APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.01.2016

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE ATTAU RAHMAN MASOODI, J.

Special Appeal No. 2 of 2016

Millennium Institute of Technology (M/S) 15 ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
H.S. Jain, Ranjana Agnihotri

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Writ Petition-maintainability-by institution-seeking enforcement of scholarship scheme to SC/ST/OBC of institution-dismissed by Learned Single Judge for want of locus-but failed to appreciate the prayer for disbursement of scholarship to those students getting education-denial on ground of locus-amounts to denial of benefit of scheme itself-calls for interference-accordingly order by Single Judge set-a-side-petition stand allowed with necessary direction.

Held: Para-9 & 10
In the present case before the learned Single Judge the appellants have categorically stated that they have not assailed the scheme, according to which the students are eligible for scholarship and have also not prayed for direct disbursement of the scholarship in the accounts of the institution but what the appellant had prayed for in the writ petition is for extending the benefit of scheme to the respective students who are being imparted education through the appellant institution. Once the prayer is made for disbursement of the scholarship as per the terms of the scheme, to doubt the locus of the appellant in such a situation, would amount to defeating the very object of the policy of the State Government, according to which the students belonging to reserved category classes are entitled to avail the benefit of scholarship through various institutions recognized by the State.

10. in our considered opinion, the judgement passed by the learned Single Judge, in the facts and circumstances of the present case, calls for interference and the same is hereby set aside.

(Delivered by Hon'ble A.R. Masoodi, J.)

1. Heard the learned counsel for the appellant and learned Standing Counsel, who has accepted notice on behalf of the respondents.

2. This special appeal is directed against the judgement passed by the learned Single Judge in Writ Petition No. 7674 (MS) of 2015, whereby the writ petition filed by the appellant institution has been dismissed as not maintainable on the ground that the scheme of scholarship being launched for the benefit of the students does not culminate into any justiciable interest of the appellant institution for maintaining a writ petition under Article 226 of the Constitution of India.

3. The judgement rendered by the learned Single Judge has been assailed primarily on the ground that the present case filed by the appellants was squarely covered by the pronouncement of a Division Bench judgement passed by this Court in Special Appeal No. 581 of 2014 and connected matters on 23.2.2015, which has already been upheld by the apex court in SLP (C) No. 14419 of 2015.

4. The contention in a nut shell is to the effect that 34 students are being imparted education by the appellant institution who are in the category of SC/ST/OBC/General to whom scholarship is payable but their forms could not be forwarded to the department on account of some technical fault of the server through e-process.

5. A similar dispute had also previously come up for consideration before the learned Single Judge of this Court, which was allowed in terms of judgement dated 3.7.2014 passed in a bunch of writ petitions, leading case being Writ Petition No. 632 (MS) of 2014. The judgement passed by the learned Single Judge was assailed in a bunch of special appeals, leading case being Special Appeal (Def.) No. 581 of 2014 and the appeals filed by the State Government against the said judgement were dismissed. The Division Bench while deciding the appeals made certain observations in respect of the stand taken by the State Government. The relevant portion of the Division Bench judgement for ready reference is extracted below:

"In the given set of facts and looking to the purpose of the Scheme, the learned Single Judge cannot be faulted in taking a view befitting the nature of the beneficial Scheme.

So far as the suggestion that it remains a budget specific scheme and liabilities of one financial year are not carried forward is concerned, we are clearly of the view that once the State Government has declared such nature Scheme, it cannot be allowed to suggest any want of budget or finances to deprive the bonafide eligible candidates of their legitimate expectations. Noteworthy it is that under the Scheme, the eligible candidates are the persons belonging to Scheduled Castes and Scheduled Tribes who are permanent or original residents of the State of U.P. More significantly, under the Scheme, an eligible candidate is provided financial support for entire of his course of study. In other words, the support under the Scheme is not limited to one particular financial year only but is of recurring nature during the course of studies of the candidate concerned. The learned counsel for the appellants has repeatedly referred to the expression "limited financial resources" as occurring in clause 11 (iv) of the Scheme. We are unable to appreciate as to how such an expression could result in denial of the financial support to an eligible candidate only for some delay in submission of online application form. Looking to the very nature and purpose of the Scheme, the time limit as provided in the schedule of procedure for submission and dealing with the applications cannot be said to be that of such an inflexible nature that it may not admit even of reasonable relaxation in desirable cases.

