO, police station Kamalganj. This witness has further proved the papers prepared by SI Rahimuddin.

10. After close of the evidence the statement of the accused was recorded under section 313 Cr.P.C., who stated that he has falsely been implicated in the present case and claims to be tried. However, in his defence, the accused-appellant has examined DW 1, Ram Dulari and DW 2, Dharmveer.

11. DW 1 Smt. Ram Dulari has deposed that on the date of incident at about 5.00 AM when she had gone to attend the call of nature, she saw that a dead body was lying on Nala (rivulet). One brick was also lying stained with blood near the dead body. It appears that Mahaveer fell into the Nala and died due to fall. She further deposed that the deceased was heavy drunkard. She neither saw nor heard any altercation between Satish and Mahaveer.

12. DW 2 is Dharmveer. He deposed that at 5.30 AM when he reached at the place of incident, he saw that dead body of Mahaveer was lying into the Nala. Near the dead body a brick stained with blood was also lying. 10-15 persons were standing there and all of them were saying that Mahaveer fell into the Nala after taking liquor. Mahaveer was handicapped. Satish and Mahaveer had a good relations.

13. Learned lower court after hearing and perusing the record came to the conclusion that prosecution had established his charge under section 336 and 304 IPC and, therefore, convicted and sentenced the appellant as already mentioned herein above vide judgement and order, hence this appeal for quashing the said judgement.

14. Heard learned counsel for the appellant and learned Additional Government Advocate and perused the record of the case.

15. It is submitted by the learned counsel for the appellant that the appellant is not challenging the order of conviction. The only question remains for consideration is as to whether offence committed by the appellant comes within the purview of section 304 Part II. It is also contended that maximum sentence has been awarded under section 304 IPC.

16. It is further contended that at the spur of mement, during altercation, injury was caused with the brick and there is no evidence that there was intention to cause death as altercation took place on taking liquor and in absence of repetition of blow, mens rea could not be attributed.

17. Learned Additional Government Advocate concedes that marpit took place after taking liquor as in the Post-mortem report, smell of alcohol also reported. It is also contended that the act by which the death is done with the knowledge that it is likely to cause death, but the act of the accused cannot be said preplanned.

18. In the case in hand, smell of liquor was reported in the post-mortem report. It is not denied that accused as well as deceased were heavy drunkard, the accused in a sudden quarrel hit the brick on head of deceased and deceased succumbed to head injury. since the deceased and accused were under influence of liquor and suddenly in the spur of moment a quarrel took place and deceased sustained injury on the head. There is no predetermination and intention to cause death, the offence in such case will always be punishable under section 304 Part II IPC as held by Hon'ble Apex Court in the cases of **State of M.P. Vs. Deshraj, AIR 2004 SC 2764** and **State of Punjab Vs. Guru Charan, AIR 1998 SC 3115**.

19. The alleged acts of accused which constitute the offence come within purview of culpable homicide amounting to murder or not amounting to murder?

20. In this respect Hon'ble Supreme Court in **Kandaswamy Vs. State of Tamil Nadu, 2008(62) ACC 969** has held as under:

"This bring us to the crucial question as to which was the appropriate provision to be applied. In the scheme of the IPC culpable homicide is genus and 'murder' its specie. All 'murder is 'culpable homicide' but not vice-versa. Speaking generally, culpable homicide sans 'special characteristics of murder is culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of the generic offence, the I.P.C. practically recognizes three degrees of culpable homicide. The first is, what may be called, 'culpable homicide of the first degree'. This is the gravest form of culpable homicide, which is defined in section 300 as 'muder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the first part of section 304. Then, there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of section 304.

The ingredients of clause "thirdly" of section 300 IPC were brought out by the illustrious Judge in his terse language as follows:

To put it shortly, the prosecution must prove the following facts before it can bring a case under section 300, "thirdly".

First, it must establish, quite objectively, that a bodily injury is present.

Secondly, the nature of the injury must be proved. These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender."

Privy Council in Reg Vs. Govinda, 1876 ILR 1876 Bom 342, decided on 18.7.1876, held has under:

"Whether the offence is culpable homicide or murder, depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide, if it is the most probable result, it is murder."

21. In this case, act of the accused was not preplanned and there is no intention to cause death as deceased sustained injury in the altercation took place during influence of liquor. It is clear that it is case of culpable homicide not amounting to murder of the third degree which is punishable under section 304 Part-II IPC. In this case minimum sentence would be upto four years, but I certainly find his case to be a fit case to reduce the sentence of imprisonment to a period of 6 years and this will serve the end of justice.

22. In view of what has been indicated herein above, the appeal is partly allowed. The conviction of the appellant under sections 336 and 304 IPC is upheld. However, the sentence of the appellant under section 304 IPC is reduced to six years, but imposition of fine shall remain intact.

23. Office is directed to send a copy of this order to the court concerned for compliance.

(2016) 8 ILRA 1281
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.08.2016

BEFORE

THE HON'BLE TARUN AGARWALA, J.
THE HON'BLE VIPIN SINHA, J.

Civil Misc. Writ Petition / Writ C No.- 4035 Of 2016
&
Connected With Other Cases

Asha Ram & Ors.

...Petitioners

Versus

Union Of India & Ors.

...Respondents

Counsel for the Petitioners:

Praveen Kumar, Pradeep Kumar

Counsel for the Respondents:

Sudhir Bharti, Rahul Agarwal

Railways Act, 1989 — S. 20F(6) — Determination of compensation — Role of Arbitrator — Mandatory duty — Land acquired for Dedicated Freight Corridor — Compensation determined by competent authority challenged before Arbitrator — Arbitrator partly accepted objection but instead of determining compensation himself, directed Chief Project Manager to redetermine amount — Held, under S. 20F(6), Arbitrator is mandatorily required to determine compensation — Delegation of such function to any other authority impermissible.

Land Acquisition — Compensation — Adjudicatory function — Non-delegable — Arbitrator being statutory authority cannot abdicate his jurisdiction — Chief Project Manager not competent under statute to determine compensation — Impugned direction unsustainable.

Interpretation of Statute — Use of word "shall" — Mandatory nature — Expression "shall" in S. 20F(6) denotes mandatory obligation — Arbitrator bound to decide quantum of compensation on merits.

Writ Jurisdiction — Interference — Remand — Where statutory authority fails to exercise jurisdiction vested in it, High Court justified in interfering and remitting matter for fresh determination — Direction issued to Arbitrator to compute compensation expeditiously.

In Result: Writ petitions allowed; impugned part of Arbitrator's order quashed; matter remitted to Arbitrator for determination of compensation within stipulated time; directions issued for deposit and disbursement of compensation.

(Delivered by Hon'ble Tarun Agarwala, J.)

1. We have heard Sri Pradeep Kumar along with Sri Praveen Kumar, the learned counsels for the petitioners and Sri Rahul Agrawal, Advocate along with Sri Sudhir Bharti, the learned counsels for the Railways.

2. This group of writ petitions involves a common question of law and, accordingly, all the writ petitions are being decided together. For facility, the facts of Writ Petition No. 4035 of 2016 is being taken into consideration.

3. It transpires that the land was acquired for Special Rail Project East Dedicated Freight Corridor, that was being constructed by the Ministry of Railways, Union of India. For the aforesaid purpose, various tracts of land were acquired under the Railways Act, 1989(hereinafter referred to as the Act). The petitioners' land being plot no. 178 measuring 0.7770 hectares was also acquired, pursuant to a notification dated 03.11.2010 issued under Section 20E of the Act. Possession was taken and thereafter compensation was determined by means of an award dated 26.08.2011 issued under Section 20F of the Act, whereby the petitioners were awarded a sum of Rs.9,95,560/- towards compensation.

4. The petitioners, being aggrieved by the determination of the compensation, filed an objection no. 34/2012-13 under Section 20F(6) before the Arbitrator. The Arbitrator, after considering the objection, partly accepted the contention of the petitioners holding that the land is within 200 meters of abadi and, accordingly, directed the Chief Project Manager of the Dedicated Freight Corridor to redetermine the compensation in the light of the observation made therein.

5. According to the petitioners, as per the order of the Arbitrator, the petitioners are entitled to Rs.2,00,65,255/- along with 12% interest as compensation taking the rate of land as per the circle rate.

6. Since the amount, as per the calculation made by the petitioners, was not released by the respondents, the present writ petition was filed praying that a writ of mandamus be issued commanding the respondents to pay Rs.2,00,65,255/- along with 12% interest pursuant to the order of the Arbitrator dated 03.02.2014.

7. The respondents have filed a counter affidavit contending that, as per the calculation chart prepared by them, the petitioners are only entitled to Rs.23,38,560/- towards compensation. In paragraph 6 of the Counter Affidavit the respondents have contended that the petitioners have received two cheques of a sum of Rs.7,75,520/- each.

8. Sri Rahul Agrawal, the learned counsel for the respondents contended that during the pendency of the writ petition the entire amount has been paid to the petitioners. It was also contended that the petitioners, being aggrieved by the award of the Arbitrator, filed an objection under Section 33 of the Arbitration and Conciliation Act and, therefore, the writ petition should be dismissed.

9. Sri Pradeep Kumar, the learned counsel for the petitioners however submitted that the objection filed under Section 33 of the Arbitration and Conciliation Act was withdrawn and there is no application pending as on date.

10. Be that as it may. We have perused the order of the Arbitrator dated 03.02.2014. We find that once the Arbitrator has accepted the contention of the petitioners in part, as raised by them in their objection, the Arbitrator should have proceeded to determine the amount of compensation instead of directing the Chief Project Manager, Dedicated Freight Corridor Corporation of India Ltd., Kanpur to redetermine the amount. In this regard Section 20F(6) of the Act reads as under:

“(6) If the amount determined by the competent authority under sub-section (1) or as the case may be sub-section (3) is not acceptable to either of the parties, the amount shall, on an application by either of the parties, be determined by the arbitrator to be appointed by the Central Government in such manner as may be prescribed.”

11. A perusal of the aforesaid provision indicates that if the amount determined by the competent authority under sub-section (1) or as the case may be under sub-section (3) is not accepted by either of the parties, the amount shall, on an application by either of the parties, be determined by the Arbitrator. The word “shall” is of importance, which indicates a mandatory tenor in the provision. In the instant case the petitioner did not accept the amount awarded by the competent authority under Section 20F(1) of the Act and filed an application under Section 20F(6) of the Act. The Arbitrator was required to determine the amount, which in the instant case has not been done. The Arbitrator instead has relegated the determination of the compensation to the Chief Project Manager, who in any case was not competent to determine the compensation under Section 20F(1) of the Act.

12. We, accordingly, allow the writ petitions and quash that part of the order dated 03.02.2014 passed by the Arbitrator by which it directs the Chief Project Manager of the Dedicated Freight Corridor Corporation India Limited to determine the amount of compensation in terms of the observations made in the order. We remit the matter to the Arbitrator with the direction to calculate the compensation in terms of the observations made in the order within six weeks from the date of production of a certified copy of this order after hearing all parties concerned. In the event, the Arbitrator considers the order of the Additional District Magistrate dated 11.04.2014 while calculating the compensation, it would be open to the petitioners to raise such objection as advised.

13. By an order dated 10.08.2016 we had directed the respondents to produce the bank drafts of the compensation, which was admittedly payable by the respondents. The bank drafts in favour of the petitioners have been produced before the Court. We direct the respondents to deposit these bank drafts before the Arbitrator on or before 05.09.2016. The necessary formalities of handing over the bank drafts to the petitioners will be done by the Arbitrator and the necessary drafts would be handed over to the petitioners within a week thereafter upon completion of necessary formalities.

(2016) 8 ILRA 1284
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 22.08.2016

BEFORE

THE HON'BLE ABHAY MAHADEO THIPSAY, J.

Application U/S 482/378/407 No.- 5166 Of 2016

Zareena

**...Applicant
Versus**

State Of U.P. & Anr.

...Respondents

Counsel for the Applicant:

Amarjeet Singh Rakhra, Ved Prakash Tiwari

Counsel for the Respondents:

Govt. Advocate, Anoop Kumar Upadhyay

Criminal Procedure Code, 1973 — Ss. 169, 170 & 173 — Scope and distinction — Release of accused during investigation — Magistrate's powers — Investigating Officer moved application seeking release of accused under S. 169 CrPC on ground of absence of evidence — Magistrate rejected application treating it akin to a "final report" and proceeded to assess merits — Held, S. 169 CrPC operates during investigation and empowers police to release accused where evidence is insufficient — It is distinct from report under S. 173 CrPC which is submitted on completion of investigation — Magistrate erred in treating application under S. 169 as a final report and in evaluating sufficiency of evidence at that stage — Magistrate not required to adjudicate upon merits prior to submission of police report under S. 173 CrPC.

Criminal Procedure Code, 1973 — S. 169 — Nature of power — Autonomy of Investigating Officer — Power to release accused for lack of evidence vests in police — Where accused is in judicial custody, police may seek appropriate order from Magistrate — Magistrate ought to give due weight to opinion of Investigating Officer unless there are compelling reasons indicating mala fides — Mechanical rejection of such request and adverse remarks against Investigating Officer held improper.

Criminal Procedure Code, 1973 — Investigation — Police report — Misconception regarding "charge-sheet" and "final report" — Code contemplates only one police report under S. 173(2) CrPC — Terms like "charge-sheet", "final report", "closure report" are colloquial and do not alter statutory scheme — Investigation may continue even after release of accused under S. 169 CrPC — Completion of investigation culminates only in report under S. 173 CrPC.

In Result: Impugned order set aside; petition disposed of with observations clarifying scope of Ss. 169, 170 and 173 CrPC; no specific direction for release issued in view of pending bail application.

(Delivered by Hon'ble Abhay Mahadeo Thipsay, J.)

1. Heard Shri Amarjeet Singh Rakhra, learned counsel for the petitioner, Shri S.N. Tilhari, learned Additional Government Advocate and Shri Anoop Kumar Upadhyay, learned counsel for the opposite party no.2- complainant.

2. Pursuant to the direction given by this Court on 17.8.2016, the Investigating Officer- Shri Shailkant Upadhyay, Sub-Inspector, Police Station Khodare, District Gonda, is present in court, with the case-diary.

3. The petitioner is one of the accused in case crime No.157 of 2016 registered at Police Station Khodare, District Gonda. The said case relates to offences punishable under Section 307 IPC, Section 326 IPC, and Section 324 IPC. The First Information Report came to be lodged on 7.5.2016. It was in respect of an offence punishable under Section 307 IPC. Later on, allegations of offences punishable under Section 326 IPC and Section 324 IPC were added. The petitioner, who is named in the First Information Report as one of the assailants, came to be arrested on 5.6.2016.

4. On 7.7.2016, when the petitioner had been remanded in judicial custody, the Investigating Officer made an application before the Magistrate stating that upon investigation, he had come to the conclusion that there was nothing to show that the petitioner was present on scene of the offences. He categorically stated that there was no material from which the commission of the alleged offences by the petitioner could be established. He, therefore, prayed to the Magistrate that the petitioner be released, as contemplated under Section 169 of the Code of Criminal Procedure (the 'Code'). This application was rejected by the Magistrate by a detailed order dated 15.7.2016. The Magistrate, by the said order, dismissed the said application, and also directed a copy of the order to be forwarded to the Superintendent of Police, Gonda and Director General of Police, Uttar Pradesh for taking legal action against the Investigating Officer.

5. Being aggrieved by the said order, the petitioner has approached this court by filing the present petition invoking the inherent powers of this court and praying that the impugned order be set aside and the petitioner be directed to be released forthwith.

6. The learned counsel for the petitioner submitted that the order passed by the learned Magistrate is erroneous. He submitted that the tenor of the order indicates that the Magistrate was extremely displeased with the Investigating Officer for having formed an opinion that the petitioner needed to be released under the provisions of Section 169 of the Code; and that it was not fair to the Investigating Officer.

7. The learned A.G.A., on the other hand, submitted that the Magistrate had jurisdiction to pass the impugned order; and that the order has been rightly passed by him. It is submitted that the opinion of the police would not matter and, ultimately, it would be the opinion of the Magistrate that would matter with regard to the involvement, or otherwise, of a particular accused in the alleged offences. It is submitted that the Magistrate, after examining the material against the petitioner, formed an opinion that her involvement in the alleged offences was revealed, and that,

therefore, the Magistrate was right in rejecting the application under Section 169 of the Code, as filed by the Investigating Officer.

8. With the assistance of the learned counsel for the parties, I have gone through the impugned order carefully and considered the authoritative pronouncements of the Superior Courts and even of the Hon'ble Apex Court, which have been brought to my notice by the learned counsel for the parties.

9. There appears to be some confusion with respect to the ambit and scope of Section 169 of the Code, for removal of which the provisions of Section 169 of the Code need to be considered, along with the provisions of Sections 170 & 173 of the Code. The confusion with respect to the area of operation of these provisions, apparently, arises because of free use of terms, such as 'charge-sheet', 'final report', 'closure report', 'summary' etc. which are not at all found in the Code, but are commonly used not only by lay-persons, but also by the police, Advocates and Judges. When the police, on conclusion of investigation, file a report to the effect that the persons named therein as accused have committed the offence (mentioned in such report), it is popularly termed as 'charge-sheet'. When the police report, on completion of investigation, that no offence is found to have been committed by any one, (or by the persons named as accused), then such report is popularly called as a 'final report'. Such final report, sometimes, is also referred to as a 'closure report' or 'summary'.

10. It would be appropriate to consider as to what, actually, Section 169 of the Code lays down. It reads as under:

"If, upon an investigation under this Chapter, it appears to the officer in-charge of the police station that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is, in custody, release him on his executing a bond with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him for trial"

11. This Section needs to be read, along with Section 170 of the Code which says that if, upon an investigation under Chapter XII, it appears to the Officer-in-charge of a police station that there is sufficient evidence or reasonable ground for the aforesaid, such officer shall forward the accused under the custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused, or commit him for trial, etc.

12. Section 169 of the Code and Section 170 of the Code do not refer to the completion of investigation. Thus, investigation may continue, even after an accused is released under Section 169 of the Code, or is forwarded to a Magistrate in custody, as contemplated under section 170 of the Code. It may, at times, happen that an application for release of an accused under Section 169 of the Code would be made at the time of submission of a final report under Section 173 of the Code, but that would not always be the case. In fact, Section 169 of the Code has nothing to do with the

completion of the investigation, or closure thereof, though, in some cases, by releasing an accused, the investigation would be concluded. Though both the things may coincide sometimes, it would be improper to understand an application made for release of an accused under Section 169 of the Code as a final report, (unless, off course, such an application forms a part of the final report itself).

13. An example can be given to explain and clarify the point. It is well-known that many times, the offender is not known to the victim or the first informant and a case -say of theft- is registered against an unknown offender. In the course of investigation, the police may arrest 'A' on suspicion, and seek his remand in custody, but would, at a later stage of investigation, be convinced about his non-involvement, or at any rate, about there being no evidence against him. In such a case, the police may release 'A' under the provisions of Section 169 of the Code, if in police custody. If, however, 'A' would be in judicial custody, the police would have to make an application to the Magistrate for his release under the said provision, as the police themselves would not be able to release a person, who is in judicial custody. After release of 'A', however, the investigation would not be over. The police if would then suspect 'B' may arrest him on such suspicion. Thus, the investigation in the very offence would continue. Experience shows that this often happens in cases of pick-pocketing, bag-lifting, house-breaking etc, where arrests are made on suspicion, there being no accusation against any particular individual. The report under Section 173 of the Code would be filed only on completion of investigation of that particular case, and not on the suspicion against a person, who was earlier arrested on such suspicion, ceasing to exist.

14. Chapter XII of the Code deals with information to the police and their powers to investigate. It opens with Section 154 of the Code, which speaks of information in cognizable case, which is known as First Information Report. Section 156 of the Code speaks of the police officers' powers to investigate into cognizable cases and Section 157 of the Code speaks of the procedure for investigation. What needs to be observed is that the Code speaks only of one 'police report', i.e. one defined in clause (r) of Section 2,- as a police report under Section 173 (2) of the Code, which is to be submitted on completion of investigation. A bare perusal of Section 173 of the Code would indicate that this report is a must; and has to be forwarded to a Magistrate, whether the conclusion of the Investigating Officer is that the offence appears to have been committed (by a certain person or persons) or is that no offence appears to have been committed. If any doubt in that regard exists, the same can be removed by referring to sub-clause (d) of Clause (i) of sub-Section (2) of Section 173 of the Code. Any investigation commenced under the Chapter XII pursuant to the lodging of the First Information Report or otherwise must end with a report under Section 173 (2) of the Code.

15. Thus, the report under Section 173 of the Code is the final report submitted after completion of investigation. However, as aforesaid, in common legal parlance, the phrase 'final report' has acquired a particular meaning and it is only where the report under Section 173 of the Code indicates that no offence is disclosed, it is popularly termed as a 'final report'. It is also, sometimes, and in some States, referred to as a 'closure report' or a 'summary'. The other type of 'final report' viz. indicating that some person or persons have committed some offence or offences is popularly termed as aforesaid, as 'charge-sheet'. In reality, both the so-called 'charge-sheet' and the so-called 'final report' are actually reports under Section 173 of the Code on completion of

investigation. It is only the report under Section 173 of the Code that is, actually, a final report-so to say.

16. It is not in dispute that in the present case, a report under Section 173 of the Code, which is the police report as defined under Section 2(r) of the Code, has not yet been filed.

17. Section 169 of the Code speaks only of the powers of the police to release an accused, when he forms an opinion that there is not sufficient material or reasonable ground of suspicion to justify for forwarding the accused to the Magistrate (in accordance with the provisions of Section 170 of the Code).

18. Section 169 of the Code does not speak of any report, or application to be submitted by the Investigating Officer to the Magistrate. However, evidently, such an application would be necessary when the particular accused would be in judicial custody under the remand order, inasmuch as the Investigating Officer, in spite of formation of an opinion about insufficiency of evidence or reasonable grounds for sending an accused for trial, cannot release him from prison.

19. The application which had been made by the Investigating Officer before the Magistrate was, evidently, not a final report. It does not even remotely suggest to be so. All that it mentions is that in the course of investigation, it was revealed that the petitioner's involvement in the alleged offence and/ or her presence on the spot at the time of incident was not revealed; and that, no evidence could be collected from which, that the petitioner committed the offence, cannot be established.

20. There was a prayer to the effect that the petitioner be released under the provisions of Section 169 of the Code.

21. As aforesaid, it is possible, in a given case, that an application for release of an accused under Section 169 of the Code may take the form of a final report, but in this case, it was evidently not so. The question is whether the Magistrate at that stage was required to or justified in discussing the merits of the matter and deciding whether or not there were sufficient grounds for taking cognizance of the alleged offences against the petitioner, as if he was dealing with a final report submitted by the police exonerating the petitioner.

22. In my opinion, the answer has to be in negative.

23. A perusal of the impugned order shows that the learned Magistrate failed to realize the distinction between the nature of application that had been made by the Investigating Officer with specific reference to Section 169 of the Code and a 'final report' filed by the police under Section 173 of the Code.