We may observe that genuineness of the claim as made by the petitioner institutions or the petitioner candidates had not been the question raised before the learned Single Judge. In the given set of facts and circumstances, it appears just and appropriate to endorse the view taken by the learned Single Judge with necessary observations which permits the appellants to process the applications in accordance with law and to carry out necessary scrutiny as regards bonafide and eligibility of the institutions and candidates concerned.

Accordingly and in view of the above, these appeals are dismissed and the order as passed by the learned Single Judge is

affirmed. However, in the interest of justice, we do make it clear that dismissal of these appeals shall have the result of approval of the directions of the learned Single Judge for acceptance of the applications within time granted and with the qualification that no further enlargement of time would be granted. Further in the interest of justice, it is provided that if the applications have been submitted within the stipulated time, the same would be entertained and processed in accordance with law and in such processing, it would, of course, be open for the appellants to carry out scrutiny, if considered necessary, as regards bona fide and eligibility of the institution and of the candidate concerned; but the entire process, including actual payment in desirable cases, shall be completed by the appellants expeditiously, and in any case within 60 days from the date of receipt of the certified copy of this order."

6. Learned Standing Counsel does not dispute the bona fides of the students and claim of the appellants being similar to that which was decided by this Court in terms of the Division Bench judgement referred to above. It is also not the case of the State Government that the students, in respect of whom the disbursement of scholarship is claimed in the bank accounts of students, who are recipients of the same benefit during previous sessions, is a question of doubt or the bona fides of the institution for laying such a claim is otherwise faulty except for the reason that there is delay in forwarding the form due to technical reasons. In such a situation, it is difficult to accept that the institution, which ultimately imparts education to a special category of students for whom the scheme is applicable and who are admitted in the institution by giving necessary relaxation, may not have a locus to file the present writ petition particularly when the students are already completing their studies and may claim requisite certificates either from the institution or the body competent to grant such certificates, which may remain withheld for non-payment of requisite fee by the students to the appellant college.

7. Once the bona fides of the students are not a subject matter of doubt and the students are entitled to the scholarship, as claimed, and are under an obligation to make payment of necessary fee to the appellant institution, it is difficult to hold that the institution does not have any justiciable interest to represent the cause on behalf of the students who are being educated.

8. The learned Single Judge, while dealing with the matter, has not considered this aspect of the matter and has, rather, proceeded on the premise of another Division Bench judgement passed by this Court in Writ-C No. 56695 of 2014. The judgement passed by the Division bench in the aforesaid writ petition appears to be in respect of some distant education program and the issue involved in that writ petition challenging the very scheme of disbursement of scholarship in the bank accounts of the students, does not appear to be an issue similar to the one dealt with by the Division Bench in the judgement dated 23.3.2015 passed in Special Appeal No. 581 of 2014 against which the SLP has also been dismissed by the apex court. Once the students are regularly studying and their details are forwarded to the State Government for necessary verification, there does not seem to be any good reason for the State not to include the claim of the students who are represented by the appellant. The students in whose accounts the necessary scholarship in terms of the scheme is to be

disbursed by the State Government are not to be compelled to litigate for bona fide claims. It is true that every student has to apply as per the time schedule prescribed in the scheme but in a situation where the necessary forms have been submitted but all the details could not be forwarded to the State authorities timely due to some technical reason beyond the control of the students, any such objections pressed by the State Government before the learned Single Judge ought not to have weighed over and above the object of the scheme which the State Government is under a bounden duty to implement.