24. The Magistrate placed emphasis on the fact that ultimately, it would be for the Magistrate to decide whether or not a particular accused or accused persons should be proceeded

against or not; and that the Magistrate is not bound by the opinion expressed by the police. Undoubtedly, the Magistrate would be fully entitled and justified in disagreeing with the conclusion arrived at by the police and is free to adopt any course, out of a large number of courses available to him under the law. One such course would be to take cognizance of the alleged offence and issue process against the accused persons disregarding the opinion of the investigating agency that there is no case for proceeding against such an accused. However, this situation would come only on the closure/ completion of the investigation. It would be indicated by the submission of a charge-sheet/ final report under Section 173 of the Code. Till that stage is arrived, the Magistrate would not be concerned with the opinion forming process of the investigating officer. In fact, the matter would not even come before the Magistrate, if the particular accused would be in police custody. The statutory power conferred on the police by Section 169 of the Code, is no way controlled by the Magistrate.

25. At the cost of repetition, it may be observed that it was because the petitioner was in judicial custody that the police made a prayer to the Magistrate to release her from prison, though the power vests in police. Usually, it is only to show deference to the Magistrate that the police bring this aspect of the matter in the notice of the Magistrate and seek appropriate orders.

26. After going through the impugned order, I find that the Magistrate has treated the application as if it was a final report under Section 173 of the Code, requiring him to decide whether or not there were sufficient grounds for proceeding against the petitioner. Since the matter is still at investigation stage, the Magistrate was not required to form any such opinion, as even after formation of such an opinion, he would not be able to proceed against the petitioner. All that he could do is to keep the petitioner under detention despite the opinion of the police that her involvement in the alleged offences was not established.

27. In my opinion, the Magistrate ought to have given due regard to the claim made by the investigating Officer. After all, the Magistrate has only mentioned about two persons having stated about presence of the petitioner on the spot and of having attributed an active role to her; but has not considered why the investigating officer did not believe those persons. It may be observed that in the course of investigation, the investigating officer may come across several aspects of the matter which would enable him to form an opinion about correctness/ truth of the claim made by the persons who are examined by him. The Investigating Officer is expected to form a reasoned and well considered opinion and come to a proper conclusion. In fact, the process of investigation is required for that purpose only; and if the mere mention of a person's complicity in the offence by one or two persons is sufficient, there would be no point in investigating into the matter, at all. The Magistrate's displeasure about the opinion of the Investigating Officer- as evident from the direction given by him to forward a copy of the order to the Director General of Inspector, U.P., for taking legal action against the Investigating Officer- does not seem to be proper. The Investigating Officer is not expected to act mechanically and is entitled to form his own opinion about the truth of the matter. Unless there were sound grounds for indicating that the Investigating Officer was falsely and deliberately making the application under Section 169 of the Code with the object of favouring the petitioner for ulterior motives, there was no occasion to come down heavily on the

Investigating Officer for forming a particular opinion. The order passed by the Magistrate does not indicate that he gave an opportunity to the Investigating Officer to explain as to why he did not believe the persons, who spoke about the presence of the petitioner on the spot at the time of the incident.

28. In my opinion, when the Investigating Officer had come to the conclusion that the involvement of the petitioner in the alleged offences was not disclosed, the Magistrate ought to have passed an appropriate order releasing the petitioner as contemplated under Section 169 of the Code. When, later, the report under Section 173 of the Code would have been filed by the police, he would have had the power and authority to decide whether or not the conclusion about non-involvement of the petitioner was acceptable and could have even proceeded against the petitioner, if satisfied about the existence of a prima facie case against her.

29. The impugned order appears to have been passed without realizing the distinction between the application made by the Investigating Officer for releasing the petitioner under Section 169 of the Code and a 'Final Report' which is required to be submitted under Section 173 of the Code.

30. In my opinion, the same is not in accordance with law and needs to be interfered with in the interest of justice.

31. The impugned order is set aside.

32. At this stage, the learned counsel for the petitioner fairly submits that a bail application has been filed by the petitioner which is pending before this court. He submits that, that the investigating officer had filed an application for release of the petitioner under Section 169 of the Code, has been mentioned in the said application, and is taken as a ground in support of the prayer for bail.

33. In view of this, as a matter of propriety, I decline to pass any specific order directing the release of the petitioner under the provisions of Section 169 of the Code.

34. The petition is disposed of with the aforesaid observations and in the above terms.

(2016) 8 ILRA 1291
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.08.2016

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.

Service Single No. - 5683 Of 2015

Manjusha Devi

...Petitioner

Versus

State Of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Sharad Pathak

Counsel for the Respondents:

C.S.C

Service Law — Promotion — Group 'D' to Group 'C' — Typing test — Validity — Challenge to promotion process on ground that typing test not prescribed under statutory rules — Relevant Rules, 2001 provide for selection based on written test, interview and character roll with Note permitting qualifying typing test where required — Government Order dated 23.08.2011 mandates knowledge of typing with minimum speed for promotion — Held, to assess such knowledge, conducting typing test is permissible — Prescription of minimum speed (25 w.p.m.) valid and not arbitrary.

Service Law — Statutory Rules vs Government Orders — Field of operation — Where statutory rules are silent or do not comprehensively cover eligibility criteria, Government Orders can supplement — Government Order prescribing typing qualification fills gap and is enforceable.

Service Law — Qualifying test — Nature — Typing test is only qualifying in nature and not part of merit evaluation — Marks of typing test not to be counted for determining merit list — Its purpose limited to assessing minimum eligibility.

Service Law — Promotion — Eligibility vs assessment — Distinction between possessing knowledge of typing and testing such knowledge — Held, requirement of knowledge necessarily implies power to test such skill — Fixation of benchmark speed justified.

In Result: Writ petition dismissed; selection/promotion process upheld.

Cases cited:

State of U.P. and others vs. Umesh Chandra Srivastava Special Appeal (D) No.477 of 2010 (decided on 20.07.2010)

Udai Pratap Singh vs. State of U.P. and others Writ Petition No.5415 (S/S) of 2014 (decided on 18.08.2015)

Sanjeev Sharma vs. State of U.P. and others Special Appeal No.485 of 2010 (decided on 22.07.2010)

Dr. Vijay Laxmi Sadho vs. Jagdish(2001) 2 SCC 247

State of Punjab and others vs. Jagdish Kaur Civil Appeal No.2897 of 2006

Dhananjay Malik and others vs. State of Uttranchal and others Appeal (Civil) No.1771 of 2008

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.)

1. Heard Sri Sharad Pathak, learned counsel for petitioner and learned Standing Counsel representing the State-respondents.

2. The petitioner, who is a class-IV employee working in the office of District Agriculture Protection Officer, Sultanpur, is aggrieved by the process of selection involving typing test adopted by the respondents for the purposes of making promotion to the post of Junior Clerk/Junior Assistant which is a class-III post on the ground that typing test not being the requirement under the relevant Service Rules for promotion to class-III post of Junior Clerk/Junior Assistant, the petitioner could not have been subjected to it. The petitioner has, thus, challenged the order dated 07.02.2014 by which the promotions of respondent nos.5 to 10 were made against class-III post.

3. Appointments to the ministerial staff in the Department of Agriculture, State of U.P. are governed by Rules framed under Article 309 of the Constitution of India known as "Uttar Pradesh Agriculture Department Ministerial Service Rules, 1983" (for brevity "Rules, 1983"). Recruitment to the various categories of posts in service has been dealt with in Part-III of Rules, 1983, according to which the regional and subordinate offices have the posts of Junior Clerks, Senior Clerks and Head Clerks. According to Rule 5 of Rules, 1983, Junior Clerks are to be recruited in accordance with the provisions contained in the Subordinate Offices Ministerial Staff (Direct Recruitment) Rules, 1975. The qualification prescribed for appointment as Junior Clerk has been given in Rule 8 of Rules, 1983, according to which, a candidate for direct recruitment to various posts in service should possess intermediate examination of the Board of High School and Intermediate Education, U.P. or an examination equivalent thereto recognized by the Government. Subsequent to promulgation of the Rules, 1983, the State Government notified the Rules known as "The Uttar Pradesh Subordinate Offices Ministerial Group 'C' Posts of the Lowest Grade (Recruitment by Promotion) Rules 2001 (for brevity "Rules, 2001)". According to Rule 5 of Rules, 2001, recruitment to 20% of the vacancies in the ministerial Group-'C' posts in subordinate office are to be made by promotion through the selection committee. Out of total 20% of the vacancies to be filled in by promotion, 15% posts are to be filled in by making promotion from amongst those substantively appointed Group-'D' employees who have passed High School examination of the Board of High School and Intermediate Education, U.P. or an examination equivalent thereto recognized by the State Government and rest of 5% vacancies are to be filled in by way of making promotion from amongst those substantively appointed Group-'D' employees who have passed Intermediate examination of the said Board or an examination equivalent thereto recognized by the State Government.

4. The claim of the petitioner for being promoted to Group-'C' post is, thus, based on the provisions contained in Rules, 2001 which prescribe quota for making recruitment to Group-'C' post from amongst substantively appointed Group-'D' employees having passed either High School or intermediate examination. The procedure for recruitment by promotion has been provided in Rule 8 of Rules, 2001 which is quoted hereinbelow:-

"8. Procedure for recruitment by promotion - (1) For the purpose of recruitment by promotion, there shall be constituted a Selection Committee in accordance with the provisions of

the Uttar Pradesh Constitution of Departmental Promotion Committee for posts outside the purview of the Public Service Commission Rules, 1992, as amended from time to time.

Note : Nomination of Officers for giving representation to the Scheduled Castes, Scheduled Tribes and Other Backward Classes of Citizens in the Selection Committee shall be made in accordance with the order made under Section 7 of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994, as amended from time to time.

(2) Recruitment by promotion shall be made on the basis of merit as disclosed by marks obtained in the test for selection through the Selection Committee constituted under sub-rule (1). The test for selection shall include a simple written test, interview and evaluation of character roll. The maximum marks to be assigned for written test, interview and evaluation of character roll shall be as given below:

<i>(a) Written Test</i>	<i>Thirty marks</i>
<i>(b) Interview</i>	<i>Ten marks</i>
<i>(c) Evaluation of character roll</i>	<i>Ten marks</i>
	<i>-----</i>
	<i>Total Fifty marks</i>
	<i>-----</i>

Note 1 - The written test shall include a single question paper. The question paper shall contain two questions. Each question shall carry fifteen marks. One question shall be on Hindi Essay writing on a simple topic and the other shall be on General Knowledge.

Note 2 - Where recruitment by promotion is being made for the post of Typist or a post for which Hindi Typewriting is essential, there shall be conducted a qualifying test of Hindi Typewriting also, as prescribed by the Government from time to time. To qualify this test a candidate must have a minimum speed of twenty-five words per minute in Hindi Typewriting.

(3) The Selection Committee shall conduct the test of eligible candidates under sub-rule (2). After the marks obtained by the candidates in the said test have been tabulated, the Selection committee shall, having regard to the need for securing due representation of the candidates belonging to the Scheduled Castes and Scheduled Tribes in accordance with rule 6, prepare a list of candidates in order of merit as disclosed by marks obtained by them in the said test and recommends such number of candidates by marks obtained by them in the said test and recommends such number of candidates as, on the basis of the result of the said test have come up to the standard fixed by the Selection Committee in this respect. If two or more candidates obtain equal marks the candidate obtaining higher marks in the written candidates obtain equal marks, the candidate obtaining higher marks in the written test shall be placed higher in the list. In case two or more candidates obtain equal marks in the written test also, the candidate senior in age

shall be placed higher in the select list. The Selection Committee shall forward the list to the appointing authority."

5. According to the aforequoted provisions contained in Rule 8 of Rules, 2001, recruitment by promotion is to be made on the basis of merit as determined by the marks obtained in the test for selection which includes a written test, interview and evaluation of character rolls. Note-2 appended to Rule 8 of Rules, 2001 provides that in a case where recruitment by promotion is to be made for the post of typist or a post for which Hindi typewriting is essential, a qualifying test of Hindi typewriting also shall be conducted. It further provides that a candidate must have a minimum speed of 25 words per minute in Hindi typewriting to qualify the said test. Thus, test of Hindi typewriting is of qualifying nature, that is to say, it will not be counted for the purposes of determining the merit in terms of the provisions contained in Rule 8 (2) of Rules, 2001.

6. Submission of learned counsel for the petitioner is that the post against which the petitioner is seeking promotion is the post of Junior Clerk and not that of Clerk-cum-Typist, as such for the post in question Hindi typewriting is not essential. He has further stated that in any event it is only knowledge of Hindi typewriting which the petitioner possesses and subjecting her to any test, since has not been envisaged either in Rules, 2001 or in Rules, 1983, action of the respondents cannot be justified as the same is contrary to the provisions contained in the aforesaid Rules.

7. In support of his submission, learned counsel for the petitioner has relied upon a Division Bench judgment of this Court in the case of ***State of U.P. and others vs. Umesh Chandra Srivastava***, delivered on 20.07.2010 in Special Appeal (D) No.477 of 2010. He has also relied upon a judgment of Hon'ble Single Judge in the case of ***Udai Pratap Singh vs. State of U.P. and others***, delivered on 18.08.2015 in Writ Petition No.5415 (S/S) of 2014, which is based on the judgment of the Division Bench of this Court in the case of ***Umesh Chandra Srivastava (supra)***. Learned counsel for the petitioner has also relied upon yet another Division Bench judgment of this Court in the case of ***Sanjeev Sharma vs. State of U.P. and others***, rendered on 22.07.2010 in Special Appeal No.485 of 2010. Lastly, Sri Pathak, learned counsel for petitioner has relied upon a judgement of Hon'ble Supreme Court in the case of ***Dr. Vijay Laxmi Sadho vs. Jagdish, reported in (2001) 2 SCC, 247*** and contended that this Court is bound by earlier decision of Hon'ble Single Judge and that in case of disagreement, the matter should be referred to a larger Bench.

8. Opposing the submission made by learned counsel for the petitioner, learned Additional Chief Standing Counsel has submitted that the arguments made by learned counsel for petitioner are not tenable in view of what has been prescribed by State Government in the government order issued on 23.08.2011 in respect of recruitment to be made in the clerical cadre in the Department of Agriculture which prescribes that the educational qualification for the post of Junior Clerk and Junior Assistant shall be intermediate along with CCC certificate granted by the DOEACC. He has further stated that this government order also provides that the candidate aspiring for recruitment to the post of Junior Clerk and Junior Assistant should have minimum typing speed of 25/30 words per minute. Learned Additional Chief Standing Counsel has relied upon enclosure-2 appended to the government order dated 23.08.2011 which is extracted hereinbelow:-

तालिका-1

मुख्यालय संवर्ग

क्रम सं०.	पदनाम	पदों की संख्या	पुनरीक्षित वेतन सरं चना में वेतन बैंड एवं ग्रेड वेतन		भर्ती/पदोन्नति का स्रोत
			वेतन बैंड	ग्रेड वेतन	
1	2	3	4		5
1	वरिष्ठ प्रशासनिक अधिकारी	01	वेतन बैंड-2 रु० 9300-34800	4800	05 वर्ष की सेवा वाले प्रशासनिक अधिकारी के पदों से पदोन्नति द्वारा
2	प्रशासनिक अधिकारी	35	वेतन बैंड-2 रु० 9300-34800	4200	05 वर्ष की सेवा वाले वरिष्ठ सहायक के पदों से पदोन्नति द्वारा
3.	वरिष्ठ सहायक	183	वेतन बैंड-1 रु०	2800	05 वर्ष की सेवा वाले कनिष्ठ सहायक के पदों से पदोन्नति द्वारा
			5200-20200		
4.	कनिष्ठ सहायक	182	वेतन बैंड-1 रु० 5200-20200	2000	80 प्रतिशत सीधी भर्ती द्वारा। अर्हता इण्टरमीडिएट के साथ-साथ कम्प्यूटर संचालन में डोयक (DOEACC) सोसायटी द्वारा प्रदत्त सी०सी०सी० प्रमाण पत्र अथवा सरकार द्वारा मान्यता प्राप्त संस्था से समकक्ष स्तर का प्रमाण पत्र तथा हिन्दी/अंग्रेजी में कम से कम कमशः 25/30 शब्द प्रति मिनट की टंकण गति। 15 प्रतिशत चतुर्थ श्रेणी के ऐसे कार्मिकों से पदोन्नति द्वारा जो हाईस्कूल हो तथा टंकण ज्ञान रखता हो। 05 प्रतिशत चतुर्थ श्रेणी के ऐसे कार्मिकों से पदोन्नति द्वारा जो इण्टरमीडिएट हो तथा टंकण ज्ञान रखते हों।

तालिका-2

अधीनस्थ संवर्ग (जनपदीय कार्यालय)

क्रम सं०.	पदनाम	पदों की संख्या	पुनरीक्षित वेतन सरं चना में वेतन बैंड एवं ग्रेड वेतन		भर्ती/पदोन्नति का स्रोत
			वेतन बैंड	ग्रेड वेतन	
1	2	3	4		5
1	वरिष्ठ प्रशासनिक अधिकारी	36	वेतन बैंड-2 रु० 9300-34800	4800	05 वर्ष की सेवा वाले प्रशासनिक अधिकारी के पदों से पदोन्नति द्वारा
2	प्रशासनिक अधिकारी	06	वेतन बैंड-2 रु० 9300-34800	4200	05 वर्ष की सेवा वाले वरिष्ठ सहायक के पदों से पदोन्नति द्वारा
3.	वरिष्ठ सहायक	1838	वेतन बैंड-1 रु० 5200-20200	2800	05 वर्ष की सेवा वाले कनिष्ठ सहायक के पदों से पदोन्नति द्वारा
4.	कनिष्ठ सहायक	1009	वेतन बैंड-1 रु० 5200-20200	2000	80 प्रतिशत सीधी भर्ती द्वारा। अर्हता इण्टरमीडिएट के साथ-साथ कम्प्यूटर संचालन में डोयक (DOEACC) सोसायटी द्वारा प्रदत्त सी०सी०सी० प्रमाण पत्र अथवा सरकार द्वारा मान्यता प्राप्त संस्था से समकक्ष स्तर का प्रमाण पत्र तथा हिन्दी/अंग्रेजी में कम से कम कमशः 25/30 शब्द प्रति मिनट की टंकण गति। 15 प्रतिशत चतुर्थ श्रेणी के ऐसे कार्मिकों से पदोन्नति द्वारा जो हाईस्कूल हो तथा टंकण ज्ञान रखता हो। 05 प्रतिशत चतुर्थ श्रेणी के ऐसे कार्मिकों से पदोन्नति द्वारा जो इण्टरमीडिएट हो तथा टंकण ज्ञान रखते हों।

9. Reliance has been placed by learned Additional Chief Standing Counsel on the judgment of Hon'ble Supreme Court rendered on 26.08.2011 in the case of ***State of Punjab and others vs. Jagdish Kaur***, Civil Appeal No.2897 of 2006. He has also placed reliance on yet another judgment

of Hon'ble Supreme Court delivered on 05.08.2008 in the case of Dhananjay Malik and others vs. State of Uttranchal and others, Appeal (Civil) No.1771 of 2008.

10. Having considered the arguments made by learned counsel for the respective parties, I am unable to agree with the submissions made by learned counsel for the petitioner for the reasons which are to follow.

11. It is true that Rules, 1983 do not prescribe knowledge of Hindi typing as essential qualification for the post of Junior Clerk as Rule 8 of the said Rules provides that a candidate for direct recruitment to various posts in service must have passed intermediate examination of Board of High School or Intermediate Education or equivalent examination. However, what is relevant at this juncture is to examine the provisions contained in Rules, 2001. As stated above, Rule, 8 of Rules, 2001 prescribes the procedure for promotion. Note-2 appended to Rule 8 (2) of Rules, 2001 in clear terms provides that in a case where promotion is to be made for the post of typist or for a post for which Hindi typewriting is essential, a qualifying test of Hindi typewriting shall be conducted, though test of Hindi typewriting is of a qualifying nature. It also provides that test of Hindi typewriting shall be as prescribed by the State Government from time to time. Note-2 appended to Rules, 2001 has to be read with the provisions contained in Government Order dated 23.08.2011, according to which the minimum qualification for direct recruitment to the post of Junior Clerk/Junior Assistant in the Department of Agriculture is intermediate with CCC certificate in computer operation. In addition to intermediate and qualification of computer operation, the candidate should have the knowledge of Hindi/English typewriting with a minimum speed of 25/30 words per minute. Thus, the prescription as required by Note-2 appended to Rule 8 (2) of Rules, 2001 is available in the Government order dated 23.08.2011.

12. Learned counsel for the petitioner has stated that knowledge of Hindi/English typewriting with the minimum speed of 25/30 words per minute is applicable only in case of direct recruitment and not in the case of promotion.

13. The said submission is highly misconceived for the reason that the appendix-2 appended with the Government Order dated 23.08.2011 provides that 15% posts shall be filled in from amongst such class-IV employees who are having High School qualification and have knowledge of typing and 5% vacancies are to be filled in from amongst those class-IV employees who are intermediate and have knowledge of typing.

14. Learned counsel for the petitioner has, however, submitted that a class-IV or Group-'D' employee having knowledge of typing is one thing and subjecting such an employee to a test is the other. His submission, thus, is that it may be correct that appendix-2 appended to the government order dated 23.08.2011 may require knowledge of typing to be possessed by Group-'D' employee for his promotion but the same does not require subjecting such an employee to typing test and since in the instant case, the petitioner was subjected to typing test and was required to possess the skill of Hindi typewriting with a minimum speed of 25 words per minute, as such the entire

procedure adopted by the respondents is not tenable being contrary not only to the Rules but also to the provisions contained in Government Order dated 23.08.2011.

15. The aforesaid submission has been considered. However, on a closure scrutiny, the same deserves rejection which is hereby rejected.

16. The prescriptions available in appendix-2 appended to the Government Order dated 23.08.2011 clearly stipulate that only those Group-'D' employees shall be considered for promotion who have knowledge of typing. As to whether a Group-'D' employee has the knowledge of typing or not can be tested only if such an employee is subjected to typing test. The minimum skill to be acquired by the Group-'D' employee in Hindi typing for making him/her eligible for promotion can always be judged and for judging as to whether Group-'D' employee has the knowledge of Hindi typing if the authorities have fixed the bench mark of speed of 25 words per minute in Hindi typing, the same cannot be faulted with.

17. It is also noticeable that Rule 8 and Note-2 appended to Rule 8 (2) of Rules, 2001 provides that Hindi typewriting test is qualifying in nature. This means that for the purposes of preparation of merit, the marks obtained or evaluation based on test of Hindi typewriting is not to be taken into account in the instant case as well. However, what the respondents have done is that they have subjected the Group-'D' employees to test of Hindi typewriting and have prescribed the speed of 25 words per minute to declare a Group-'D' employee to be qualified in Hindi typewriting, that is to say, to judge as to whether a Group-'D' employee has knowledge of Hindi typewriting, a criteria has been fixed by the respondents that only those Group-'D' employees can be said to have knowledge of Hindi typewriting who have a speed of 25 words per minute in Hindi typing. In view of this, submission made by learned counsel for the petitioner that the Government Order only prescribes that Group-'D' employee seeking promotion should only have the knowledge of Hindi typing and they cannot be subjected to test of Hindi typing is misconceived and thus is not accepted.

18. The judgment rendered by the Division Bench of this Court in the case of **Umesh Chandra Srivastava (supra)** pertained to recruitment process to be adopted for making promotion of Group-'D' employees to Group-'C' post in Public Works Department. In the said case despite time having been granted to learned counsel representing the State, no such rules or government order was produced before the Court by which the Group-'D' employees were required to pass the typing test. In the instant case, the requirement of passing typing test by Group-'D' employees seeking promotion to Group-'C' post in the Department of Agriculture has been prescribed by the Government Order dated 23.08.2011. So far as the Public Works Department is concerned, either there is no such prescription available in Rules or in any Government Order or the same were not shown or produced before the Division Bench in the case of **Umesh Chandra Srivastava (supra)**. The judgment rendered by Hon'ble Single Judge in the case of **Udai Pratap Singh (supra)** is based on Division Bench judgment of this Court in the case of **Umesh Chandra Srivastava (supra)**. However, it may be mentioned that the judgment rendered by Hon'ble Single Judge in the case of **Udai Pratap Singh (supra)** related to the Transport Department and in the said case also, no such

government order or rules containing provisions similar to the provisions contained in appendix-2 appended to Government Order dated 23.08.2011 were produced. The other judgment of Division Bench of this Court relied upon by learned counsel for the petitioner in the case of **Sanjeev Sharma (supra)** is also based on the judgment dated 20.07.2010 passed in Special Appeal (D) No.477 of 2010 i.e. case of **Umesh Chandra Srivastava (supra)**.

19. The provisions contained in appendix-2 appended to Government Order dated 23.08.2011 are applicable in case of recruitment in the Department of Agriculture and it is this Government Order which distinguishes the present case from the cases which have been cited by learned counsel for the petitioner i.e. the judgment in the cases of **Umesh Chandra Srivastava (supra)**, **Udai Pratap Singh (supra)** and also in the case of **Sanjeev Sharma (supra)**.

20. The Hon'ble Supreme Court in the case of **State of Punjab and others vs. Jagdish Kaur (supra)**, has dealt with a similar issue and concluded that in absence of statutory rules on any subject the relevant government order would hold the field.

21. The facts in the case of **State of Punjab and others vs. Jagdish Kaur (supra)** were that the Group-'D' employees were claiming promotion against class-III post without having passed the typewriting test in Punjabi with a minimum speed of 30 words per minute. The Hon'ble High Court of Punjab and Haryana held that condition of qualifying in typing test in Punjabi was illegal, unreasonable and arbitrary. The finding of High Court was primarily based on the provisions of Punjab Civil Services (General and Common Conditions of Service) Rules, 1994 and Hon'ble High Court in the said case observed that in the service rules, the requirement of qualifying typewriting test in Punjabi with a minimum speed of 30 words per minute was for direct recruitment but there was no such requirement for promotion from class-IV to class-III posts. The Hon'ble Supreme Court, however, reversed the finding recorded by the High Court in the said case noticing that the statutory service rules framed under Article 309 of the Constitution of India did not provide for promotion from class-IV as a mode of recruitment to class-III post and hence, there was no question of finding any provision dealing with eligibility criteria for promotion from class-IV to class-III posts in the said service rules. The Hon'ble Supreme Court relied upon the Government circular dated 24.08.1993 wherein it was clearly prescribed that a provision for a qualifying test in Punjabi typewriting which should be equal to the one prescribed by Subordinate Services Selection Board for filling up class-III posts by promotion from amongst class-IV employees. The Hon'ble Supreme Court also noticed that the aforesaid Government Order was subsequently amended by another circular dated 27.10.1998 increasing the quota for promotion from 10% to 15% only however, retaining the qualification of Punjabi typewriting as prescribed in earlier government order. It is in the background of the aforesaid facts that the Hon'ble Supreme Court in the case of **State of Punjab and others vs. Jagdish Kaur (supra)** has held that the requirement of qualifying test in Punjabi typewriting with the minimum speed of 30 words per minute is manifestly a criterion for promotion from class-IV to class-III post. The Hon'ble Supreme Court also held that in absence of statutory rules on any subject the relevant government order would hold the field.

22. If the facts of the present case are analyzed in the light of what has been held by Hon'ble Supreme Court in the case of ***State of Punjab and others vs. Jagdish Kaur (supra)***, it becomes clear that though neither Rules, 1983 nor Rules, 2001 prescribe for a qualifying test in Hindi typewriting (however, Note-2 appended to Rule 8 (2) of Rules, 2001 does prescribe for conducting qualifying test of Hindi typewriting for recruitment by promotion to a post for which Hindi typewriting is essential) but the government order dated 23.08.2011, which has been issued in respect of recruitment to be made by promotion of Group-'D' employees to Group-'C' post in the Department of Agriculture, State of U.P., clearly prescribes in appendix-2 appended thereto that such Group-'D' employee desirous of promotion should have the knowledge of typewriting.

23. As observed above, to test as to whether a candidate possesses knowledge of typewriting, the criteria of minimum speed of 25 words per minute in Hindi typewriting can be fixed by the respondents and if such criteria is uniformly applied to all the candidates, no wrong can be attributed to the same.

24. For the reasons disclosed above and also keeping in view the dictum of Hon'ble Supreme Court in the case of ***State of Punjab and others vs. Jagdish Kaur (supra)***, the writ petition, in my considered opinion, fails which is resultantly **dismissed**.

25. However, there will be no order as to costs.

(2016) 8 ILRA 1301
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.08.2016

BEFORE

THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Service Single No.- 6035 Of 2013

Dinesh Kumar

...Petitioner

Versus

State Of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Rakesh Kumar Srivastava, Mrs. Seema Srivastava

Counsel for the Respondents:

C.S.C

Service Law — Disciplinary proceedings — Absenteeism — Dismissal — Validity — Petitioner, a Class-IV employee in Civil Police, dismissed for remaining absent for about 277 days — Subsequently, competent authority sanctioned said period as leave without pay under Fundamental Rule 73 — Held, once leave is sanctioned by competent authority, absence cannot be treated as unauthorized — Disciplinary and appellate authorities failed to consider this material fact — Orders vitiated.

Service Law — Disciplinary enquiry — Consideration of evidence — Perverse finding — Defence evidence including testimony of treating doctor indicating illness ignored — No finding that absence was wilful — Non-consideration of relevant evidence renders findings perverse and unsustainable.

Service Law — Punishment — Proportionality — Dismissal imposed for single charge of absence without allegation of habitual absenteeism — Held, punishment disproportionate, especially when absence explained by illness and later regularized — Extreme penalty unjustified.

Service Law — Judicial review — Scope — Interference justified — Where disciplinary authority ignores material evidence and passes cryptic order, writ court justified in interfering — Matter liable to be remitted for fresh consideration.

In Result: Writ petition allowed; impugned dismissal and appellate orders set aside; matter remitted to disciplinary authority for fresh decision.

Cases cited:

1. Krushnakant B. Parmar v. Union of India and another(2012) 3 SCC 178
2. Om Prakash v. State of Punjab and others(2011) 14 SCC 682
3. General Manager (P), Punjab & Sind Bank and others v. Daya Singh(2010) 11 SCC 233
4. Chairman-cum-Managing Director, Coal India Limited and another v. Mukul Kumar Choudhuri and others(2009) 15 SCC 620

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J.)

1. The petitioner was a Class-IV employee in Civil Police. He has instituted this writ proceedings for quashing of the orders dated 30th August, 2012 and 24th April, 2013 passed by the

third and second respondents respectively, whereby the petitioner has been dismissed from service and his appeal against the dismissal order has been rejected respectively.

2. The essential facts are that the petitioner was initially appointed as a Follower in Civil Police on 23rd March, 1998. In the year 2011, he was subjected to disciplinary proceedings on the ground of absenteeism. A charge-sheet was served upon him on 21st October, 2011. The only charge mentioned in the charge-sheet was that without any leave he was absent from duty from 29th July, 2010 to 02nd May, 2011 i.e. for a period of more than 277 days. There was no other charge.

3. Earlier a preliminary enquiry was conducted, wherein prima facie the petitioner was found guilty. Thereupon a decision was taken to hold disciplinary proceedings against him and he was placed under suspension on 23rd April, 2011. The petitioner did not submit reply to the charge-sheet but in the enquiry he has produced one Dr. Vinay Katiyar, who had treated the petitioner during his illness. The defence of the petitioner was that due to illness he could not join earlier and when he was completely cured and fit, he offered his joining on 02nd May, 2011, he was permitted to join and allowed to work. The Enquiry Officer found that both the charges were proved and he was found to be guilty of the absenteeism. It was recorded that he was absent without applying for leave.

4. The disciplinary authority issued a show cause notice to the petitioner. It is stated that the petitioner made an application to the authority concerned to grant him leave to go to Hardoi to give reply to the show cause notice but he was not granted leave, therefore, the petitioner could not file reply to the notice.

5. The disciplinary authority by the impugned order dated 30th August, 2012 has passed the order of dismissal of petitioner from service under Rule 4(1)(a) read with Rule 14(1) of the Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 (for short, the "Rules, 1991"). Aggrieved by the order of dismissal, the petitioner preferred an appeal, which also came to be dismissed on 24th April, 2013. Feeling aggrieved, the petitioner has preferred this writ petition.

6. I have heard learned counsel for the petitioner Sri Rakesh Kumar Srivastava and learned Standing Counsel.

7. It is contended on behalf of the petitioner that the petitioner was suddenly ill and was under treatment of Dr. Vinay Katiyar. He had moved an application for sanction of leave for the period of absence. The said application was allowed vide order dated 20th July, 2012 by the third respondent, Senior Superintendent of Police, Hardoi. In the said order it is mentioned that leave for the period from 29th July, 2010 to 02nd May, 2011 has been sanctioned as leave without pay.

8. Learned counsel for the petitioner submitted that in view of the fact that the Senior Superintendent of Police, who is the appropriate authority, has sanctioned the leave from 29th July,

2010 to 02nd May, 2011 as leave without pay, there was no justification to treat the said period as his absence without any leave. The learned counsel has next submitted that in any view of the matter disproportionate punishment of dismissal from service has been awarded to the petitioner as there was no charge that the petitioner was a habitual absentee. Learned counsel for the petitioner has placed reliance on a judgment of the Supreme Court in the case of **Krushnakant B. Parmar v. Union of India and another, (2012) 3 SCC 178**.

9. Learned Standing Counsel submits that the petitioner has not submitted any reply to the charge-sheet. The charges have been proved. He was given full opportunity, therefore, the dismissal order does not warrant any interference under Article 226 of the Constitution. He has placed reliance on a judgment of the Supreme Court in **Om Prakash v. State of Punjab and others, (2011) 14 SCC 682**.

10. I have considered the rival submissions of learned counsel for the parties and perused the record.

11. The petitioner was a Follower, i.e. Class-IV employee in Civil Police. Admittedly, he was absent from duty from 29th July, 2010 to 02nd May, 2011. The said period has already been treated as leave without pay vide order of the Senior Superintendent of Police, Hardoi dated 20th July, 2012 in terms of the provisions of Fundamental Rule 73 of the Financial Handbook, Vol. II (Parts II to IV). A copy of the order dated 20th July, 2012 is on the record as annexure-2 to the writ petition. In the said order the Senior Superintendent of Police clearly mentions that in terms of Fundamental Rule 73 of the Financial Handbook, Vol. II (Parts II to IV) the period for his absence shall be treated as on leave without pay and on the principle of no work and no pay, the petitioner shall not be paid any salary for the said period. For the sake of convenience, Fundamental Rule 73 is extracted below:

"73. A Government servant who remains absent after the end of his leave is entitled to no leave-salary for the period of such absence, and that period will be debited against his leave account as though it were leave on half average pay, unless his leave is extended by the Government. Wilful absence from duty after the expiry of leave may be treated as misbehaviour for the purpose of Rule 15.

NOTE.--In the case of a Government servant governed by leave rules laid down in Fundamental Rule 81-B and Subsidiary Rule 157-A, who remains absent after the end of his leave, the period of such overstayal of leave should, unless the leave is extended by the competent authority, be treated as follows:

(a) If the Government servant is in superior service and holds a lien on a permanent post—

(i) as leave on private affairs to the extent such leave is due unless the overstayal is supported by a medical certificate.

(ii) as leave on medical certificate to the extent such leave is due, if the overstayal is supported by a medical certificate.

(iii) as extraordinary leave to the extent the period of leave on private affairs and/or on medical certificate falls short of the period of overstayal;

(b) If the Government servant is in superior service without a lien on a permanent post or in inferior service, as in (a) (ii) and (iii) above *mutatis mutandis*.

The period of overstayal of leave will be debited as leave taken but no leave salary will be paid for such period unless it is covered by an extension of leave granted by the competent authority."

12. The petitioner has averred in paragraph-21 of the writ petition about the order passed by the Senior Superintendent of Police, which is on record as annexure-2 to the writ petition. For the sake of convenience, Paragraph-21 of the writ petition is reproduced hereunder:

"21. That after submission of the aforesaid inquiry report dated 14.7.2012 the opposite party no. 3 issued order dated 20.7.2012 sanctioning leave without pay for the period of absence on the basis of the principle of "no work no pay"."

Reply to the said paragraph-21 of the writ petition has been given by the State functionaries in paragraph-15 of the counter affidavit, which reads as under:

15- यह कि रिट याचिका के प्रस्तर संख्या-20 एवं 21 में जिस तथ्य का उल्लेख किया गया है, के सम्बन्ध स्पष्ट करना है कि याची को सुनवाई का समक अवसर प्रदान करते हुए जाँच की कार्यवाही सम्पादित की गयी और उसके आधार पर पीठासीन अधिकारी द्वारा अपनी जाँच आख्या पुलिस अधीक्षक, हरदोई को दिनांक- 14-07-2012 को प्रस्तुत की गयी। शेष कथन के सम्बन्ध में किसी प्रकार की टिप्पणी की आवश्यकता नहीं है।

13. From the extracted pleading it is evident that the fact regarding sanction of leave by the appropriate authority has not been specifically denied. Rather an evasive reply has been given.

14. In addition to the above, the impugned dismissal order as well as the appellate order do not indicate that the order dated 20th July, 2012 has been considered either in the dismissal order or in the appellate order. Thus, it is clear that the order passed by the competent authority which has a material bearing on the case, has escaped the notice of both the authorities i.e. disciplinary and appellate. Thus, the petitioner has been dismissed from service without considering this material document, which indicates that the appropriate authority exercising his power had sanctioned the leave of the petitioner for the period when he was absent from duty as leave without pay. Hence, the submission of learned counsel for the petitioner that the leave was sanctioned by the appropriate authority is well founded.

15. The Supreme Court in the case of **Krushnakant B. Parmar (supra)** has considered the similar facts and charge of absenteeism. A departmental proceeding was initiated against a Security Assistant in the Intelligence Bureau. The Supreme Court has held that since the petitioner therein was not a habitual absentee, on the said charge it was not proper to dismiss him from service. The Court also found that no finding was recorded that the absenteeism of the petitioner was wilful. In the present case also, the Enquiry Officer though has recorded that earlier the petitioner was found to be absent, but no finding has been recorded that the absence in question of the petitioner was wilful. Moreover, there was no charge in the charge-sheet that the petitioner was a habitual absentee. As regards the submission of learned Standing Counsel that the Enquiry Officer has recorded the finding that on the earlier occasion also the petitioner was absent is concerned, in absence of a charge regarding habitual absenteeism the petitioner was not in a position to controvert the said allegation. Besides, there is no finding but only a passing observation. The department did not adduce any evidence in this regard.

16. The Enquiry Officer, disciplinary authority as well as the appellate authority have not considered the evidence adduced by the petitioner. The petitioner had produced Dr. Vinay Katiyar as a witness in his defence, who has clearly stated that the petitioner was under his treatment and he was suffering from depression. This material evidence has not been considered by Enquiry Officer, disciplinary authority and appellate authority.

17. It is a trite law that if it is shown that finding recorded by the Enquiry Officer is not based on the evidence adduced by the parties or a material evidence has been ignored and if such evidence were considered, no reasonable person would have reached same conclusion, such finding would be a perverse finding. The Supreme Court in the case of **General Manager (P), Punjab & Sind Bank and others v. Daya Singh, (2010) 11 SCC 233**, has considered the issue when an order of the disciplinary authority can be held to be perverse. The relevant part of the judgment reads as under:

"24. ... This has been held by this Court long back in *Triveni Rubber & Plastics v. CCE*¹. Unless it is found that some relevant evidence has not been considered or that certain inadmissible material has been taken into consideration the finding cannot be said to be perverse. The legal position in this behalf has been recently reiterated in *Arulvelu v. State*². The decision of the High Court cannot therefore be sustained."

18. In the case of **Chairman-cum-Managing Director, Coal India Limited and another v. Mukul Kumar Choudhuri and others, (2009) 15 SCC 620**, the Supreme Court has considered the unauthorized absence from duty for six months. The Court found that the punishment of dismissal was unduly harsh. Paragraph-21 of the judgment is as follows:

"21. In a case like the present one where the misconduct of the delinquent was unauthorised absence from duty for six months but upon being charged of such misconduct, he fairly admitted his guilt and explained the reasons for his absence by stating that he did not have any intention nor desired to disobey the order of higher authority or violate any of the Company's

rules and regulations but the reason was purely personal and beyond his control and, as a matter of fact, he sent his resignation which was not accepted, the order of removal cannot be held to be justified, since in our judgment, no reasonable employer would have imposed extreme punishment of removal in like circumstances. The punishment is not only unduly harsh but grossly in excess to the allegations."

19. Applying the said principle in the case in hand also, the evidence of the Doctor has not been duly considered by the disciplinary authority or the appellate authority. In fact, a perusal of the order of the disciplinary authority would indicate that the order is cryptic and skeletal and detailed consideration has not been adverted to by the disciplinary authority.

20. As regards the judgment relied upon by the learned Standing Counsel in **Om Prakash (supra)** is concerned, in the said case a Head Constable of Punjab Police was absent from duty. In that case, the Head Constable (petitioner therein) had neither moved any application for sanction of leave during the period of absence nor did he intimate the reason for not coming on duty. From a perusal of the judgment, I find that the facts of the present case are completely distinguishable. In the present case the period of absence has been sanctioned by the Senior Superintendent of Police as leave without pay. Therefore, in my view, the law laid down in *Om Prakash (supra)* has no application in the present case.

21. After careful perusal of the records and consideration of the submissions of learned counsel for the parties, I am of the view that the impugned order of dismissal and appellate order dated 30th August, 2012 and 24th April, 2013 passed by the third and second respondents respectively stand vitiated for the reasons mentioned hereinabove and accordingly, both the orders are set aside. The matter is remitted to the disciplinary authority to take appropriate decision in accordance with law expeditiously, preferably within a period of three months from the date of communication of this order.

22. Thus, the writ petition is allowed.

23. No order as to costs.

(2016) 8 ILRA 1307
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.08.2016

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Appeal No.- 7117 Of 2006

Gabadoo @ Laljit Singh

...Appellant

Versus

State Of U.P.

...Respondent

Counsel for the Appellant:

J.N. Singh, Ambrish Kumar, K.Kumar Tripathi, N.K.Mishra, R.B. Verma

Counsel for the Respondent:

Govt. Advocate

Penal Code, 1860 — S. 302 — Murder — Conviction based on sole eyewitness — Reliability — Prosecution case rested primarily on testimony of injured eyewitness — Other eyewitness turned hostile and informant not a direct witness — Held, conviction can be sustained on sole testimony of a single witness if found wholly reliable and trustworthy — Evidence of injured witness carries great evidentiary value and his presence at scene natural — Testimony corroborated by medical and circumstantial evidence.

Evidence — Single witness — Appreciation — Law does not require plurality of witnesses — Evidence has to be weighed, not counted — Where testimony of solitary witness is consistent, credible and inspires confidence, conviction can be based thereon without corroboration.

Evidence — Ocular and medical evidence — Corroboration — Eyewitness account of bomb explosion and firearm injury corroborated by post-mortem findings showing blast and gunshot injuries — Minor variations in timing of injuries not fatal — Ocular evidence prevails when broadly consistent with medical evidence.

Criminal Trial — FIR — Allegation of ante-timing — Rejection — FIR lodged on same day within reasonable time — Mere fact that police made preliminary inquiry before registration does not render FIR ante-timed or fabricated.

Criminal Trial — Defective investigation — Effect — Lapses in investigation not sufficient to discard otherwise reliable prosecution evidence — Court required to assess credibility of evidence independently.

In Result: Appeal dismissed; conviction under S. 302 IPC and sentence of life imprisonment affirmed.

Cases cited:

1. Vadivelu Thevar Vs. The State of Madras AIR 1957 SC 614

2. Kusti Mallaiah Vs. State of A.P.2013 Cri.LJ 3098

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.)

1. Heard Sri Ambrish Kumar, learned counsel for the appellant, Sri Sagir Ahmad, Sri J.K. Upadhyay and Ms. Manju Thathur, learned AGAs for the State and perused the record.

2. The present criminal appeal has been preferred by the appellant Gabadoo @ Laljit Singh against the judgment and order dated 06.11.2006 passed by I-Additional Sessions Judge, Kannauj, in Sessions Trial No.205 of 2005 (State Vs. Gabadoo @ Laljit) arising out of Case Crime No.315 of 2005 under Section 302 IPC, Police Station Gursahaiganj, District Kannauj whereby he has been convicted under Section 302 IPC and sentenced to life imprisonment.

3. Facts of this appeal as unfolded in the first information report appear to be; that first informant Suresh Singh resident of Village Rudauli, Police Station Kannauj, lodged the first information report at Police Station Gursahaiganj, on 30.04.2005 at 20:05 hours to the effect that his son Samar Singh had gone to purchase some articles on bicycle from market of village Bhawanipur on 30.04.2005. When he was returning from market around 5:00 p.m. on bicycle, he was being followed at some distance by Amar Singh son of Vijay Bahadur Singh and Brij Bhan Singh son of Ram Autar. Certain cemented pipes were lying on the road at some place 1 kilometer away to the southern side of village Bhawanipur where the appellant was lying in ambush. He came out of the aforesaid pipe and hurled bomb upon Samar Singh as a result of which Samar Singh fell down from his bicycle and the appellant came close to him and fired from close range on the back of his neck due to which Samar Singh died on the spot. Because of explosion of bomb, Amar Singh, and the another co-villager who was also following the deceased sustained injuries. The motive for committing crime has been suggested to be old enmity between families of the deceased and the appellant. The appellant after committing the murder fled away towards village Badlepurwa. The incident was witnessed by Amar Singh and Brij Bhan Singh. They could not catch the appellant because of fear of weapon which the appellant was possessing. The dead body was lying on the spot. Report be lodged and action be taken.

4. On the basis of the first information report, relevant entries were made in Check FIR at Crime No.315 of 2005 under Section 302 IPC, Police Station Gursahaiganj, District Kannauj on 30.04.2005 at 20:05 p.m. Check FIR is Ext. Ka-5. On the basis of the entry made in the Check FIR, a case was registered against the appellant under Section 302 IPC in the relevant General Diary, rapat no.47 on 30.04.2005 at Crime No.315 of 2005 at the same Police Station, copy whereof Exhibit Ka-6.

5. Thereafter investigation of the case commenced. PW-9 Maan Singh Yadav was entrusted with investigation of the case. In the process, he got inquest report of the deceased Samar Singh prepared by S.S.I. R.V. Singh under his supervision. Inquest report was completed at 11:30 p.m. 'Panchas' opined that for ascertaining real cause of death, dead body of the deceased Samar Singh should be sent for post mortem examination. This inquest report is Ext. Ka-11.

6. As a sequel to the same, relevant papers were also prepared for sending the dead body for post mortem examination which are letter to CMO Ext. Ka-12, Photonash Ext. Ka-13 and Police Challan Form No.13 Ext. Ka-14. The Investigating Officer also prepared memo of cycle of the deceased Samar Singh which memo is Ext. Ka-2. In due course, the Investigating Officer also recorded recovery of weapon used in the alleged crime on 18.05.2005 and prepared memo of the same which is Ext. Ka-10 on record. Besides, the Investigating Officer also collected sample of simple and blood stained soil from the spot and prepared memo of the same which is Ext. Ka-16 on record.

7. Record reflects that post mortem examination on the dead body of the deceased Samar Singh was conducted by Dr. Anoop Singh Gautam, PW-4 at mortuary district hospital Fatehgarh on 01.05.2005 at 2:10 p.m. wherein he noted the following anti mortem injuries:

(1) Firearm wound of entry 1.5 cm x 1 cm x through and through back of neck upper part margins inverted lacerated ecchymosed. Blackening and tattooing present around wound communicating wound of exit 2 cm x 1.5 cm over right side of chin, mandible lacerated. Teeth loose broken, tongue lacerated. Margins of wound everted.

(2) Blast injury 12 cm x 11 cm on back of right side of chest scapular region, blackening, tattooing present. Scorching hair back of neck.

(3) Abrasion 3 cm x 1 cm on back of right leg.

8. In the opinion of the doctor, cause of death was shock and haemorrhage due to ante mortem firearm injuries. This post mortem examination report is Ext. Ka-3.

9. Record further reflects that medical examination of the injured Amar Singh was conducted by PW-5 Dr. Suresh Patariya at PHC Gursahaiganj, District Kannauj on 01.05.2005 at 8:30 a.m. wherein following injury was found:

(1) One lacerated wound of size 3.0 cm x 1.0 cm x muscle deep present in left parieto-occipital part of scalp. Margins are lacerated. Clotted blood seen in wound.

10. In the opinion of the doctor, injury was simple in nature caused by hard and blunt object. This injury report is Ext. Ka-3.

11. The Investigating Officer PW-9 Maan Singh Yadav also prepared site plan of the incident besides recording the statement of various witnesses. The site plan is Ext. Ka-15. After completing the investigation, charge sheet was filed in this case against the appellant under Section 302 IPC at Crime No.315 of 2005 at Police Station Gursahaiganj, District Kannauj, which is Ext. Ka-17 on record. Thereafter the case of the appellant was committed to the court of Sessions from

where it was made over for trial to the concerned trial court of I-Additional Sessions Judge, Kannauj.

12. The trial court heard the appellant on the point of charge and charged him under Section 302 IPC. Charge was read over and explained to the appellant who denied the charge and claimed to be tried. Thereafter the prosecution was asked to adduce its testimony in order to prove its case whereupon the prosecution produced in all 10 witnesses. A brief reference of the same is hereunder.

13. PW-1 Suresh Singh is first informant. He has claimed himself to be an eyewitness of the incident and has proved the written report Ext. Ka-1. PW-2 Brij Bhan Singh has turned hostile and has not supported the prosecution version. PW-3 Amar Singh claims himself to be injured eyewitness. PW-4 is Dr. Anoop Singh Gautam who has conducted post mortem examination on the dead body of the deceased Samar Singh on 01.05.2005 and has proved the same as Ext. Ka-3. PW-5 is Dr. Suresh Patariya who has examined injury on the person of the injured Amar Singh on 01.05.2005 at PHC Gursahaiganj, District Kannauj and has proved injury report as Ext. Ka-3. PW-6 Dhawal Singh has proved entry made in Check FIR and entry made in the concerned General Diary as Ext. Ka-5 and Ka-6, respectively. He has also proved 'Majrubi Chitthi' of Amar Singh as Ext. Ka-7. PW-8 Constable Dinesh Shanker Chaubey is formal witness and has witnessed recovery of countrymade pistol 315 bore from possession of the appellant and he has also proved recovery memo as Ext. Ka-10. PW-9 Maan Singh Yadav is Investigating Officer. He has detailed various steps whereby he completed investigation and in the process, he has proved several prosecution papers. Except as above, the rest of the witnesses were concerned with Case Crime No.378 of 2005 (in Sessions Trial No.204 of 2005), therefore, their reference is not being made in this judgment which is confined to Crime No.315 of 2005 under Section 302 IPC.

14. Thereafter evidence for the prosecution was closed and statement of the appellant was recorded under Section 313 Cr.P.C. wherein he has termed his implication false on account of enmity and it has been stated that appellant's mother was assaulted with gunshot by the deceased and Ajay Pal in which case some compromise was entered into between the parties due to which the first informant was inimical towards the appellant. No evidence whatsoever has been led by the defence.

15. Learned trial court after hearing both the sides on merit passed the aforesaid judgment and order of conviction dated 06.11.2006 sentencing the appellant to life imprisonment. Consequently this appeal.

16. It has been vehemently claimed on behalf of the appellant that this case is absolutely false and there is no clinching evidence appearing against the appellant. Even circumstances do not support the case of the prosecution. The first information report is ante timed. The place of the incident is deserted jungle and no one in fact saw the incident. After the incident, the police did a lot of manipulation and found it convenient to rope in

the appellant in this case. It can be conveniently seen that there are cuttings in the inquest report. The fact is that the dead body was sealed and thereafter cuttings were made in the inquest report in order to adjust the same to the fictitious circumstances of the case.

17. It has been further added by learned counsel for the appellant that the statement of the prosecution witnesses is contradictory in material particulars. The blood stained clothes from the first informant were taken at inordinate delay on 31.08.2005. In fact, the place of occurrence is doubtful and not certain. In this case, it appears from circumstances that the dead body was recovered somewhere and the proceedings undertaken and then the prosecution deliberately made false implication of the appellant in this case. The prosecution has failed to establish charge against the appellant. Finding of conviction is based more on conjecture and surmises than on evidence on record.

18. Per contra, Sri J.K. Upadhyay, learned AGA has replied that the case in hand is consistent and genuine one. Evidence on record proves prosecution version overwhelmingly. It cannot be said to be either shallow or shaky. The incident has been witnessed by the first informant and Amar Singh. Moreover, Amar Singh is an injured witness and his injury has been medically examined at PHC Gursahaiganj, District Kannauj on 05.01.2005 and the doctor has proved his injury report which will be read against the appellant. His presence on the spot is most natural. He is an independent prosecution witness.

19. Learned AGA further added that besides distance from the place of the occurrence to Police Station Gursahaiganj, District Kannauj is 13 kilometers. The incident took place on 30.04.2005 around 05:00 p.m., whereas, the first information report was lodged the very same day at 20:05 hours at Police Station Gursahaiganj, District Kannauj which, under circumstances, is justified and it cannot be said that there is inordinate delay in lodging of the first information report. There is no point in sparing real culprit and implicating an innocent person in this case. The appellant was sighted by many prosecution witnesses at the time of the occurrence which is supported by direct testimony of the prosecution witnesses. The testimony of the prosecution witness of fact does inspire confidence and there is no element of doubt in their testimony. Accordingly, the instant appeal has no force.

20. Also considered above submissions.

21. The moot point involved in this case relates to the fact whether the prosecution has been able to establish its charge against the appellant beyond reasonable doubt and whether the incident was not seen by anyone and it is a case of blind murder?

22. Before we enter into merit of this case it would be convenient to have glimpse of the contents of the first information report wherein allegations have been made by the first informant, PW-1 Suresh Singh that on 30.04.2005, his son Samar Singh had gone to

village Bhawanipur for marketing on bicycle and he was returning home around 5:00 p.m. when he was being followed at some distance on bicycle by Amar Singh and Brij Bhan Singh of the same village. Some cemented pipes were lying by the side of the road at some place away to one kilometer south of village Bhawanipur, where the appellant was lying in ambush. All of a sudden he came out of these pipes and hurled bomb on Samar Singh who fell down from his bicycle and in the meantime the appellant fired from behind the neck of the deceased with countrymade pistol due to which he died. Because of explosion of bomb, some splinter injury was also caused to the injured Amar Singh.

23. It is stated that there was old enmity between family members of the first informant and the appellant. The appellant after committing the offence fled away towards Badlepurwa. In this case, another witness named in the first information report Brij Bhan Singh has turned hostile and has not supported the prosecution version. Therefore, his testimony is discarded to that extent. However, testimony of first informant, PW-1 Suresh Singh and the injured witness PW-3 Amar Singh are quite relevant, for assessing merit of the case.

24. PW-1 Suresh Singh has stated that the incident occurred on 30.04.2005 when his son Samar Singh had gone to village Bhawanipur for marketing and he was returning home on bicycle at 5:00 p.m. He was also being followed by co-villagers Amar Singh and Brij Bhan Singh on bicycle. At some place one kilometer away on southern side of village Bhawanipur, some cemented pipes were lying by the side of the road in which the appellant had hidden himself and all of a sudden he came out of cemented pipes and hurled bomb from behind upon Samar Singh, due to which Samar Singh fell down from his bicycle then the appellant shot fire on the neck of Samar Singh as a result of which Samar Singh died on the spot. Amar Singh who was following the deceased at some distance also sustained bomb injury.

25. PW-1 Suresh Singh has further stated that the incident was witnessed by Amar Singh and Brij Bhan Singh and he also arrived on the spot and he too witnessed the incident. Thereafter he went to the Police Station and then he lodged the first information report. However, this witness has not clarified in his examination-in-chief as to how he arrived on the spot and how he witnessed the incident. It appears that this witness arrived on the spot after a short while after the incident had taken place, but under facts and circumstances, it is apparent that he did not witness the incident as such. Therefore, on point of being eyewitness to the occurrence, testimony of this witness cannot be said to be relevant and credible, therefore, eyewitness account testimony, as such, is not to be believed as given by PW-1 Suresh Singh.

26. At this juncture we may record that another so called eyewitness PW-2 Brij Bhan Singh has turned hostile and he has not supported the prosecution version. He has been cross examined by the prosecution wherein he has reiterated his claim that he did not witness the incident and he was not present on the spot. Therefore, testimony of PW-2 also

becomes inadmissible on the point of being eyewitness to the occurrence. Now we are left with testimony of solitary eyewitness Amar Singh. We may appraise the same in its entirety as available on record.

27. PW-3 Amar Singh has stated in his testimony that on 30.04.2005, he was going along with Brij Bhan Singh on bicycle and Samar Singh who belonged to his village, was also riding on bicycle ahead of him. One kilometer south away to village Bhawanipur, some cemented pipes were lying. It was around 5:00 p.m., the appellant came out of these cemented pipes and hurled bomb on Samar Singh due to which Samar Singh sustained injury and fell on the ground. He claimed that he also sustained splinter injury. Thereafter the appellant fired on Samar Singh. A number of people arrived on the spot when the appellant made his escape good. Samar Singh died on the spot after sustaining gun shot injury.

28. PW-3 Amar Singh has stated that he too was medically examined. He has stated that at the time of the incident, no other person was there except Brij Bhan Singh and himself. A number of people arrived on the spot after some time of the incident. He has stated in his cross examination that he informed about the incident to the father of the deceased. The first informant-father of the deceased-met him around 5:15 p.m. He has stated at page 22 of the paper book in his cross examination that Daroga Ji enquired of him at the police station thereafter the first information report was lodged. However, he has stated that the first information report was lodged only after inquiry was made from him.

29. At this stage, contention has been raised on behalf of the appellant that this piece of testimony specifically establishes that the first information report was lodged at the interference of 'Daroga Ji' and the same is outcome of well thought out deliberation. The appellant's name was mentioned in the first information report merely because the first informant was abhorrent towards the appellant.

30. This specific, contention is not sustainable in view of the fact that it is very common experience that as and when one goes to some police station for lodging of the first information report, primarily inquiry is made regarding the incident/occurrence. After inquiry is made, if the incident appears to be genuine and element of truth is found to be existing in the description inquiry/description of incident then naturally the first information report is lodged at the police station. This witness has nowhere stated that the first information report was deliberated by Daroga Ji. This piece of testimony that after inquiry was made by Darogaji then the first information report was lodged, cannot be interpreted to mean that Daroga Ji himself entered into shoes of first informant and dictated the first information report.

31. It is due to viles and guiles of clever cross examination by the defence wherein such type of aberrations have surfaced and these aberrations cannot paint different picture than the one which this witness (PW-3) claims to testify; because there is no positive

assertion on the part of this witness that the first information report is outcome of the dictation of Daroga Ji, therefore, it cannot be contemplated that the first information report is ante timed. Merely an isolated piece of evidence will not render the FIR ante time, if the testimony on the whole reveals that it was act of the first informant alone, as is the case in hand.

32. A careful analysis of the post mortem report at this stage becomes relevant wherein we discover ante mortem injuries (1) firearm wound of entry 1.5 cm x 1 cm x through and through back of neck upper part margins inverted lacerated ecchymosed. Blackening and tattooing present around wound communicating wound of exit 2 cm x 1.5 cm over right side of chin, mandible lacerated. Teeth loose broken, tongue lacerated. Margins of wound everted. (2) Blast injury 12 cm x 11 cm on back of right side of chest scapular region, blackening, tattooing present. Scorching hair back of neck. (3) Abrasion 3 cm x 1 cm on back of right leg. Therefore, it is obvious that fact of explosion of bomb on the spot and causing of firearm injury both are corroborated by post mortem examination report Ext. Ka-3.

33. In this regard, we may also discuss testimony of Dr. Anoop Singh Gautam PW-4 who conducted the post mortem examination and proved the same as Ext. Ka-3. In the post mortem examination report, duration of death has been stated to be about one day and the same fact has been testified by this witness before the trial court. However, he has suggested in his cross examination that injuries found on the body of the deceased could have been caused between 1:00 p.m. to 3:00 p.m. on 30.04.2005. This fact merely suggests to only the admissible variation in time of injury that there is possibility of injuries being caused between 1:00 p.m. to 3:00 p.m. on 30.04.2005. But fact of this admissible variation in time will not be presumed to the extent that it was not caused around 5:00 p.m. It has not been testified that these injuries could not have been caused around 5:00 p.m. on 30.04.2005. Some marginal difference in time gap is always there in such cases like the present one where death of a person is under scrutiny. Normally in death cases, there is variation of six hours on either side based on medical jurisprudence. No specific challenge has been made to the doctor that these injuries could not have been caused by bomb explosion or firearm at 5:00 pm. on 30.04.2005. Therefore, ocular testimony is corroborated by medical testimony and presence of eyewitness Amar Singh PW-3 on the spot cannot be doubted and cannot be said to be unnatural and his presence on the spot becomes natural and probable. His testimony carries element of truth and the same is supported by attendant circumstances.

34. PW-5 Dr. Suresh Patariya has proved injury report Ext. Ka-3 relating to the injury caused to Amar Singh in the shape of lacerated wound of size 3.0 cm x 1.0 cm x muscle deep present in left parieto-occipital part of scalp. Margins are lacerated. Clotted blood seen in wound. This injury has been said to be of duration 12 to 24 hours. This medical examination was conducted at 8:30 a.m. on 01.05.2005 and the duration described very well covers the time and date of occurrence. However, the doctor has opined that

injury was simple and caused by hard and blunt object. The doctor witness in his cross examination has stated that this injury cannot be said to be blast injury. Assuming it to be; that this injury is superficial and cannot be blast injury even then that alone will not nullify presence of PW-3 Amar Singh on the spot.

35. It has been held in catena of decisions of the Apex Court that there is no legal hurdle in convicting a person on the sole testimony of a single witness if his version is found to be consistent clear and reliable, for the principle is that the evidence has to be weighed and not to be counted. In Vadivelu Thevar Vs. The State of Madras; AIR 1957 SC 614, it has been held that if the testimony of a singular witness is found by the court to be entirely reliable, there is no legal impediment in recording the conviction of the accused on such proof. In the said pronouncement it has been further ruled that the law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the court may classify the oral testimony into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness as has been held in the case of Kusti Mallaiah Vs. State of A.P.: 2013 Cri.LJ 3098.

36. Moreover, PW-9 Maan Singh Yadav, the Investigating Officer has proved investigation and also proved fact that he took simple soil, blood stained soil from the spot and memo of the same which he prepared is Ext. Ka-16. Therefore, the place of the occurrence cannot be said to be uncertain or doubtful. In so far as statement of eyewitness PW-3 Amar Singh is concerned, the same is clinching, consistent and inspiring confidence and it gives innocuous description of the incident. There is no such material contradiction as may render his testimony dubious or unreliable.

37. Learned counsel for the appellant could not point out any such material contradiction in his testimony and in the statement recorded under Section 161 Cr.P.C. by the Investigating Officer. May be that some laches have been committed by the Investigating Officer but that alone will not throw away the prosecution case and that factor alone will not generate doubt in the testimony of eyewitness PW-3 Amar Singh.

38. In the statement recorded under Section 313 Cr.P.C., the appellant has stated that he has been falsely implicated in this case on account of the fact that one Ajay Pal and the deceased had fired on his mother five years ago for which the first information report was lodged but compromise was entered into between the parties due to which the first informant was inimical towards the appellant, but this fact by itself cannot be any reason for PW-3 Amar Singh to depose falsely against the appellant. We may conveniently observe that in such a case of murder, it is hard thinking that any independent witness shall

be interested in falsely implicating an innocent person as the murderer while sparing real culprit. Moreover, no such material exists on record nor has come in the testimony of PW-3 in his cross examination that he is prejudicial towards the appellant and is interested in achieving his conviction.

39. In this view of the matter, we find that testimony on record qua circumstances are sufficient to establish and prove charge under Section 302 IPC beyond reasonable doubt. Learned trial court has taken correct view of the fact, circumstances and evidence on record and has recorded just finding and has rightly sentenced the appellant to life imprisonment which order of conviction and sentence need no interference by this Court. Judgment of conviction and sentence dated 06.11.2006 passed by trial court in Sessions Trial No.205 of 2005 against the appellant is upheld by us.

40. In view of above, the appeal lacks merit and is dismissed. The appellant is in jail. He shall serve out his sentence.

41. Let a copy of this judgment be certified to the trial court for necessary information and follow up action.

(2016) 8 ILRA 1317
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.08.2016

BEFORE

THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Application U/s 482 No.- 22437 Of 2016

Seema Devi

...Petitioner

Versus

State Of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Vijay Singh Sengar, Pankaj Singh

Counsel for the Respondents:

G.A.

Criminal Procedure Code, 1973 — S. 482 — Exercise of inherent powers — Expeditious trial — Directions to trial court — Application filed seeking appropriate directions in pending complaint case under Ss. 498-A, 323, 504, 506 IPC and S. 4 Dowry Prohibition Act — Record revealed repeated adjournments on dates when Presiding Officer was not available — Held, such practice of fixing dates when likelihood of Presiding Officer's absence exists is improper and must be avoided — Trial courts expected to regulate listing appropriately — Direction issued to trial court to frame charges expeditiously and thereafter conclude trial proceedings with due promptitude.

Practice and Procedure — Adjournments — Administrative discipline in listing of cases — Fixing dates despite foreseeable absence of Presiding Officer leads to delay and prejudice to litigants — Courts must ensure effective case management and avoid unnecessary adjournments.

In Result: Application disposed of with direction to the trial court to frame charges expeditiously and proceed to conclude the trial without undue delay.

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. Heard learned counsel for the applicant, learned AGA and perused the records.

2. From perusal of order sheet, it appears that many dates of the case were fixed when Presiding Officer of the court was not available. When there is probability of Presiding Officer being absent, dates for that period should not be fixed. Presiding Officers are expected to take note of it.

3. This application is disposed of with observation that trial court will make attempt to frame charge expeditiously in complaint case no. 997/2014 (Seema Devi Vs. Manish Kumar & others) under sections 498A, 323, 504, 506 IPC and section 4 D.P. Act, P.S. Meerganj, District Jaunpur and thereafter try to conclude hearing of the case expeditiously.

(2016) 8 ILRA 1318
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.08.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 25091 Of 2015

Amit Srivastava

...Applicant
Versus

State Of U.P.

...Respondent

Counsel for the Applicant:

H.M. Srivastava, Ajatshatru Pandey, Neeraj Srivastava

Counsel for the Respondent:

Govt. Advocate

Criminal Procedure Code, 1973 — Bail — Murder case — Appreciation of evidence at bail stage — Trial already commenced — Bail application in offences under Ss. 147, 148, 149, 302, 201 IPC — Trial had already commenced and prosecution witnesses were being examined — Held, when trial is in progress, detailed appreciation of evidence and assessment of testimonial worth is to be left to trial court — High Court should refrain from entering into intricate evaluation of evidence at bail stage so as to avoid prejudice to either party — Prima facie material on record disclosed strong case against accused.

Criminal Procedure Code, 1973 — Bail — Parity — Applicability — Co-accused granted bail — Applicant named in FIR with specific allegations and placed on graver footing — Held, principle of parity not applicable where role and circumstances of accused are distinguishable — Earlier bail orders of co-accused passed prior to commencement of trial and on different factual footing.

Criminal Procedure Code, 1973 — Bail — Considerations — Gravity of offence and prima facie evidence — Allegations based on circumstantial evidence including last seen, motive arising from financial transactions, extra-judicial confession and documentary material — Held, seriousness of offence coupled with available evidence and ongoing trial militates against grant of bail — Period of custody not so prolonged as to justify release.

In Result: Bail application rejected.

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. This bail application has been moved seeking the release of applicant on bail in connection with Case no.11743 of 2015, case Crime No.11 of 2015, u/s 147, 148, 149, 302, 201 I.P.C. Police Station-Mussoorie, District-Ghaziabad.

2. Counter affidavit filed by learned A.G.A. on behalf of State and the certified copies of statements of P.W.-1 and P.W.2 placed by learned counsel for the informant are taken on record. Rejoinder affidavit filed on behalf of applicant is also taken on record.

3. Heard Shri G.S. Chaturvedi, learned senior counsel assisted by Shri Ajatshatru Pandey, counsel for the applicant.

4. Submission of counsel for the applicant is that the name of accused-applicant has been mentioned in the F.I.R. without any parentage only on the basis of suspicion and the entire case rests upon circumstantial evidence and the last seen circumstance has been disclosed by one Ankur, who is brother of deceased Umesh Nagar, after a gap of five days. It has been further submitted that the applicant is an Ex-Manager of Axis Bank and had knowledge of financial transactions and hence, the applicant being close friend of the deceased used to invest his money through him, and certificates in lieu of the same had been given to the deceased after investing the same. The next submission is that in fact the relationship of applicant with the deceased was very cordial and was like family relationship and as the deceased had given large amounts of money to various other persons also, the possibility of his murder by any of them cannot be ruled out and the Investigating Officer has not probed this aspect of the matter and has proceeded with the investigation on the basis of one private diary of the deceased which was allegedly being maintained by him in respect of money transactions and the description of money transactions were showing the period of 2009, 2012 and 2013. Further submission of counsel is that the said alleged private diary of the deceased has been relied upon for implication of applicant, whereas the signature of the deceased and the handwriting in the alleged private diary appear to be different and it cannot be said authentically that the alleged private diary belonged to Umesh Nagar. It has also been pointed out that the co-accused Lokesh @ Lucky and Chandra Prakash @ Tiger have already been released on bail by another Benches of this Court vide orders dated 25.3.2015 and 31.3.2015 respectively. It has been also submitted that as the present accusation does not find support from any substantive material against the applicant and whatever material is being alleged against the applicant is nothing but suspicion, the accused-applicant is liable to be released on bail in view of bail orders passed with regard to co-accused. It has also been pointed out that the applicant is languishing in jail since 11.01.2015, and therefore, the applicant may be released on bail.

5. Heard learned A.G.A. for the State and Shri Adesh Kumar, learned counsel for the informant and perused the record.

6. Learned A.G.A. and learned counsel for the informant have vehemently opposed the bail application and have submitted that the materials which have been collected against the applicant during the course of investigation and the totality of circumstances are such which put the case of applicant on graver footing than the co-accused who have been enlarged on bail by another Bench. Applicant has been nominated as accused in the F.I.R. with specific allegation that the deceased was having monitory transactions with accused-applicant since long and on 03.01.2015 the deceased left his house after informing that he would go to Amit (applicant) to get his money returned back which was long due and when the deceased did not come back home, his brother

(informant) called on two mobile numbers of the deceased out of which one was switched off and the another was not being picked up. That aroused the suspicion and when the informant contacted the accused-applicant, he was not given any clear information and was misled by applicant by saying that the deceased had left and parted with the applicant, whereupon the informant started searching his brother during which the four-wheeler of the deceased was found parked near Imantac College and dead-body of the deceased was found lying on the back seat of four-wheeler. Further submission is that there is also the evidence of one another brother of the deceased namely Ankur who has stated that huge amount of money belonging to deceased was due upon the accused-applicant and when he had visited Indirapuram, Ghaziabad on 3.1.2015 for his own work, at about 9.30 P.M. he had seen that Deepak Tomar, Navneet Khatik, Sabbir, Chandra Prakash @ Tiger, Lucky @ Logesh, the accused Amit and the deceased were sitting in the Electric goods shop of Deepak, which is situated near Ashiana Arket Green Four Way and the four-wheeler of his deceased brother and four-wheeler of accused were also parked there and all the persons were heard talking to the effect that today account of Amit and Umesh would be cleared and in his presence they went away from said two four-wheelers towards the house of Amit. Thereafter he found the four-wheeler of his deceased brother standing near Imantac College, wherein the dead body of his brother was found. It has been contended that the said witness Ankur being younger brother of the deceased was very much disturbed due to murder of his elder brother and was not in a position to get his statement recorded soon thereafter. Further submission is that the record reveals that the accused-applicant has also confessed his guilt giving an extra judicial confession made before the witnesses Deepak who is friend of accused and one Manoj. It has also been contended that the private diary of the deceased, which was being maintained by him with regard to the financial transactions, is a vital piece of evidence and the handwriting contained therein has been identified by the informant, who being brother of the deceased was well acquainted with the handwriting of deceased and the entries in said private diary disclose that in the year 2009 total Rs.4 lacs were given by the deceased to the accused-applicant and in the year 2012, 2013 and 2014 a total amount of Rs.1,33,29,000/- (rupees one crore thirty three lac twenty nine thousand) was given by the deceased to the accused-applicant on different dates and the said private diary has been made part of the case diary. Submission is that the total amount of money of deceased, which was due against the accused-applicant is itself very strong circumstance in respect of his guilt and explains the strong motive of the applicant to commit the crime. It was also contended that if the entries contained in the case diary were related to the investments made by the deceased in routine then there was no question for the deceased to have referred or talked about the amount of money being due on the applicant. The evidence in this regard is consistent from the very outset that the applicant owed money and the deceased had made the visit on the fateful day to applicant with regard to the same in the expectation to get it back.

7. Learned counsel for the informant has also informed that the trial of the accused-applicant has already commenced and the statements of P.W.-1 and P.W.-2 have been recorded, certified copies of the same have been filed today. Submission is that the perusal thereof would reveal that the evidence produced in trial touches upon the merits of the case contained therein. It was further pointed out that the case of co-accused is not only distinguishable on merit from that of the present applicant, but it is also noteworthy that the bail order of co-accused dated 25.3.2015 and

31.3.2015 were passed prior to recording of the testimonies of P.W.-1 and P.W.-2 by the court below which were recorded from 26.8.2015 and at that stage the trial had not commenced. Contention is that benefit of parity is not apt to be extended to the accused-applicant who is the prime mover behind the crime in question and was nominated as accused from the very outset.

8. After considering the submissions made at the Bar and perusing the record, this Court is of the view that when the trial is already in progress, it shall not be proper to pass any order on merits of the case on the basis of the statements given in the court. The matter is already within the realm of the trial court now and the accused should get the final verdict with regard to his innocence or guilt from the trial court itself on the basis of thorough appreciation of evidence produced in the trial. Weighing the evidence, analysing the testimonial worth of witnesses and thereby making a judicial assessment of the same can more appropriately be done by the trial court. Going into the intricate details and the subtle appreciation of facts at this stage when the trial is already progressing, are all matters relating to trial. Any order passed by this Court on merits after assessing the testimonies of prosecution witnesses produced in the trial court or after assessing the material collected during investigation might seriously impair the independent dispassionate assessment of the trial court. This Court, therefore, abstains to pass any detailed order on the point of bail on that basis at this stage of the trial, lest it may cause prejudice to either side. Suffice it to say that the record discloses enough material to make out strong prima facie case against the accused and there is enough material to substantiate the charge against him. The case of applicant is also on a much graver footing than the co-accused who have been enlarged on bail by another Bench and so the principle of parity also cannot be brought into application. The perusal of the bail order with regard to co-accused Lokesh @ Lucky itself reveals that while considering his bail it was very much noted and considered by the Court that unlike applicant he was not nominated in the F.I.R. as accused.

9. In a case of this gravity along with the nature of evidence which is available on record against applicant, the detention of the applicant can also not be said to be so long drawn out which may constitute a legitimate ground enough to set him at liberty or may persuade the Court to grant him bail on that basis.

10. Looking to the nature of offence, its gravity and the evidence in support of it and the overall circumstances of this case and also keeping in perspective the fact that trial has already commenced and the prosecution witnesses are being examined, this Court is of the view that the applicant has not made out a case for bail. Therefore, the prayer for bail of the applicant is rejected.

11. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merits of the case.

(2016) 8 ILRA 1322
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.08.2016

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ C No.- 28105 Of 2011

The Handicraft And Handlooms Exports Corp. Of India & Anr.
Versus
State Of U.P. & Ors.

...Petitioners

...Respondents

Counsel for the Petitioners:

Gautam Baghel, Vinay Saran

Counsel for the Respondents:

C.S.C., Dinesh Pratap Singh, Sohan Lal Yadav, Vishwa Ratna Dwivedi

Industrial Disputes — Appropriate Government — Determination — Jurisdiction of Labour Court

— Petitioner, a Government company with 100% shareholding and deep control of Central Government, held to be "State" under Article 12 — Held, appropriate Government for reference of industrial dispute is Central Government and not State Government — Reference made by State Government under U.P. Industrial Disputes Act incompetent — Labour Court lacked jurisdiction.

Industrial Disputes — Reference — Jurisdictional issue — Plea raised at later stage — Though plea of jurisdiction not specifically taken in written statement, same can be raised at any stage as it goes to root of matter — Court can examine jurisdictional issue in writ proceedings to avoid multiplicity of litigation.

Industrial Disputes — Burden of proof — Employer-employee relationship — Continuous service — Onus lies on workmen to establish appointment and continuous working (240 days) — Labour Court failed to record findings on date of appointment, nature of engagement and completion of 240 days — Award suffers from lack of evidence and proper adjudication.

Contract Labour — Sham contract — Determination — Finding that contract system was sham recorded without proper analysis of evidence and statutory provisions — Mere existence of contract document of later period insufficient to infer absence of valid contract system.

Writ Jurisdiction — Interference with award — Remand and liberty — Award vitiated both on merits and jurisdiction — Instead of remand to State Labour Court, liberty granted to workmen to approach appropriate Government (Central Government) for fresh reference — Direction issued for expeditious adjudication.

In Result: Writ petition allowed; impugned award set aside; liberty granted to workmen to seek reference before appropriate Government; directions issued for expeditious adjudication.

Cases cited:

Steel Authority of India vs. National Union Waterfront Workers and others(2001) 7 SCC 1

Range Forest Officer vs. S.T. Hadimani(2002) 3 SCC 25

National Textile Corporation Limited vs. Naresh Kumar Badrikumar Jagad and other(2011) 12 SCC 695

National Textile Corporation U.P. Limited vs. State of U.P.2004 (2) LBESR 984

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Petitioner is a government company registered under the provisions of section 617 of the Indian Companies Act, 1956. It is engaged in the business of handicrafts and handlooms and also imports bullion. It is asserted that Central Government owns 100% shares and otherwise exercises deep and pervasive control over its affairs, and consequently, it qualifies to be a 'State' within the meaning of Article 12 of the Constitution of India. Challenge is laid in this petition to an award passed by Labour Court, Noida, District Gautam Budh Nagar in Adjudication Case No.2488 of 2008, dated 16.8.2010, whereby reference has been answered in favour of the respondent workmen.

2. Briefly stated facts are that a reference was made to Labour Court, constituted under U.P. Industrial Disputes Act, 1947, by the State Government under section 4-K, on 25.10.2007, on the question as to whether action of employer in not engaging 31 workmen as per schedule from 1.1.1991 is justified or not and to what relief are they entitled to?. The schedule contains names of 31 workmen, who are stated to be drawing wages of Rs.1,500/- per month and are stated to be working from 1977 to 1990. A written statement was filed by workmen stating that an industrial dispute has arisen on account of the fact that workmen, who have been permanently working since long, raised demand of regularization whereafter employer started describing such workmen to be employees of respondent no.9 and stopped taking work from them from 1.1.1991, without passing any order. Prayer consequently was made to declare 31 workmen to be employees of petitioner and to regularize them, apart from declaring petitioner's action of not taking work from them w.e.f. 1.1.1991 as illegal and unjustified and to reinstate them alongwith back wages. Other service benefits were also claimed. A written statement was filed by the petitioner denying the averments made by the workmen. It was stated that none of the 31 workmen were employed by petitioner and in fact they were employees of respondent no.9. Existence of employee-employer relationship has been denied. It was also stated that being contractor's workmen they do not become employees of petitioner and no industrial dispute exists. Various other submissions were also made. An affidavit was also filed by the petitioner stating that petitioner is an establishment of Government of India. Written and oral evidence was led by the parties, which shall be dealt with later.

3. Labour Court has returned a finding that the workmen are not the employees of respondent no.9 and they were engaged on different dates from 1977 to 1990. Further finding has been returned that workmen were illegally terminated from 1.1.1991. The argument raised on behalf of petitioner that reference itself was incompetent, as the employer herein is an establishment of Government of India, has not been entertained since no specific plea in this regard was taken by the petitioner in the written statement. Relief of reinstatement alongwith back wages and other service benefits has thus been granted. Cost of Rs.10,000/- has also been awarded to the workmen.

4. Sri Vinay Saran, learned counsel appearing for the petitioner submits that the entire proceedings culminating in passing of award are wholly without jurisdiction inasmuch as petitioner being a concern of Government of India, the appropriate government for making of reference was the Government of India and neither the State of Uttar Pradesh had any jurisdiction to refer the

dispute nor the Labour Court, Noida, Gautam Budh Nagar, U.P. had any authority to decide the matter. The award is also impeached on merits on the ground that in the absence of any details of appointment, which varies from 1977 to 1990, the appointment itself was not established. It is also argued that there is no finding that any of these workmen have worked for 240 days in a calendar year, nor reasons have been specified, on account of which their disengagement is held to be illegal. Various other submissions have also been advanced.

5. Sri Siddharath Singh, learned counsel appearing for the workmen states that the plea of jurisdiction, in making of reference or entertainment of dispute before Labour Court, was not raised in the written statement, and in the absence of any pleading or evidence in that regard, has rightly not been considered by the Labour Court. Learned counsel further contends that these workmen had continued for very long and disengagement without payment of retrenchment compensation is bad in law. Learned counsel further submits that the finding that workmen were not employees of respondent no.9 is based upon correct interpretation of the provisions of Contract Labour (Regulation and Abolition) Act, 1970.

6. The submission raised by the learned counsel for the petitioner on the legality of reference and jurisdiction of Labour Court is taken as first. Perusal of award goes to show that such a plea was raised before the Labour Court, but has been repelled on the ground that it was not raised in the written statement. This Court has perused the written statement of the employer to find that no such plea was actually raised. It is only in the writ petition filed before this Court that a specific plea in that regard has been taken in para 2 and 3. An affidavit although was filed before the Labour Court stating that petitioner is an establishment of Government of India, but validity of reference was not questioned. In the oral statement also, employer's witnesses claimed that petitioner is an establishment of Government of India. Learned counsel for the petitioner has laid emphasis upon the statement of workers' witness Sri Mohd. Munsif recorded on 9.5.1997. This witness in his cross examination has admitted that petitioner is an establishment of Government of India. According to petitioner, such statement clearly amounts to an admission on part of the workmen that petitioner is an establishment of Government of India, and therefore, not only reference by State Government was incompetent but the Labour Court also had no jurisdiction. Learned counsel also contends that specific plea, taken in para 2 and 3 of the writ petition that petitioner corporation is an establishment of Government of India and all its share holding is held by Government of India, has not been denied.

7. The submission aforesaid is countered by learned counsel appearing for the workmen relying upon Constitution Bench judgment of Apex Court in *Steel Authority of India vs. National Union Waterfront Workers and others*, (2001) 7 SCC 1 to contend that the issue as to whether establishment is a unit of Central Government or not is essentially a question of fact to be decided by the Industrial Adjudicator, and in the absence of any plea having been setup in the written statement did not merit its examination by the Labour Court. It is also contended that the plea based upon ascertainment of fact need not be entertained for the first time in writ proceedings. Learned counsel for the workmen submits that the dispute has remained pending since 1992 and after expiry of more than 24 years, it would not be appropriate for this Court to entertain a factual issue, which

has not been specifically setup as a defence in proceedings before the Labour Court. Argument advanced on behalf of respondents prima facie appears to have force. Having found substance in the contention advanced on behalf of the workmen that no specific plea was raised on behalf of employer before the Labour Court in the written statement regarding incompetence of reference and consequential lack of jurisdiction with the Labour Court, Noida, U.P. as well as the fact that a period of 24 years have expired, the Court has proceeded to examine the award on merits and the issue of jurisdiction was deferred for being examined later, depending upon the outcome of challenge made to the award on merits.

8. The reference itself has been made at the instance of 31 workmen, who claim themselves to have been appointed from 1977 to 1990. There is no specific plea in the written statement as to when exactly these workmen were appointed. It is admitted to them that no appointment letter was ever issued. According to employer, none of these workmen were ever appointed and they were employees of respondent no.9 Contractor. Labour Court in para 12 to 15 of the award has dealt with the case on merits, in following words:-

12. पत्रावली के अवलोकन से मैं इसी निष्कर्ष पर पहुँचता हूँ कि प्रतिवादी सेवायोजक के इस तर्क में बल प्रतीत नहीं होता कि श्रमिकगण मैसर्स क्लार्थ चैनल नोएडा के कर्मचारी थे। क्योंकि जो अभिलेख क्लार्थ चैनल ठेकेदार का प्रतिवादी संख्या-1 की ओर से दाखिल किया गया है वह 26.2.90 का है जो प्रतिवादी सेवायोजक संख्या-1 द्वारा प्रदर्श ई-2 के रूप में सिद्ध किया गया है। जबकि श्रमिकगण प्रतिवादी प्रतिष्ठान में वर्ष 1777 से सन् 1990 तक विभिन्न-विभिन्न तिथियों में नियोजित हुए थे इस बात का कोई स्पष्ट खण्डन प्रतिवादी सेवायोजक की ओर से नहीं किया गया है। प्रतिवादी संख्या-1 द्वारा संबंधित श्रमिकों द्वारा भेजे गये मांग पत्र प्रदर्श डब्लू-1 का भी कोई स्पष्ट खण्डन नहीं किया है। प्रतिवादी सेवायोजक नं०-2 की ओर से एक प्रार्थना पत्र 26.10.07 का दाखिल किया गया जिसमें कहा गया है कि संबंधित श्रमिकगण प्रतिवादी सेवायोजक नं०-1 के यहाँ नियोजित थे और प्रतिवादी संख्या-02 के विरुद्ध कोई विवाद नहीं है।

13. अतः मैं इसी निष्कर्ष पर पहुँचता हूँ कि समस्त श्रमिकगण प्रतिवादी संख्या-01 के कर्मचारी थे और उन्होंने श्रमिकों द्वारा विधि सम्मत सुविधाओं की मांग किये गये जाने पर 1.1.91 से समस्त श्रमिकों की सेवाये अनुचित एवं अवैधानिक ढंग से हो गया है। जबकि श्रमिकगण इस अवार्ड के पैरा-8 के पेज 4 में श्रमिक की नियुक्ति दर्शायी गयी है सन् 77 से लेकर विभिन्न-विभिन्न तिथियों कार्यरत थे। ठेकेदार ने स्वयं कहा है कि मुख्य नियोजन के कर्मचारी थे और उन्होंने काम करवाया है इसलिए मेरा यह मानना है कि ठेकेदार को दिया गया ठेका कानूनी ठेका नहीं है, कानूनी व्यवस्था नहीं है वह सेम ठेका है। इसलिए मेरा मानना है कि श्रमिकगण प्रतिवादी संख्या-1 के कर्मचारी थे। श्रमिकगण द्वारा श्रमविधि सुविधाओं की मांग करने के कारण प्रतिवादी संख्या-1 द्वारा बिना विधि सम्मत प्रदान किये श्रमिकगण की सेवायें समाप्त कर दी।

14. प्रतिवादी संख्या-1 द्वारा यह भी तर्क दिया गया कि प्रतिवादी संख्या-1 भारत सरकार का एक उपक्रम है इसलिए इस न्यायालय को सुनने का अधिकार नहीं है। प्रतिवादी संख्या-1 द्वारा अपने प्लीडिंग्स में कहीं नहीं कहा गया है कि यह प्रतिष्ठान भारत सरकार का उपक्रम है। अतः प्रतिवादी संख्या-1 के इस तर्क में कोई बल नहीं है। इसलिए सेवायोजक नं०-1 का तर्क मानने योग्य नहीं है।

15. अतः प्रतिवादी सेवायोजक मैसर्स दि हैण्डिकाफ्ट हैण्डलूमस एक्सपोर्ट कारपो0 आफ इण्डिया लि0, ए-2,3,4 व 5 सेक्टर-2 नोएडा को आदेशित किया जाता है कि इस अवार्ड के साथ संलग्न सूची में अंकित 31 श्रमिकों को पुरानी नौकरी के क्रम में पूर्व पूर्ण वेतन व अन्य समस्त हित लाभों सहित सेवा में बहाल करे। वाद व्यय के रूप में रुपये दस हजार का भी भुगतान करें।

9. Labour Court has disbelieved petitioner's plea of engagement of workmen by Contractor, essentially on the ground that contract executed in favour of contractor, filed as Exhibit E-2 was

w.e.f. 26.2.1990, whereas engagement of workmen was from 1977 to 1990 and had not been specifically denied. This observation of labour court is clearly contrary to record inasmuch as engagement of workmen from 1977 to 1990 by the employer has been specifically denied in the written statement. Employer's witnesses have disputed it in their oral testimony also. Admittedly, neither any letter of appointment was brought on record nor any finding has been returned by the Labour Court as to which of the workmen has been appointed since when. Workmen had claimed their appointment to have been made from 1977 to 1990, but only 3 out of them had claimed their appointment from prior to 1980. Most of the workers were engaged in 1988, 1989, 1990 whereas their termination is w.e.f. 1.1.1991. Labour Court has also not recorded any finding that these 31 workmen had completed 240 days of working in a calendar year so as to render their termination bad for non compliance of section 6-N of the U.P.I.D. Act. In the absence of any specific pleading with regard to date of engagement of workmen and lack of evidence to substantiate it, Labour Court had clearly erred in holding that workmen were engaged from 1977 onwards. Law is otherwise settled that onus to establish appointment and working of the workmen was upon them. (*See Range Forest Officer vs. S.T. Hadimani, (2002) 3 SCC 25*). The labour court has not examined as to whether a valid contract system was enforce nor material aspect with reference to the provisions of Contract Labour (Regulation and Abolition) Act has been examined and dealt with. The finding that there was no valid contract system and that contract was sham, is also based on irrelevant consideration inasmuch as merely for the reasons that the contract filed before it was from February, 1990 would not lead to such an inference. The labour court was required to have returned a finding with regard to appointment and working of workmen for more than 240 days in a calendar year to justify its conclusion that termination was bad in law, which is non existent. There is further no finding of violation of any statutory provision to hold that termination of workmen is bad in law. Upon all relevant aspects, relating to existence or otherwise of contract and continuous working for more than 240 days, appropriate consideration and finding is lacking. In the absence of discussion and finding on relevant aspects, noticed above, the award holding termination to be bad cannot be sustained.

10. For the reasons noticed above, the award of labour court dated 16.8.2010 is found to be vitiated in law and cannot be sustained and is hereby set aside.

11. At this stage, the issue crops up as to whether the matter be remitted back for a fresh consideration by the Labour Court, Noida, Guatam Budh Nagar, U.P. or the issue of validity of reference and jurisdiction of the Labour Court under the Act of 1947 be examined by this Court exercising its jurisdiction under Article 226 of the Constitution of India?

12. Learned counsel for the petitioner has placed reliance upon a judgment of Apex Court in *National Textile Corporation Limited vs. Naresh Kumar Badrikumar Jagad and other, (2011) 12 SCC 695* in order to contend that a pure legal issue relating to jurisdiction can be raised at any stage of the proceedings. Reliance has also been placed upon judgment of this Court in *National Textile Corporation U.P. Limited vs. State of U.P., 2004 (2) LBESR 984*. Para 15 of the judgment is reproduced:-

"15. Reliance has been placed on notification dated 3rd July, 1998 of which notification following extract was quoted by the Presiding Officer in the order dated 17th July 2000, "In exercise of the powers conferred by Section 39 of the Industrial Disputes Act, 1947 (14 of the 1947) Central Government hereby directs that all the powers exercisable by it under that Act and the Rules made thereunder shall...be exercisable also by the State Government". The Presiding Officer held that since in the present case reference was made after the notification dated 3rd July, 1998, the State Government was competent to refer the matter. After the order dated 17th July 2000, a review application was immediately filed by the employer in which notification dated 3rd July, 1998 was not denied, rather it was stated that the State Government can exercise delegated power only with regard to references which could have been made by the Central Government under the Industrial Disputes Act, 1947. It was stated in paragraph 5 that reference could have been made to the industrial Tribunal constituted under the Industrial Disputes Act, 1947 by the State Government. In paragraph 6 of the application, it was specifically stated that the State Government has referred the dispute to the industrial Tribunal constituted by the State Government under the U.P. Industrial Disputes Act, 1947. From the materials on the record, it is clear that the reference was made by the State Government vide its order dated 12th November, 1998 exercising jurisdiction under Section 4K of the U.P. Industrial Disputes Act, 1947. Delegated power under Section 39 of Industrial Disputes Act, 1947, the Central Government, which is the appropriate Government for the purposes of present case, could have made a reference to a Court constituted in accordance with Section 17A of the Industrial Disputes Act, 1947. The industrial Tribunal to which the reference was made was a industrial Tribunal constituted for Uttar Pradesh under the U.P. Industrial Disputes Act, 1947. The State Government in the referring order itself referred to its power under Section 4K of U.P. Industrial Disputes Act, 1947. Thus, the stand taken by the Respondents that under Section 39, the State Government can exercise delegated power of the Central Government while making reference cannot be accepted. In the present case, the State Government did not make reference exercising delegated power of the Central Government under Section 39 of the Industrial Disputes Act, 1947, rather it exercised its jurisdiction under Section 4K of U.P. Industrial Disputes Act, 1947. The appropriate Government in the present case being the Central Government, as observed above, the reference could have been made only by the Central Government. The plea of the Respondents that State Government exercised the delegated power under Section 39 of Industrial Disputes Act, 1947 which found favour with the Presiding Officer, Industrial Tribunal, is unsustainable. The reference made to the industrial Tribunal itself being incompetent, the award falls on the ground due to the said reason. It having been found that the reference itself was incompetent, it is not necessary, for this case, to consider and decide other submissions raised by the counsel for the Petitioners. This writ petition deserves to be allowed on the decision taken on the first submission of counsel for the Petitioners."

13. No doubt it is true that no specific plea had been raised in the written statement by the petitioner to the effect that petitioner corporation is an establishment of Government of India but the factual aspect that emerges on record is clear. The workmen in the oral statement had admitted that the petitioner is an establishment of Government of India. Statement of Sri Mohd. Munsli, who appeared as workers' witness, is categorical in stating that petitioner is an establishment of Government of India. Specific pleading made in para 2 to 3 of the writ petition that petitioner is a

company under section 617 of the Companies Act, of which 100% share are held by the Government of India. Para 2 to 3 of the writ petition are reproduced:-

"2. That the Handicrafts & Handlooms Exports Corporation of India Ltd. 'Noida Complex' A-2, Sector-2, Udyog Marg, Noida-201301, Gautam Budh Nagar (U.P.), the petitioner No.1 herein, is a Government of India undertaking under the Ministry of Textiles and it is a Government Company within the meaning of section 617 of the Companies Act, 1956 as the Government of India has 100% shares. The petitioner No.1 carries on business of exports of handicrafts & handlooms. It also imports bullion.

3. That the petitioner No.1 is an instrumentality of the Central Government and as such it is 'State' within the meaning of Article 12 of the Constitution of India. The Central Government has deep and pervasive control over the affairs of the petitioner No.1. The Central Government provides 100% finance to the petitioner No.1 to run its affairs and the Central Government sends two nominees on the Board of Directors of the petitioner No.1."

Para 3 of the counter affidavit is also reproduced:-

"3. That the contents of paragraph no.1, 2, 3, 4 and 5 of the writ petition need no comment."

14. In view of such admitted position, this Court has no hesitation to hold that petitioner corporation is an establishment of Government of India, and Government of India alone was the appropriate government for referring the dispute, and therefore, it would be the tribunal constituted under the provisions of Industrial Disputes Act, 1947, which alone had jurisdiction to adjudicate the dispute. This aspect is being examined by this Court only with the object of avoiding any future litigation which may arise between the parties on the aspect of jurisdiction at a later date.

15. It would, therefore, be appropriate to dispose of the writ petition with the direction that in case respondent nos.3 and 4, who were the authorized representative of 31 workmen in question, approach the appropriate Government, i.e. Government of India, in respect of their grievance relating to alleged termination of their services, alongwith certified copy of this order, within a period of three weeks from today, the appropriate Government shall refer the dispute to the appropriate Industrial Adjudicator within a further period of two months thereafter. Considering the fact that a period of almost 26 years have expired, it is observed that Industrial Adjudicator would proceed with all expedition and make all endeavours to answer the reference, preferably within a period of one year thereafter.

16. Writ petition is accordingly allowed.

BEFORE

Writ C No.- 32744 Of 2016

Cases cited:

T.M.A.Pai. Foundation v. State of Karnataka(2002) 8 SCC 481

Islamic Academy of Education and another v. State of Karnataka and others(2003) 6 SCC 679

P.A. Inamdar and others v. State of Maharashtra and others(2005) 6 SCC 537

U.P. State Spinning Co. Ltd. v. R.S. Pandey and another(2005) 8 SCC 264

Ram and Shyam Co. v. State of Haryana(1985) 3 SCC 267

State of U.P. v. Indian Hume Pipe Co. Ltd.(1977) 2 SCC 724

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

1. Rejoinder affidavit filed today, is taken on record.

2. Indian Institute of Management & Engineering Society, Ghaziabad, duly registered under the Societies Registration Act, 1860, has established, in 1998, an Institution in the name & style 'Ajay Kumar Garg Engineering College, Ghaziabad¹, which offers B.Tec, M.Tec and M.C.A. Courses. The Institution is duly recognized by the All India Council for Technical Education (AICTE) and affiliated to Dr. A.P.J. Abdul Kalam Technical University, Lucknow².

3. Students admitted by the Institution for the aforementioned courses for 2016-17 are as follows:

1. B.Tech - 960 students

2. M.Tech - 114 students

3. M.C.A. - 120 students

4. It is contended that the petitioner-Institution is one of the best and reputed Engineering Institution in the State of U.P. and offers the highest quality of education; provides state of art facilities in terms of infrastructure and teaching. The Institution has received the Academic Excellence Award for the best Engineering College by Technical University from the Governor of the State of Uttar Pradesh for two consecutive years i.e. 2008 and 2009. Further, the Institution is accredited by "National Assessment and Accreditation Council (NAAC) which is an autonomous Institution of the University Grants Commission. The accreditation by NAAC is for a period of five years with effect from 3 March 2015. B.Tech course is duly accredited by the National Board of Accreditation (NBA) since 2006 and vide communication dated 14 April 2016, the NBA has again provided accreditation for two more years w.e.f. 1 July 2016.

5. The petitioner-Institution has approached this Court assailing the order dated 22 June 2016 passed by the third respondent-Special Secretary, Government of Uttar Pradesh, Lucknow, whereby, the private technical institutions in the State, including the petitioner-Institution, has been directed to charge fee for session 2016-17 as determined earlier by the Committee for session 2012-13.

6. Sri Anurag Khanna, Senior Advocate assisted by Sri Yash Tandon, learned counsel appearing for the petitioner would submit :

(i) the Committee as required under the Act, Rules and Regulation has not determined the fee for session 2016-17;

(ii) the last determination was done for session 2012-13, which was valid for three academic session;

(iii) the Institution has sought enhancement of the fee @ Rs.1,74,000/- per annum per student for session 2016-17 which has not been considered by the Committee;

7. In rebuttal, Sri Ashok Kumar Pandey, learned Additional Advocate General appearing on behalf of the State would contend that:

(i) the Committee has determined the fee and in case, the Institution has any objection, it may approach the Committee under Regulation 4(3) of the Uttar Pradesh Private Technical Educational Institutions (Regulation of Admission and Fixation of Fee) Regulations, 2015³ for enhancement;

(ii) upon decision of the Committee, the petitioner would have an alternative remedy to prefer an appeal before the Tribunal;

(iii) the fee could not have been determined by the Committee under the Act and Regulations for paucity of time, therefore, the fee already determined in 2013 for respective technical institutions has been made applicable for the session 2016-17 alone;

(iv) the Committee has undertaken the task of fee fixation for the session 2017-18.

8. Sri Neeraj Tiwari, learned counsel appearing for the second respondent-Technical University would contend that the last date for admission of the students in B.Tech, M.Tech and M.C.A. courses was 15 August 2016, as such, admissions have already been closed; Institution, therefore, is not entitled for enhancement of fee.

9. Rival submissions fall for consideration.

10. The sole question that arises for determination is as to whether the Committee constituted under the Regulations has determined the fee to be charged by the private technical institution for the session 2016-17.

11. Pursuant to decision rendered by the Supreme Court in *T.M.A.Pai. Foundation v. State of Karnataka*⁴, *Islamic Academy of Education and another v. State of Karnataka and others*⁵, and *P.A. Inamdar and others v. State of Maharashtra and others*⁶, the State enacted the Uttar

Pradesh Private Professional Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2006⁷ for the regulation of admission and fixation of fee in private professional educational institutions and the matters connected therewith or incidental thereto. The Act was enforced on 10 July 2006. Pursuant thereof, the State Government framed Uttar Pradesh Private Professional Educational Institutions (Regulation of Admission and Fixation of Fee) (Constitution of Committee) Rules, 2008⁸. The Government vide order dated 27 June 2008 constituted a Fee Fixation Committee, which determined the fee at Rs.81,200/- for the Institution for session 2010-11 to 2012-13, by enhancing it from Rs.75,000/- per student charged earlier. Thereafter, the Committee for session 2013-14 to 2015-16 enhanced the fee by almost 20% and fixed it at Rs.97,100/- per student per year for the courses. Consequently, the Committee was required to fix the fee for session 2016-17 to 2019-20, therefore, proposals were invited from the institutions for determination of the fee. The Chairman of the Committee, Special Secretary, Technical Education, Government of U.P., Lucknow vide communication dated 2 March 2016 addressed to the Director of the petitioner-Institution sought details under 10 heads so as to determine the fee for session 2016-17. Pursuant thereof, the petitioner-Institution vide proposal dated 21 March 2016 claimed enhancement of fee @ Rs.1,74,000/- per student per annum. The details, as sought was furnished, which include expenses on teaching staff, expenses on non teaching staff, investment on computer systems, investment on college building, investment on library books, investment on furniture, investment on lab etc. Depreciation chart for the Financial Year 2014-15 to 2019-20, cash-book for the year 2014-15 and the details of loan taken by the petitioner-Institution, audited balance sheet, computation of proposed fee for the period 2016-17 to 2019-20, increase in Direct Operating Expenditure from 2011-12 to 2014-15 and increase in D.A. rate from July 2012 to July 2015 by the State Government was furnished with the proposal.

12. The State in the counter affidavit filed on behalf of respondents no. 1 & 3, would contend that there are 700 technical private institutions in the State, therefore, in order to fix the Standard Fee for the institutions; on random basis, 24 institutions including that of the petitioner were asked to furnish the details vide communication dated 2 March 2016. It is contended that only 5 institutions responded to the communication by submitting their proposal as required. This fact has been noted in the meeting held on 14 June 2016 by the Sub Committee appointed by the Committee to suggest the fee for session 2016-17. The Sub Committee would record that the fee fixed for various institutions range between Rs.26,400.00 to Rs.97,100.00 for 24 institutions, which were communicated to submit their proposal, out of which only five institutions responded. In respect of the petitioner-Institution it has been noted that the Institution towards salary of teachers have proposed expenses at Rs.16.92 Crores. As per information furnished to the Technical University there are 240 teachers, whereas, upon verification, only 215 teachers are qualified who have a valid PAN card and are working in the Institution, 22 teachers do not fulfill the required qualification and PAN card of three teachers were not valid. Therefore, an inference was drawn that the qualification of the teachers, their actual numbers and the sum paid towards salary and other expenses incurred upon the teachers and staff appears to be doubtful. The actual number of the teachers working in the Institution is less than the number of teachers that has been proposed by the Institution, therefore, the Committee was of the opinion that the exercise of fee fixation since being time consuming, it was not in a position to determine the fee for 2016-17, accordingly, resolved

that in the interest of the students and considering the paucity of time, the fee already determined and fixed in 2013 would be charged by the respective institutions for 2016-17. The proposal of the Sub Committee was accepted by the Fee Fixation Committee in its resolution dated 15 June 2016. Pursuant thereof, the impugned order has been passed.

13. Per contra, the petitioner-Institution would contend that the Committee has not perused the proposal submitted by it, rather the Committee has placed reliance on the information available on the portal of the Technical University which is factually incorrect. The proposal, which is available on record, would reflect that the Institution has 209 teachers, 211 non teaching staff, strength of students since 2011-12 to 2014-15 being 3863 which gradually increased from 2942 students. The break up of students in various courses since 2011-12 has gradually increased, details have been furnished in the proposal. It is, therefore, contended that there has been total non application of mind by the Committee, the opinion has been expressed without examining the proposal and documents in support thereof.

14. In the case of **Islamic Academy**, one of the questions posed before the Supreme Court was "whether educational institutions are entitled to fix their own fee structure". The Court held that each institute must have the freedom to fix its own fee structure taking into consideration the needs to generate funds to run the institution and to provide facilities necessary for the benefit of the students. They must also be able to generate surplus which must be used for the betterment and growth of the educational institution, however, there can be no profiteering and capitation fees cannot be charged.

"So far as the first question is concerned, in our view the majority judgment is very clear. There can be no fixing of a rigid fee structure by the government. Each institute must have the freedom to fix its own fee structure taking into consideration the need to generate funds to run the institution and to provide facilities necessary for the benefit of the students. They must also be able to generate surplus which must be used for the betterment and growth of that educational institution. In paragraph 56 of the judgment it has been categorically laid down that the decision on the fees to be charged must necessarily be left to the private educational institutions that do not seek and which are not dependent upon any funds from the Government. Each institute will be entitled to have its own fee structure. The fee structure for each institute must be fixed keeping in mind the infrastructure and facilities available, the investments made, salaries paid to the teachers and staff, future plans for expansion and/or betterment of the institution etc. Of course there can be no profiteering and capitation fees cannot be charged. It thus needs to be emphasized that as per the majority judgment imparting of education is essentially charitable in nature. Thus the surplus/profit that can be generated must be only for the benefit/use of that educational institution. Profits/surplus cannot be diverted for any other use or purpose and cannot be used for personal gain or for any other business or enterprise. Each educational Institute must place before this Committee, well in advance of the academic year, its proposed fee structure. Along with the proposed fee structure all relevant documents and books of accounts must also be produced before the committee for their scrutiny. The Committee shall then decide whether the fees proposed by that institute are justified and are not profiteering or charging capitation fee. The Committee will be

at liberty to approve the fee structure or to propose some other fee which can be charged by the institute. The fee fixed by the committee shall be binding for a period of three years, at the end of which period the institute would be at liberty to apply for revision. Once fees are fixed by the Committee, the institute cannot charge either directly or indirectly any other amount over and above the amount fixed as fees. If any other amount is charged, under any other head or guise e.g. donations the same would amount to charging of capitation fee."

15. In **P.A. Inamdar**, Supreme Court while answering question no. 3 held that every institution is free to devise its own fee structure but the same can be regulated in the interest of preventing profiteering. No capitation fee can be charged. Leverage was allowed to educational institutions to generate reasonable surplus to meet cost of expansion and augmentation of facilities which would not amount to profiteering. The Court upheld the two Committees for monitoring admission procedure and determining fee structure as held in **Islamic Academy** was permissible as regulatory measures aimed at protecting the interest of the student community as a whole as also the minorities.

16. In the backdrop of the law laid down by the Apex Court, it would be apposite to examine the statutory provision. Sub-clause (d) of Section 3 of Act 2006 defines "Fee" which means all fees including tuition fee and development charges"; Sub-clause (i) defines "private professional educational institution" which means a professional educational institution not established or maintained by the Central Government, the State Government or any public body; Sub-clause (o) of Section 3 defines "unaided institution" which means a private professional educational institution, not being an aided institution.

17. Chapter II provides for constitution of the Fee Fixation Committee. Section 4 would provide for composition, disqualification and functions of the Committee. Sub-section (8) of Section 4 provides for determination of fee by the Committee as prescribed under Section 10. Sub-section (8) is extracted:

"The Committee may require a private aided or unaided professional educational institution or, a deemed to be University or a private University to furnish by a prescribed date, information as may be necessary for enabling the Committee determine the fee as prescribed under section 10 of the this Act that may be fixed by the institution in respect of each professional course, and the fee so determined shall be valid for such period as notified by the State Government."

18. Chapter IV provides for Fixation of Fee. The Committee while determining the fee to be charged by a private aided or unaided professional educational institution will have regard to the parameters prescribed thereunder. Section 10 is extracted :

"10(1). The Committee shall determine, the fee to be charged by a private aided or unaided professional educational institution having regard to:—

(i) the nature of the professional course,

- (ii) the available infrastructure,
 - (iii) a reasonable surplus required for growth and development of the professional institution,
 - (iv) the expenditure on administration and maintenance,
 - (v) the expenditure on teaching and non teaching employees of the institution,
 - (vi) any other relevant factor,
 - (2) The Committee, shall give the institution an opportunity of being heard before fixing any fee :—
- Provided that no such fee, as may be fixed by the Committee, shall amount to profiteering or commercialization of education."

19. Chapter V provides for miscellaneous matter. Section 11 would confer power upon the State Government to appoint an Appellate Authority, where any person or professional institution if aggrieved by an order of the Committee may file an appeal. Section 13 would confer power upon the State Government to make rules for carrying out the purposes of the Act. Pursuant thereof, Rules 2008 was framed which only provides the composition of the Committee to determine the fee of private institutions and appeal therefrom. The details and parameters on how the Committee is to determine the fee is provided under Regulation 2015 framed under Section 14 of the Act, 2006. Regulation 3 would provide the composition of the Committee consisting of Principal Secretary/Secretary Technical Education and two other members. Regulation 4 (1) would provide that the Committee may fix Standard Fee including tuition fee and development charges for the private Institution. Sub-regulation (3) would provide that if any institution, referred to in sub-regulation (1), request the Committee to fix a fee higher than the Standard Fee or if an institution requests to fix a fee lower than the Standard Fee being an institution of charitable in nature or involving in philanthropic work or for any reason, the Committee will consider the request of such institution. Sub-regulation (3) of Regulation 4 is extracted:

"If any institution referred to in sub-regulation (1) request to the Committee to fix a fee higher than the Standard Fee because it is an institute of excellence offering specific, useful and job-oriented courses or is purchasing latest equipments for specific course for student welfare, or for any other reason, then in the interest of growth of technical education and its quality, the Committee shall considered the institution's request for higher fee. Further, also if an institution requests to fix a fee lower than Standard Fee because it is an institution of charitable nature or it is also involved in philanthropic work or for any other reason, the Committee shall consider the institution's request for lower fee. The Committee shall give the institution an opportunity of being heard before fixing its final fee."

20. Sub-regulation (4) details the parameter for determining the fee which includes, expenses on depreciation, expenditure on advertisement, expenditure on development, expenditure due to inflation, expenditure on salary, expenditure on interest, direct recurring expenses, total expenses per student and expenditure on electricity. Sub-regulation (4) is extracted:

(4) The Committee shall fix the fee having regards to the following :-

(i) **Expenses on Depreciation-** Straight line method shall be applied and the revised rates mentioned in the Companies Act, 1956 will be taken into account.

(ii) **Expenditure on Advertisement-** Maximum 1% of the total expenses of the institutions on advertisement required for new courses and college related activities through news papers, hoardings, magazines etc. will be allowed:

(iii) **Expenditure on Development-** Maximum of 10% development charges will be allowed.

(iv) **Expenditure due to inflation-** The basis of the average of the rates of Consumer Price Index of last three years will be considered for calculating the average rate applicable for next three years, for the purposes of allowing inflation of expenses.

(v) **Expenditure on interest-** If the Institution has taken loan from any nationalized bank for infrastructure and other fixed capital assets and the interest on above loan is paid by the Institution, than 25% of the interest paid or Rs.3,000 for degree courses/Rs.1,000/- for diploma courses, per sanctioned number of students, whichever is less, shall be considered as expenses;

Provided that the interest paid on the loan taken for hostel and other works, for which the institution is charging money from the students shall not be considered.

(vi) **Direct recurring Expenses-** The expenses on purchasing periodicals, journals and lab consumables will be considered as recurring expenses but expenditure on books will be considered as capital expenses.

(vii) **Total expenses per student-** The expenses of an institution shall be determined by considering different types of expenses and dividing it by the number of seats sanctioned by All India Council for Technical Education.

(viii) **Expenditure on electricity-** The expenses on electricity utilized in an administrative building and in laboratories for operating equipments excluding the expenses on electricity utilized in hostel, staff quarters and mess will be considered.

21. It is averred in the counter affidavit that the fee for the session 2016-17 could not have been determined by the Committee due to paucity of time. The fee, therefore, determined earlier (2013) would be the fee for session 2016-17. The delay has not been attributed to the institutions. Admittedly, five institutions responded, as against 24 Institutions, for fixing Standard Fee, however, the Committee was unable to determine the fee even in respect of the five institutions. Petitioner-Institution being aggrieved by non determination of fee has pleaded that it would not be

possible, even considering the inflation, to run the Institution, maintain quality and pay higher salary to the teachers upon implementation of the 7th Pay Commission Report, therefore, the Institution would have to run at expenses less than their revenue, thus, eroding its surplus.

22. The learned Additional Advocate General would contend that presently three Institutions out of five have approached the Court, therefore, would urge that all the other Institutions are satisfied with the fee fixed previously, therefore, the Committee would not be in a position to determine Standard Fee and thereafter the fee of each aggrieved institutions. Three Institutions are assailing the impugned order for the reason that they would be adversely affected, in case their fee is not revised. Regulation 4 itself provides that the Committee shall consider the request of the institutions for fixing the final fees, if they are not satisfied by the Standard Fee. In the present case, admittedly, Standard Fee has not been determined by the Committee due to paucity of time though the proposal was submitted by some of the institutions on 21 March 2016. No plausible explanation has been stated in the counter affidavit as to why the Committee could not determine the fee of each of the five institutions that had furnished their proposal. No reason has been assigned as to why the Committee failed to discharge its statutory obligation under the Act 2006 and Regulation 2015. The State is not disputing that the petitioner-Institution is one of the premier private institution of the State and in order to maintain its quality and reputation, fee enhancement sought by it is justified. Private Universities in National Capital Region (NCR) viz. AMITY and JAYPEE are charging @ Rs.2,00,000/- and Rs.2,60,000/- respectively for the same course, whereas, the petitioner-Institution had proposed Rs.1,74,000/-. It is further contended on behalf of the petitioner that all the admission for the session 2016-17 are over and fee charged from the students at Rs.97,400/- has been made subject to the decision of the writ petition.

23. It is admitted position that the Committee had to determine the fee for session 2016-17 which would continue upto 2019-20, however, the Committee skipped 2016-17 and resolved to determine the fee for 2017-18, therefore, one batch of students for session 2016-17 have been left out without determination of fee, which in my opinion, would adversely affect on the Institution as the fee fixed in 2013 would have to be charged from the students for the next three years. In these circumstances, I find merit in the submission of learned counsel for the petitioner that the Committee has not discharged its statutory obligation, therefore, the plea that the institution can prefer an appeal would not arise as there has been no determination of either Standard Fee or fee in respect of the individual Institutions who had approached the Committee. Reliance has been placed on a decision rendered in ***U.P. State Spinning Co. Ltd. v. R.S. Pandey and another***⁹, wherein, the Supreme Court held *where hierarchy of appeals is provided by the statute, party must exhaust the statutory remedies before restoring to writ jurisdiction*.

24. The plea of alternative remedy would not apply in the facts of the present case as Committee has not gone into the question of determining the fee for the session.

25. In ***Ram and Shyam Co. v. State of Haryana***¹⁰ the Supreme Court held that *where the appeal is from "Caesar to Caesar's wife" the existence of alternative remedy would be a mirage and an exercise in futility. When the High Court had entertained a writ petition*

*notwithstanding existence of an alternative remedy this Court while dealing with the matter in an appeal should not permit the question to be raised unless the High Court's reasoning for entertaining the writ petition is found to be palpably unsound and irrational. Similar view was expressed by this Court in **State of U.P. v. Indian Hume Pipe Co. Ltd.**¹¹*

26. It is contended on behalf of the State that the Committee resolved that the fee determined in respect of each of the Institution in the State may be taken to be the Standard Fee, therefore, it is urged that in terms of Sub-regulation (3) of Regulation 4 the aggrieved institute should have approached the Committee for determination of the fee for the session 2016-17. The submission, in my opinion, lacks merit and is not in sync with Chapter IV of Regulation 2015. On a plain reading of Regulation (4), it would provide that the Committee would fix the Standard Fee for the Institutions, and an aggrieved institute may approach the Committee for enhancement or for lowering the fee fixed. Standard fee is not defined in the Regulation 2015, the Additional Advocate General failed to explain the concept of Standard Fee, he would urge that the Standard Fee would mean a fee determined upon random selection of data from some of the institutes, which would be made applicable upon all the institutions of the State at a flat rate, and thereafter, an aggrieved institute would have to approach the Committee for enhancement. The resolution dated 14 June 2016 of the Sub-committee would reflect that in order to determine the Standard Fee, 24 out of 700 institutions were required to submit their proposal. The individual fee determined in 2013 in respect of the said 24 institutions ranged between Rs.26,000/- to Rs.1,00,000/-.

27. In the event of the Committee fixing Standard Fee say at Rs.60,000/- per student, it is evident that all the institutions who are either far below the said sum or institutions which are at higher end would have to approach the Committee for determination of the fee for their respective Institution. In either case, the Committee would have to determine the fee in respect of almost all the Institutions independently. The fallacy in determination of the Standard Fee, as is being submitted by the learned counsel for the respondent, is evident from the fact that the Institutions, which are in the range of Rs.26,000/- and above would have to approach the Committee for lowering the fee and all the Institutions who are say at Rs.70,000/- and above would have to approach the Committee for enhancement their fee, therefore, the plea that without determining Standard Fee, the fee fixation of the institutions cannot be gone into appears to be misconceived. The very concept of Standard Fee as is being sought to be urged is in teeth of the decisions rendered by the Supreme Court on the subject of determination of fee of each institutions.

28. The AICTE under the Chairmanship of Justice Srikrishna (Former Justice of the Supreme Court of India) had come out with a report prescribing guidelines for charging tuition and other fees for professional courses on 7 May 2015. As per the report, Committee in para (3.1.4) opined as follows:

"Higher fees than 'maximum' fees

Institutes who want to excel in technical education are likely to provide facilities beyond the minimum prescribed standards. Such Institutes may be allowed to charge fees higher than the prescribed fees as mentioned below.

The Institute, who has got accreditation from appropriate authority for at least two thirds of their eligible approved programmes/courses, can charge a maximum of 20% additional tuition fees than prescribed maximum fees.

The Institute, who has been awarded 'Autonomous' status by appropriate authority can charge a maximum of 10% additional tuition fees than prescribed maximum fees."

29. The maximum tuition and development fees recommended for B.Tech course city/category wise is as under:

- (i) Type X Cities Rs.1,58,300/-
- (ii) Type Y Cities Rs.1,50,500/-
- (iii) Type Z Cities Rs.1,44,900/-

30. The petitioner-Institution contends that considering their track record and accreditation, the institute is entitled to a further 20% hike over and above the proposed fee.

31. The learned counsel for the respondent would urge that in continuing the fee fixed earlier for 2016-17 is in keeping with the interest of the students. The argument on face value appears attractive, but tested in depth, appears shallow and lacks merit. The interest of the students is sub-served best by institutions of repute, imparting quality education of international standard. The students are prepared to pay more on placement in such institutions; if the argument that is sought to be advanced by the learned counsel for the respondent is accepted then a much lower fee would serve the student interest but unfortunately the State does not sponsor or assist financially in either setting up such private institutions or provide working capital. It is for these reasons the Apex Court held that fixation of fee should be left to the private institutions but should be monitored by a Committee so as to prohibit profiteering or from charging capitation fee; the role of the Committee is not that of a 'big brother' to force upon an institution fees determined three years earlier and compel the institution to run the courses at rates which makes it unworkable, therefore, seriously undermining quality instructions to the students. The cow cannot be milked for long without appropriately feeding it.

32. The cut of date fixed for admission would have no bearing, as admittedly the Committee failed to discharge its statutory duty cast upon it under the Act 2006 and Regulation 2015 framed thereunder. A writ would issue directing the Committee to discharge its legal duty. The conduct of the Committee has not only been casual as reflected from the record but also arbitrary which is deprecated. It is not open for the Committee to say that it would not discharge its statutory duty due to paucity of time.

33. In the facts of the present case, out of 24 institutions only 5 institutions had submitted their proposal and only three institutions have approached this Court for enhancement of their fee for session 2016-17. The other institutions which have not approached are either not having students in requisite number or infrastructure to cater the students, therefore, may have preferred to continue on the fee determined in 2013. The petitioner-Institution being a premium private institute has sought revision, therefore, it was incumbent upon the Committee to have addressed the issue of fee review.

34. In these circumstances, the impugned order dated 22 June 2016 passed by the third respondent-Special Secretary, Government of Uttar Pradesh, Lucknow cannot be sustained, accordingly, quashed.

35. The writ petition is **allowed** with the following directions:

(i) Committee shall fix the fee for session 2016-17 in respect of the Institutions before the Court, after hearing their representative;

(ii) Institutions undertake to submit their proposal before the Committee within one week from date i.e. by 29 August 2016;

(iii) Committee shall determine the fee for 2016-17 within four weeks thereafter i.e. by 26 September 2016;

(iv) The fee charged by the Institution for 2016-17 would be provisional fee subject to the final fee determined by the Committee;

(v) Upon enhancement, the arrears would be payable by the students in installment (half yearly/quarterly) depending upon the hike recommended by the Committee. Installment to be determined by the Committee.

(vi) Committee in future to discharge its statutory function in determination of fee well in advance.

36. No cost.

(2016) 8 ILRA 1341
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.08.2016

BEFORE

THE HON'BLE DILIP B. BHOSALE, C. J.
THE HON'BLE YASHWANT VARMA, J.

Writ C No.- 36294 Of 2016

Mohd. Yaseen

...Petitioner

Versus

Union Of India & Ors.

...Respondents

Counsel for the Petitioner:

Pramod Kumar Srivastava

Counsel for the Respondents:

A.S.G.I., Piyush Mishra

Passports — Correction of date of birth — Guidelines — Exhaustion of alternative remedy — Petitioner sought correction of date of birth in passport after issuance — Ministry of External Affairs Office Memorandum dated 26-11-2015 prescribes detailed procedure and conditions for correction, including limitation period and requirement of genuine documents — Held, such disputes involve factual determination and must be first examined by Passport Authorities in accordance with prescribed guidelines — Writ petition not maintainable at initial stage.

Passports — Change of date of birth — Limitation — Reasonable time — Correction permissible only in bona fide cases and within reasonable period (normally within five years of issuance of passport) — Requests beyond prescribed period ordinarily not entertainable except in limited circumstances such as cases of minors.

Administrative Law — Alternative remedy — Availability of statutory/administrative mechanism — Where effective grievance redressal mechanism exists including Passport Seva system, Passport Adalats and recourse before Regional Passport Officer, writ jurisdiction should not be invoked without exhausting such remedies.

Writ Jurisdiction — Scope — Direction to approach competent authority — High Court declined to adjudicate factual dispute — Liberty granted to petitioner to approach Regional Passport Officer for consideration in accordance with guidelines — Authority directed to decide expeditiously.

In Result: Writ petition disposed of with liberty to petitioner to approach Regional Passport Officer for redressal of grievance in accordance with applicable guidelines.

(Delivered by Hon'ble Dilip B. Bhosale, C. J.

&

Hon'ble Yashwant Varma, J.)

1. Heard Sri Pramod Kumar Srivastava, learned counsel for the petitioner and Sri Piyush Mishra, learned counsel appearing for the respondents.

2. The petitioner has instituted these proceedings seeking correction of his date of birth as recorded in his passport application. The application made for the grant of a fresh passport is stated to be "On Hold". The issue itself arises on account of the fact that the petitioner holds a passport issued on 27 January 2014 and which is valid upto 26 January 2024. His date of birth as recorded in this passport is stated to be 10 June 1992. He is stated to have made an application on 13 June 2016 for correction of his date of birth. As is evident from his application for correction, the petitioner admits that mistakenly the date of birth in his passport has come to be recorded as 10 June 1992 whereas in fact it should be 7 January 1996. He relies upon a certificate issued by the Board of High School, U.P. in support of his claim that his correct date of birth is 7 January 1996.

3. We find that on more than one occasion, writ petitions are being preferred before this Court seeking resolution of such disputes. However, we find that detailed guidelines formulated by the passport authorities stand duly enshrined in an Office Memorandum dated 26 November 2015 issued by the Ministry of External Affairs in the Union Government. The Office Memorandum is in the following terms:

"No. VI/401/2/5/2001

Ministry of External Affairs CPV Division

PV-I Section

Patiala House Annexe, New Delhi the 26th November, 2015

OFFICE MEMORANDUM

Subject:-Guidelines with regard to change/ correction of dates of birth entries in the passport of an applicant already held by him/ her reg.

It may be mentioned that the necessary provisions with regard to change/correction of dates of birth in the passports are contained in the Passports Manual, 2010 and from time to time number of circulars have been issued by the Ministry on this issue.

2. It is pertinent to mention that recently, the High Court of Kerala while hearing the WP No. 9073 of 2015 (Jayakumar Vs UOI & others) has delivered a land-mark judgment on the issue of correction/change of entries regarding date/place of birth in the passport. During the course of arguments, the Court has elaborated upon the fact that the details entered in the Passport cannot be lightly interfered with, that too after many years without any sustainable cause and without any explanation as to why initially such a wrong declaration was made and why now a change is sought that too based on a document which was available with the applicant when the original declaration was made.

The High Court has further observed that the difference in dates of birth whether two years or twenty years, the power 'should be one to correct bonafide mistake and that too within a reasonable time. Even a Civil Court declaration after many number of years would lead to the applicant having possibly perpetrated a fraud on many other who acted upon the authenticated declaration of sovereign State as to the age status of its Citizen.

3. The Court, therefore, while dismissing the petition of the applicant petitioner has directed that the authorities would do well to introspect on the observation made herein to make suitable amendments to the circular. It has also been directed that there would be no scope for leaving any liberty on the petitioners to approach a Civil Court too on the reasoning adopted by this Court and the delay occasioned in seeking the correction.

4. Hence, the core principle of the judgment of the High Court of Kerala is that only the bonafide claims of the applicants for the change/correction of the date of birth in the passport should be accepted and that too if the same are submitted by them within a reasonable time limit after the issuance of passport. In pursuance of the directions of the High Court, it has been decided that henceforth, all the PIA shall follow the following instructions/guidelines in order to consider the claims/request the applicant for the change/correction of entries regarding of date of birth in their passports:

(i) Where an applicant claims clerical/technical mistake in the entry relating to birth/place of birth in the passport and asks for rectification/correction:

In all such cases, the documents produced earlier as proof of date of birth/place of birth at the time of issue of passport may be perused (if not already destroyed) by PIA. In case, it is a clerical mistake either by the applicant or the PIA, date/place of birth correction may be allowed by issue of fresh booklet; in the former case by charging fee for fresh passport and in the latter 'gratis' (same as mentioned in Ministry's Circular No. VI/401/2/5/2001, dated 29/10/2007).

(ii) If an applicant applies for the change of date of birth in the passport **within a reasonable period of time i.e. within a span of five (5) years from the date of issue of passport having the alleged wrong date of birth**, with the birth certificate issued by the Registrar of Births & Deaths stating that the date of birth recorded in the passport was based on the entries mentioned documents other than the Birth Certificate, the request of such an applicant irrespective of the difference in the dates of birth, may be considered by the Passport Issuing Authority. However, before the issuance of passport with changed date of birth, the Passport Authority shall also levy appropriate penalty on the applicant for obtaining passport on previous occasion by providing wrong information regarding his/her date of birth.

(iii) The cases where the applicant comes to PIA for change/correction with regard to date of birth in the Passport after a period of five years from the date of issue of passport with alleged wrong date of birth, **no such request shall be entertained/accepted by the PIA and be rejected out rightly.**

However, an exemption in this regard may be given to an applicant who was minor at the time when passport with alleged wrong date of birth was issued to him. As and when such an applicant after attaining the age of majority applies for the passport with the request to change the date of birth in the

passport issued to him when he was minor, the PIA irrespective of the duration of the issuance of passport may accept his case for consideration and if is satisfied with the claim and document(s) submitted by the applicant, may accept his request for change of date of birth in the passport without imposition of any penalty.

(iv) In no way, the Passport Authority will relegate the applicant to obtain the declaratory court order to carry out changes with regard to date of birth in the passport, as the Passport Authority subject to the condition that the case has been submitted by the applicant within the stipulated limit of 5 years from the date of issuance of passport (except the cases of minor passport holder as detailed in para 5(ii) above) would now be eligible to accept the genuine cases irrespective of the difference of dates of birth.

5. In view of the above, all the Passport Issuing Authorities are hereby requested to follow the above guidelines scrupulously to consider the requests of applicants for change/correction of dates of birth entries in the passports. Provisions contained in Chapter '4 and 8' of the Passport Manual, 2010 stand revised to the extent as stipulated above.

(Muktesh K. Pardeshi)
Joint Secretary (PSP & CPO) &
the Chief Passport Officer"

4. Further supplementary instructions have also been issued by the Department concerned after taking into consideration a detailed judgment rendered by a learned Single Judge of the Kerala High Court in Jayakumar Vs. The Regional Passport Officer¹ These supplementary instructions are to the following effect:

**"FAQ
CORRECTION OF DATE OF BIRTH IN PASSPORT-**

**NEW GUIDELINES BASED ON KERALA HIGH COURT JUDGMENT
(Case No. 9073/2015 dated 23/06/2015)**

Major Applicants

1. If the applicant was a major when his/her first passport with incorrect date of birth was issued, he/she can correct it, within five years of issue of the first passport. No change of date of birth is allowed afterwards.

Minor Applicants

2. If the applicant was a minor when his/her first passport was issued, he/she can correct the date of birth, any time when he/she is a minor, or when he/she first time applies for reissue of passport after becoming a major.

Requirement of Documents

3. Only a genuine birth certificate issued by the competent authority will be accepted as a proof of age for correction of date of birth in the passport. No other document such as School Certificate etc. will be accepted for correction of date of birth. In exceptional cases, official documents proving correct date of birth may be considered.

Fine payable

4. Prescribed fine shall be levied on the applicant, who seeks correction of date of birth in the passport, in accordance with the relevant provisions of the Passports Act, 1967 and Rules framed there under.

Fake documents

5. Application fee and penalty will not be reimbursed if the application for correction of date of birth is found to be incomplete, faulty or fraudulent. In case of fraudulent applications for change of date of birth based on forged or fake documents, appropriate action will be taken in accordance with the Passports Act."

5. Apart from the above, we find that the Ministry of External Affairs under the "*Passport Seva Project*" has put in place a detailed grievance redressal system enabling applicants to seek information, make enquiries and their grievances redressed by various modes of electronic communication. Apart from putting in place a mechanism for lodging of grievances through electronic means, it also envisages the holding of Passport Adalats and Passport Mela in the course of which such disputes can be easily resolved. This grievance mechanism stands duly enumerated in the order dated 10 September 2014 issued by the Ministry of External Affairs.

6. Issues relating to correction of the date of birth as recorded in a passport would necessarily entail an enquiry into facts which can best be addressed, looked into and remedied by the passport authorities themselves at the first instance. We are, therefore, of the view that grievances of the nature raised in this petition are liable to be entertained only after the petitioner has exhausted the remedies provided and put in place by the Union Government in the first instance.

7. We find that the grievances of the petitioner can be duly redressed by the Regional Passport Officer, the third respondent herein, in terms of the Office Memorandum dated 26 November 2015 referred to above.

8. We accordingly dispose of this writ petition leaving it open to the petitioner to approach the Regional Passport Officer and seek redressal of his grievances in light of the Office Memorandum and Supplementary Instructions referred to hereinabove. Needless to state in case, such an application is made the third respondent will attend to the same and dispose of the said application expeditiously.

(2016) 8 ILRA 1346
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.08.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 40772 Of 2015

Anand Dubey

...Applicant
Versus

State Of U.P.

...Respondent

Counsel for the Applicant:

Manish Tiwary, Anurag Shukla, Ashwini Kumar Awasthi

Counsel for the Respondent:

G.A., Irfan U Huda

Criminal Procedure Code, 1973 — Bail — Dowry death case — Considerations for grant of bail — Delay in FIR and dying declaration — Bail application in offences under Ss. 498-A, 304-B, 201 IPC and Ss. 3/4 Dowry Prohibition Act — FIR lodged after considerable delay of nearly three months from incident — Dying declaration of deceased indicated accidental burn injuries and did not implicate accused — Conduct of accused in informing parental side and taking deceased for treatment noted — Held, delay in FIR coupled with exculpatory dying declaration and surrounding circumstances create grounds for grant of bail.

Criminal Procedure Code, 1973 — Bail — Evaluation of circumstances — Prima facie satisfaction — At bail stage, final adjudication of guilt not required — Court to consider nature of evidence, period of detention, likelihood of early conclusion of trial and possibility of tampering with evidence — Absence of convincing material indicating likelihood of tampering and prolonged custody weighed in favour of applicant.

Criminal Procedure Code, 1973 — Bail — Conditions — Safeguards — Bail granted subject to conditions ensuring presence of accused and non-interference with evidence — Trial court empowered to cancel bail upon breach of conditions.

In Result: Bail granted subject to conditions.

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. Counter affidavit filed by Sri Irfan U. Huda, learned counsel for the complainant is taken on record.

2. Heard Sri Gopal S. Chaturvedi, learned Senior counsel assisted by Sri Anurag Shukla, learned counsel for the applicant, Sri Irfan U. Huda, learned counsel for the complainant and the learned A.G.A. for the State.

3. Submission of learned counsel for the applicant is that the incident is said to have taken place on 17.11.2014 but the FIR of the case has been lodged on 25.2.2015 on the basis of an application dated 13.2.2015. It has been further pointed out that according to the version of the FIR itself, the information about the deceased having caught fire was communicated to the parents of the deceased by the applicant's side and it is not a case where the incident of burning was concealed from the parents. It has been further pointed out that this is the admitted case of the prosecution, and the first informant has also admitted this fact, that on getting the information the first informant had reached the matrimonial home of the deceased and had gone to the hospital where she had been admitted by that time and had found the deceased being treated. Further submission is that during the period when the deceased was admitted in the hospital, the dying declaration of the deceased was also recorded. The attention of the Court was drawn to the dying declaration of the deceased, which is Annexure-3 to the bail application, according to which, the version of the incident as narrated by the deceased was that on 16.11.2014 at about 7.00-8.00 p.m., while she was in the kitchen she accidentally caught fire. No allegation was made by the deceased against applicant or anyone else of his family. It was also stated by the deceased that after she caught fire her husband rushed to douse the fire and in that process he also received burn injuries. In this regard, the attention of the Court has been drawn towards Annexure-4 of the bail application, which is in the form of several medical papers regarding the treatment of burn injuries which were received by the applicant. Further submission of counsel is that subsequently in order to give better treatment she was being taken to Lucknow but she succumbed in the way to the injuries and died. The contention raised by the learned counsel for the applicant is that had there been any truth in the allegation made against the applicant then it is wholly incomprehensible as to how and under what circumstances, the First Information Report was not lodged against the applicant earlier by the first informant, who was very much present there even before the deceased died. Much emphasis has been laid by the learned counsel for the applicant on the extra-ordinary delay in lodging the FIR. Submission is that the yawning gap between the occurrence and the lodging of the FIR is by itself sufficient to demonstrate that the version given in the FIR is nothing but an out-come of confabulation, deliberation and afterthought which by itself denudes the prosecution version from all its credibility. Further submission is that had there been any ill-intention on the part of the applicant and had he had any guilty conscience then there was no question for him to communicate the information of incident to the parents of the deceased and thereby give the opportunity to the first informant to come and talk to his daughter about the incident. It is further submitted that as the deceased had nothing to speak against the applicant, the applicant also had no reason to hide the incident from her parents. In fact as the first informant also had nothing to report against the applicant, he did not lodge any FIR for almost three months. For pure emotional reasons, even the post mortem of deceased was not got done because as a mark of respect it was a joint decision of first informant and applicant's family not to subject the deceased to any further mutilation. It was only long after the occurrence that present FIR was lodged with all sorts of mendacious allegations. The conduct of the accused giving immediate information to the parents is by itself a strong circumstance to indicate his innocence and bonafides. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required. It has also been submitted that the applicant is languishing in jail since 24.7.2015 and in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

4. Sri Irfan U. Huda, learned counsel for the complainant has opposed the prayer for bail and has submitted that the incident had taken place initially in the evening of 16.11.2014 but the medical papers indicate that the deceased was admitted to the hospital on the next day, which indicates that medical succour was not provided in time to the deceased. It has been further submitted that the deceased was not discharged from the hospital with the consent or referral of the Doctor but yet she was taken away from the hospital and she died on the way to Lucknow and such an act of accused was not proper and in turn contributed to the death of the deceased. It has been further submitted by the learned counsel for the complainant that initially the burns received by the husband were said to have been 15% but the subsequent medical papers of the hospital at Lucknow where the applicant was treated would indicate that his burns have been shown to be about 40%. Learned counsel for the complainant has tried to argue that it indicates that there is deliberate attempt on the part of the applicant to exaggerate his own injuries and thereby raise a false defence plea in his favour.

5. Perused the record.

6. The final verdict about the guilt or innocence of accused can be arrived at only through a proper trial but after perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, this Court is of the view that the applicant may be enlarged on bail.

7. Let the applicant Anand Dubey involved in Case Crime No. 142 of 2015 u/ss 498A, 304B, 201 IPC and Section 3/4 of Dowry Prohibition Act, P.S. Dhoomanganj District Allahabad be released on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(1) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicant will personally appear on each and every date in the court and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

8. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

9. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merits of the case.

(2016) 8 ILRA 1349
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.08.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 41702 Of 2015

Raju	...Petitioner
	Versus
State Of U.P.	...Respondent

Counsel for the Petitioner:

Santosh Kumar Tiwari, Madan Mohan Yaduvanshi

Counsel for the Respondent:

G.A.

Criminal Procedure Code, 1973 — Bail — Murder case — Appreciation of prima facie evidence — Rejection of bail — Bail application in offences under S. 302 IPC and S. 3(2)(v) SC/ST Act — Prosecution case supported by ocular version of informant and corroborated by medical evidence indicating multiple injuries including firearm and sharp-edged weapon injuries — Held, presence of strong prima facie evidence and gravity of offence disentitle applicant from grant of bail.

Criminal Procedure Code, 1973 — Bail — Conduct of witness — Non-interference by eyewitness — Contention that eyewitness did not attempt to save deceased — Held, conduct of witness varies with circumstances and individual disposition — Where assailants were armed with deadly weapons and actively using them, failure of witness to intervene cannot by itself discredit prosecution version.

Criminal Procedure Code, 1973 — Bail — Scope of consideration — Trial stage — Detailed appreciation of evidence to be undertaken at trial — At bail stage, existence of prima facie case sufficient — Court should refrain from exhaustive evaluation of evidence.

In Result: Bail application rejected with direction to trial court to expedite proceedings.

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. Counter affidavit filed by the learned AGA is taken on record.
2. This application has been filed seeking the release of the applicant on bail in Case Crime No. 435 of 2014 u/s 302 IPC and Section 3(2) 5 of SC/ST Act, Police Station Harduaganj District Aligarh.
3. Heard learned counsel for the applicant and learned A.G.A.
4. Perused the record.

5. Submission of learned counsel for the applicant is that there is no independent witness of the occurrence and the incident took place in night hours. There was no sufficient light on spot. No identification parade has been conducted by the police and it appears that nobody has witnessed the occurrence and the interested family members have been introduced as witnesses artificially. It is further submitted by the learned counsel for the applicant that there is no evidence on record to indicate that the first informant, who was the brother, made any attempt to save his deceased brother, while he was under attack, which in its turn would give rise to the inference that probably he was not present at the time of his brother's murder.

6. Learned AGA has opposed the prayer for bail and has drawn the attention of the Court to the contents of the FIR, according to which, the deceased was carried by co-accused Kali Charan on the pretext that he was being called by some other co-accused Sanjay and Bhupendra in order to settle the dispute. Further submission is that the deceased was having inimical terms with co-accused Sanjay. It was further pointed out that the first informant, who is the brother of the deceased smelled something foul and therefore, he accompanied the deceased's brother. It was thereafter when the deceased reached the place of occurrence, he found co-accused Bhupendra and Raju (applicant) standing there and then the deceased was caught hold by co-accused Kali Charan, while the applicant and co-accused Bhupendra started making delivery of blows by their knives. Co-accused Sanjay fired shots at the deceased. Learned AGA has also drawn the attention of the Court to the post mortem report which lends the complete corroboration to the prosecution story, which indicates the presence of incised wounds and punctured wounds on the body of the deceased apart from the fire-arm wounds. It was further contended that in a case like this where the accused persons were armed with deadly weapons like knives and fire-arms and where the weapons were used also then in such a condition it is not very unnatural for the witnesses not to have meddled in the incident as that would have necessarily endangered their lives. Moreover, the conduct of any witness depends on his own individual traits and vary from man to man. A more audacious witness may jump in the fray and may risk his own life, while the other who may be timid may take to his heels. Yet another may get dum-founded in utter nervousness. Therefore, if the eye witness informant did not attempt to save his brother, there is nothing such in his conduct, specially when the applicants were having deadly weapons and were also using them, which may be deemed sufficient to disbelieve the witness or doubt his version of occurrence. It was further submitted that final appreciation of evidence can more appropriately be done at the stage of the trial. For the present, *prima facie*, there are strong circumstances and evidence available against the accused persons, which is corroborated by the medical evidence.

7. Looking to the nature of offence, its gravity and the evidence in support of it and the overall circumstances of this case, this Court is of the view that the applicant has not made out a case for bail. Therefore, the prayer for bail of the applicant is rejected.

8. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merits of the case.

9. However, it is expected that the trial court shall make all sincere endeavours to expedite the proceedings of the trial and conclude the same as expeditiously as possible without granting unnecessary adjournment to either side.

(2016) 8 ILRA 1351
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2016

BEFORE

THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Second Appeal No.- 1263 Of 2002

Sita Ram Tekriwal

...Appellant

Versus

Raj Kumar & Ors.

...Respondents

Counsel for the Appellant:

Shri G.N. Varma, Dr. Madhu Tandon, Shri H.M.B. Sinha , Shri Indrajeet Singh Yadav, Shri Kapil Rathore, Shri R.K. Srivastava, Shri S.S. Yadav, S.S. Sharma

Counsel for the Respondents:

Shri M.K. Gupta, Shri A.K. Gupta, Shri Pankaj Agarwal

Held –

Paragraph 1: Nature of the Appeal

The present second appeal challenges a first appellate court judgment dated September 18, 2002, passed by the Additional District Judge (ADJ), Gorakhpur. The ADJ's judgment had set aside a trial court order dated November 17, 1983, thereby allowing the first appeal and decreeing the plaintiffs' original suit (O.S. No. 102 of 1980) for the reliefs claimed.

Paragraph 2: The Plaintiffs' Case

The plaintiffs filed the original suit asserting ownership over 26,000 square feet of land in Purdilpur, Gorakhpur. They had leased it to the defendant (Sita Ram Tekriwal) via a registered lease deed dated February 23, 1972, for a 23-year term to run a cinema. The agreement required a monthly rent of Rs. 931 for the first 15 years (increasing to Rs. 1,131 thereafter) and a premium of Rs. 8,000. The defendant defaulted on the premium—paying only Rs. 500 later under a written acknowledgment—and stopped paying monthly rent in September 1977. Consequently, the plaintiffs terminated the lease via a 30-day registered notice dated March 25, 1980, and sued for eviction, recovery of possession, outstanding dues of Rs. 45,716, and mesne profits.

Paragraph 3: The Defendant's Pleadings

In his written statement, the defendant admitted executing the registered lease deed, taking possession, and defaulting on the premium except for a Rs. 500 payment. However, he contested the eviction by arguing that the land was demarcated under the U.P. Urban Zamindari Abolition Act, stripping the plaintiffs of ownership. He further claimed that the payments were inherently premium payments rather than rent, which automatically transformed his status into an absolute owner (Bhumidhar) under Section 164 of the UPZA & LR Act. Finally, he contended that the 30-day notice could not terminate the lease because a permanent cinema building had already been constructed on the plot.

Paragraph 4–5: Lower Court Trajectory

The trial court (Civil Judge-I, Gorakhpur) initially dismissed the plaintiffs' suit on November 17, 1983. On appeal, the first appellate court reversed this dismissal on September 18, 2002, fully decreeing the suit in

favor of the plaintiffs. Aggrieved by this reversal, the defendant preferred the present second appeal before the High Court.

Paragraph 6: Formulation of Substantial Questions of Law

The High Court noted that while the second appeal was admitted in 2003, no substantial questions of law were framed at that time. Upon reviewing the records and hearing arguments, the Court framed four specific substantial questions of law concerning: (1) the alleged demarcation under the U.P. Urban Zamindari Abolition Act, (2) the applicability of the doctrine of estoppel and acquiescence against the defendant, (3) whether the defense was barred by law, and (4) the legal validity of the 1972 lease deed.

Paragraph 7: Arguments on Behalf of the Appellant (Defendant)

The appellant's counsel argued that the property was agricultural land being used for non-agricultural purposes without a formal declaration under Section 143 of the UPZA & LR Act, meaning the civil court lacked jurisdiction. He maintained that the land had vested in the State post-demarcation, making the lease deed void. He also asserted that the appellant had become a sub-tenant, placing exclusive jurisdiction with the revenue court, and noted that the failure to substitute a deceased co-plaintiff (Plaintiff No. 2) should fatalize the decree.

Paragraph 8: Arguments on Behalf of the Respondents (Plaintiffs)

The respondents' counsel countered that because the defendant executing the registered lease deed and taking possession were admitted facts, he was strictly barred from challenging his lessors' title under Section 116 of the Indian Evidence Act. He highlighted that issues regarding Section 331-A or lack of jurisdiction were never raised in the lower courts and could not be introduced at the second appeal stage. Additionally, he stated that the death of one co-owner does not prevent surviving co-owners from pursuing a valid eviction suit.

Paragraph 9: Finding on Demarcation (Question 1)

The High Court observed that the burden of proving that the land was demarcated under the U.P. Urban Zamindari Abolition Act lay squarely on the defendant, who failed to produce any documentary evidence. The first appellate court properly scrutinized the facts to conclude that no such demarcation ever occurred. Affirming this factual finding, the High Court answered the first substantial question of law in the negative, against the appellant.

Paragraph 10–12: Finding on Estoppel under Section 115 (Question 2)

The Court extracted Sections 115 (Estoppel) and 116 (Estoppel of tenant) of the Indian Evidence Act, 1872. It held that the defendant intentionally induced the plaintiffs to hand over vacant possession of the land by executing a registered lease deed and promising to pay rent. Having obtained possession based on that representation, the defendant cannot turn around and deny the plaintiffs' title or their right to reclaim possession. Consequently, his defense is barred by Section 115.

Paragraph 13: Finding on Tenant Estoppel under Section 116 (Question 2 Continued)

The Court ruled that since the appellant entered the property purely as a lessee, Section 116 strictly prohibits him from denying that his landlords held a valid title at the commencement of the tenancy. His defense is fundamentally barred by the principles of estoppel and acquiescence. The second substantial question of law was thus decided in the affirmative, against the appellant.

Paragraph 14–15: Defense Barred by Law (Question 3)

Combining its prior findings, the Court ruled that a tenant cannot legally alter their status to clear their own title against a landlord without a formal declaration from a competent revenue court, which the defendant lacks. His attempts to deny his prior admissions and claim Bhumidhari rights are entirely barred by Sections 115 and 116 of the Indian Evidence Act. The third substantial question of law was decided in the affirmative, against the appellant.

Paragraph 16: Validity of the Lease Deed (Question 4)

The Court found no evidence of fraud, misrepresentation, or structural illegality in the execution of the lease deed dated February 23, 1972. It noted the paradox in the appellant's argument: if the lease deed were truly void, his possession of the land would be completely unauthorized, requiring an immediate restoration of

possession to the plaintiffs. Finding the lease valid and the appellant estopped from arguing otherwise, the fourth substantial question of law was decided in the negative.

Paragraph 17–19: Conclusion and Dismissal

The High Court concluded that the lower appellate court's judgment was thoroughly well-reasoned, free from perversity, and based on a correct appreciation of evidence. The tenant cannot build a defense on claims that contradict his own written agreements. Finding all arguments raised by the appellant unsustainable, the High Court dismissed the second appeal with costs.

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. Present second appeal has been preferred against the judgment dated 18.9.2002 passed by Additional District Judge Court, No.-2, Gorakhpur passed in Civil Appeal No. 79 of 1994, Vishwanath Prasad & others Vs. Sita Ram Tekriwal, by which judgment dated 17.11.19823 passed by Civil Judge-I, Gorakhpur in O.S. No. 102 of 1980 Vishwanath Prasad and others Vs. Sita Ram was set aside and the first appeal was allowed for the relief claimed in the original suit.

2. In original Suit No. 102 of 1980 the plaint case in brief was that plaintiffs are owners of land detailed at the foot of plaint measuring approximately 26000 square feet situated in mohalla Purdilpur, Gorakhpur. The defendant Sita Ram Tekriwal took the land in possession from the plaintiff on lease by registered lease-deed dated 23.2.1972 for a period of 23 years and took the possession of said land same day for running the cinema. The defendant agreed to pay from the date of lease-deed Rs. 931/- per month as monthly rent for this lease in first week of each calendar month regularly up to period of 15 years, and thereafter at the rate of Rs. 1131/- per month for the remaining lease period in the like manner. The defendant had also agreed to pay Rs. 8000/- as premium within 9 months from the date of execution of lease deed to the plaintiff. The defendant did not pay Rs. 8000/- the amount of premium within time specified in lease deed in spite of several demands. Subsequently on protest and demand from the side of plaintiff, the defendant gave a signed written undertaking dated 4.2.1975 by which he acknowledged the liability to pay premium of amount of Rs. 8000/- and assured the plaintiff for its payment at an early date. But he did not honoured his assurance and avoided the payment of premium amount, and on 27.1.1978 defendant only paid Rs. 500/- towards amount of premium for which he made the endorsement of part-payment on the back of writing given by him on 4.2.1975 in his handwriting and signature and again acknowledged the liability to pay remaining amount of Rs. 7500/- by the same endorsement. Since September, 1977 the defendant had not paid the monthly rent of Rs. 931/- per month in spite of demand and request of plaintiffs. Therefore under terms of lease deed, in case of non payment of rent continuously for 6 months, the plaintiffs are entitled to enter into possession of land in suit by terminating the lease of defendants by giving 30 days' notice. As the defendants had failed to pay monthly rent of disputed land for more than 6 months in continuation the plaintiff sent a registered post notice dated 25.3.1980 to defendant through counsel for terminating the lease and for the demand of amount of rent due as well as the remaining amount of premium due alongwith interest. Said notice was served on defendant on 27.3.1980 but inspite of its service, the defendant had neither paid the amount of rent and premium due nor had handed over the vacant possession of the land in suit. Therefore, the plaintiff had filed suit for recovery of possession over land in suit detailed in plaint by ejecting the defendant and recovery of Rs. 45,716/- as the amount due as above

and also for recovery of damages at the rate of Rs. 931/- per month pendente lite and till recovery of actual possession of disputed property.

3. In original suit, defendant had filed written-statement in which he had admitted that he had taken possession of disputed land from plaintiffs after execution of registered lease-deed dated 23.2.1972 and had agreed to pay monthly rent for 15 years at the rate of Rs. 931/- per month and thereafter monthly rent at the rate of Rs. 1151/ per month and had also admitted to pay premium amount of Rs. 8000/- against which he had paid Rs. 500/-. Except these admissions, the defendant (present appellant in second appeal) had denied other plaint averments. In his written-statement, the defendant had further pleaded that although lease deed was executed for plot no. 216 but the area mentioned it also included the area of plot no 215. The disputed plot no. 216 was Khudkasht land of plaintiffs no. 1 to 4 before the abolition of urban zamindari, but after its demarcation plaintiff had lost its rights of ownership. The demarcation of these lands became final under section 3 of this Act. When plaintiffs no. 1 to 4 needed the money then they had leased their aforesaid 26000 sq. Feet land to defendant the limits of which is given in lease-deed by which disputed land was transferred to defendant and the defendant had undertaken to pay rent and premium as stated above, but in fact it is not amount of rent but is amount of premium. Therefore, defendant had automatically become Bhumidhar on said land. The lease deed executed by plaintiffs no. 1 to 4 was illegal and ineffective. The plaintiffs had already received Rs. 61,946/- from time to time from defendant who became owner of disputed land under section 164 of UPZA & LR Act, 1951. Plaintiff cannot terminate the lease in favour of defendant by notice of 30 days because cinema building is constructed over the said land. The acknowledgment dated 4.2.1975 executed by defendant was not possible, therefore the said acknowledgment cannot confer any right to plaintiff. Suit is liable to be dismissed.

4. After framing of issues and affording opportunity of hearing to parties the court of Civil Judge-I, Gorakhpur had dismissed the original suit by its judgment dated 17.11.1983. Against this judgment of trial court, Civil Appeal no. 79 of 1994 they've dated at that Nicola Manitoba your will that we'll you in the Lane on the month is that if the peaceful review the sub number the sub to us for parch totally because delay are to her bumper from the will only you number was but they arewith this amount on the sum of the's was delayed in manner in the ballroom telephoning one, positively Locarno Khatoni because you lay militiaman order will was preferred by plaintiffs which was heard and allowed by the judgment dated 18.9.2002 of Additional District Judge, Court No.-2, Gorakhpur. By this judgment, the first appeal was allowed and original suit was decreed for the relief sought in plaint.

5. Against impugned judgment dated 18.9.2002 of the first appellate court, present second appeal has been preferred by the defendant of original suit.

6. This second appeal was admitted by order dated 7.4.2003 of this Court, but at that time no substantial question of law was framed. Therefore after hearing, after perusal of memorandum of second appeal, original records and on the basis of arguments preferred by learned counsels for the parties, following substantial questions of law are framed for deciding the appeal on merits:

(1) Whether the disputed plot no. 216 had been demarcated under U.P. Urban Zamindari Abolition Act? If so, its effect on rights of plaintiffs-respondents?

(2) Whether the defence advanced by defendant-appellant is barred by doctrine of estoppels and acquiescence?

(3) Whether the defence advanced by defendant-appellant is barred by law?

(4) Whether the lease-deed dated 23.2.1972 executed by plaintiffs-respondents in favour of defendant-appellant is null and void?

7. Learned counsel for the appellant contended that this is a suit for recovery of possession of bhumidhari land but there is evidence that the said land is being used for non-agricultural purposes. Since no proceeding under Section 143 of UPZA & LR Act has been conducted, therefore no finding could be given about change of agricultural nature of disputed property. Without considering these facts, judgment given by lower appellate court is erroneous. He further submitted that after abolition of zamindari the UP urban Area Zamindari Abolition Act has come into operation, and disputed land was demarcated. So plaintiffs had been deprived of their alleged bhumidhari rights because disputed property had vested in State by operation of law; but these facts were suppressed by the plaintiffs/respondents at the time of execution of registered lease-deed in question which in itself is a void document and is not enforceable under the law. He further submitted that defendant/appellant became sub-tenant of the disputed property which was earlier held by plaintiffs, so relief of eviction is exclusively within jurisdiction of revenue court. Unless it is proved that disputed property is non-bhumidhari land, as such, the relief cannot be granted to plaintiffs. The lower court should have framed issues on this point before deciding the matter. He submitted that civil court has no jurisdiction to grant relief for agricultural property. For these reasons appeal should be allowed. He admitted after taking possession to the disputed land from plaintiffs, defendant/appellant had stopped paying rent to him admissible under registered lease-deed executed by the parties. His submission was that in aforesaid circumstances civil court has no jurisdiction to grant relief to plaintiffs. He further contended that plaintiff no.-2 of the original suit had died and was not substituted; therefore relief cannot be granted regarding his share. These points were not considered by lower appellate court at the time of passing of the impugned judgment, therefore appeal should be allowed.

8. Learned counsel for the respondents contended that defendant/appellant had admittedly executed registered lease deed dated 23.2.1972 and on same day had taken possession of said land and agreed to pay rent, as admitted in the pleadings of the parties. His submission was that in any circumstances, defendant cannot deny or challenge the right of his lessor and plea taken by him is barred by doctrine of estoppel and from the provisions of Section 116 of Indian Evidence Act. He further submitted that no plea of bar under Section 331-A of UPZA & LR Act and lack of jurisdiction of court was taken by the appellant in lower court. Such plea cannot be raised directly in second appeal by defendant/appellant. He further submitted that bhumidhari rights and title of plaintiff over dispute property is admitted fact in the pleadings, and there is no evidence to prove

that disputed property was ever demarcated; therefore the judgment of lower appellate court giving such finding is without infirmity or error. He further submitted that in spite of absence of one co-owner the other co-owners can file suit on his behalf for eviction; therefore, the death of plaintiff no. 2 will not bar relief required in the suit. There is no error in the impugned judgment, so appeal should be dismissed.

9. The main point of contention is that the disputed land has been demarcated under the U.P. Urban Zamindari Abolition Act, therefore that plaintiffs-respondent had lost his legal rights over it. The pertinent point is that if the said land was demarcated then that must have been some evidence of it. This point was not properly considered by the trial Court, but the first appellate Court had properly scrutinized the evidences and after discussing them, gave specific and direct finding of fact that said land was not demarcated. This finding of the first appellate Court appears correct that had there been any demarcation, there must have been evidence for the same. The absence of any evidence regarding demarcation leads to only inference that the demarcation of disputed land was not proved. The fact of demarcation was pleaded and asserted by the defendant-appellant, therefore burden of proving the same is on defendant-appellant; but he had failed to discharge this burden. Therefore findings of the first appellate Court in this regard is found correct that the disputed land of plot no. 216, Purdilpur was never demarcated under the U.P. Urban Zamindari Abolition Act, and said findings are hereby confirmed. Accordingly the first substantial question of law is decided in negative, against appellant-defendant and in favour of the respondent-plaintiffs.

10. Sections 115 and of 116 of the Indian Evidence Act, 1872 reads as under:

“115. Estoppel.-When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

Illustration- A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it. The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

116. Estoppel of tenant; and of licensee of person in possession.- No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given.”

11. In original suit, in reply to plaint averments, the defendant had filed written-statement in which he had admitted that the disputed land was in possession and user of plaintiffs. After accepting the plaintiffs to be the owner and title holder of said property he had taken possession of it from them after execution of registered lease-deed dated 23.2.1972 and had agreed to pay monthly rent for 15 years at the rate of Rs. 931/- per month and thereafter monthly rent at the rate of Rs. 1151/ per month and had also admitted to pay premium amount of Rs. 8000/- against which he had paid Rs. 500/-. Had there been no execution of lease-deed dated 23.2.1972 and contract for payment of monthly rent as well as premium amount, there would have been no occasion for the plaintiffs to hand over possession of disputed property and there was no reason for defendant-appellant to get the possession of the same.

12. In this matter the defendant-appellant had by his act and declaration in form of registered lease-deed had intentionally and deliberately caused the plaintiffs-respondents to believe that he will pay lease rent and premium and shall recognize right of plaintiffs as owner/ lessor of the property in question and hand over its possession to them after stipulated period. It is also admitted that acting upon such belief, the plaintiffs-respondents had handed over the possession of disputed property to defendant-appellant. Therefore the defendant-appellant cannot be allowed in any suit to deny the truth of title and right to get possession back of said property. His defence as well as the contentions in this appeal are not acceptable, and barred by section 115 of the Indian Evidence Act.

13. After entering into registered lease deed and the contract is relating it, the appellant became lessee and tenant of the disputed immovable property. Therefore under section 116 of the Indian Evidence Act, he or any person claiming through him cannot be permitted to deny being the tenant and lessee of the plaintiff-respondents. The defence of the appellant is barred by the principle of estoppels and acquiescence. Accordingly the 2nd substantial question of law is decided in affirmative, and against appellant-defendant.

14. In view of the findings of first and second substantial questions of law, as above, it is held that after its earlier admission at the time of execution of registered lease-deed dated 23.2.1972 regarding the title, lessor-ship and ownership of plaintiffs and their right to get back possession of disputed property, the defence of the defendant-appellant containing denial of his earlier of admission is barred by law. The defence of the appellant-defendant is barred by sections 115, and 116 Indian Evidence Act.

15. Apart from it the appellant had claimed in their written-statement that they had become Bhumidhar of the disputed land. Any such right of appellant cannot be recognized unless it is declared by competent revenue court, which is not their case. Without any such declaration, the appellants cannot legally raise defence of their title and ownership of disputed land. Therefore their defence is not legally acceptable and barred by law. The third substantial question of law is accordingly decided in affirmative, and against the defendant-appellant.

16. As held earlier the plaintiff-respondents had been in possession and user of disputed property, and had been exercising their rights over it as owner, without any adverse claim from any other person. The defendant-appellant had admitted their aforesaid rights. Admittedly on the promise of defendant-appellant to act as lessor-tenant, the parties had executed registered lease-deed dated 23.2.1972 without any misrepresentation or fraud. In absence of any error or illegality in said lease-deed, this enabled the defendant to take possession of the property in question. There is no reason to hold said lease-deed as null or void. If said lease-deed was invalid or void, then possession of appellant on its basis was erroneous, and the possession of plaintiff-respondents should be restored. So there is no error in judgment under challenge in this appeal. Apart from it, as held earlier the defendant-appellant cannot legally raise such plea in defence, and he is legally estopped from doing so. The plea of defendant-appellant in this regards barred by principle of estoppel and acquiescence. For these reasons fourth substantial question of law is decided in negative.

17. On the basis of above discussion it is found that the plaint case, on its facts was rightly found proved by the first appellate court. This court had re-appreciated the evidences adduced by parties during the proceedings, and discussed them before holding that disputed land belongs to title and rights of plaintiffs-respondents, and also that the defendant-appellant is neither owner nor has right to retain its possession. On examination of reasonings recorded by the learned first appellate court in first appeal, I am of the view that its judgment is well reasoned and based upon proper appreciation of entire evidences on record. These findings appear to have been given after application of mind and are apparently acceptable. No perversity or infirmity is found in the finding of fact recorded by the first appellate court to warrant interference through this appeal. None of the contentions of learned counsel for the defendant-appellants can be sustained.

18. On the basis of above discussion it is also proved that defence of defendant-appellant is not tenable. He cannot plead against his own admission which led the plaintiffs-respondents to hand over possession of disputed property to him. It is also found that the defence of the appellant is barred by principle of estoppels and acquiescence. It is also proved that the defendant-appellant had failed to prove his right or title over disputed property, while plaintiff-respondent's rights over this property is proved. Therefore appellant is not entitled to any relief in this second appeal.

19. In view of the above this appeal is dismissed with costs.