9. There is yet another feature of distinction in the case set up before us as compared to the Division Bench judgement dated 11.12.2014. In the present case before the learned Single Judge the appellants have categorically stated that they have not assailed the scheme, according to which the students are eligible for scholarship and have also not prayed for direct disbursement of the scholarship in the accounts of the institution but what the appellant had prayed for in the writ petition is for extending the benefit of scheme to the respective students who are being imparted education through the appellant institution. Once the prayer is made for disbursement of the scholarship as per the terms of the scheme, to doubt the locus of the appellant in such a situation, would amount to defeating the very object of the policy of the State Government, according to which the students belonging to reserved category classes are entitled to avail the benefit of scholarship through various institutions recognized by the State.

10. In our considered opinion, the judgement passed by the learned Single Judge, in the facts and circumstances of the present case, calls for interference and the same is hereby set aside.

11. The respondents are directed to extend the benefit of scholarship scheme to the students whose details have been forwarded by the appellant institution even if the students have failed to submit all the necessary details before the cut-off date, however, it shall be open to the State authorities to verify the bona fides of all such students. The claims of all the eligible students shall be included in the process for actual payment and the entire process shall be completed expeditiously and not later than a period of two months from the date of receipt of a certified copy of this order by the competent authority.

12. The special appeal thus, stands allowed with no order as to cost.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.01.2016

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE YASHWANT VARMA, J.

Special Appeal No. 3 of 2016

Shri Sumati Nath Jain ...Appellant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellant:
Aishwarya Pratap Singh

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Writ Petition-against the order by District Magistrate-fixing liability of additional stamp duty-in utter violation of Principle of Natural Justice-Learned Single Judge dismissed the petition on ground of alternative remedy to appeal under Section 56 of Stamp Act-held-Learned

Single Judge committed apparent error-petition-held-maintainable.

Held: Para-8
We are, with respect, of the firm opinion that the learned Single Judge has yet again fallen in error in dismissing the writ petition and relegating the appellant to the alternative remedy.

(B)Stamp Act 1899-Section 47-A-demand of additional duty-plot in question still recorded agricultural land-with agricultural use-Sub Registrar's report can be basis-on assumption of future use-moreover plot situated in flood area constructions already prohibited-ignoring same demand of additional stamp duty-held-not proper.

Held: Para-22
The response filed before the second respondent clearly asserted that the property in question fell within the flood plain area of the Hindon river. The order of the NGT, NOIDA Master Plan as well as the Government Order clearly restrained all residential activities in this area. There was therefore no basis for the Sub Registrar or for that matter the second Respondent presuming that the property was liable to be treated as for residential purposes and taxed at residential rates. For this additional reason also we find that the proceedings initiated against the appellant and the order impugned in the writ petition are rendered unsustainable.

Case Law discussed:
(2008) 4 SCC 720; (2011) 14 SCC 160; (2010) 13 SCC 427

(Delivered by Hon'ble Dr. Dhananjaya Yeshwant Chandrachud, C.J.)

1. Aggrieved by the judgment and order rendered by the learned Single Judge on 21 December 2015, dismissing a writ petition and relegating him to the alternative remedy, the original petitioner is in appeal before us.

2. The writ petition challenged an order dated 26 October 2015 passed by the second respondent in purported exercise of powers conferred under Sections 47-A and 33 of the Indian Stamp Act 18991. The order impugned held the petitioner-appellant liable to pay additional stamp duty of Rs.7,14,650/- and penalty of Rs.1,78,663/-, thus totaling Rs.8,93,313/-. The order imposing additional stamp duty is on an instrument executed in favor of the appellant on 26 September 2011, being a sale deed in respect of Khasra No. 786 admeasuring 0.7160 hectares. This instrument, upon presentation in the office of the Sub Registrar, Gautam Budh Nagar and on payment of stamp duty of Rs. 1,07,600/- had been duly registered and returned to the appellant.

3. From the material brought on record of the writ petition, it appears that a copy of the instrument in question fell for scrutiny before the Sub Registrar, Gautambudh Nagar who on 7 December 2012 put up a note for consideration of the second respondent asserting therein that the instrument was in respect of a property, which had been valued at agricultural rates. In the opinion of the Sub Registrar, the property comprised in the instrument was liable to be taxed @ Rs. 6,500/- per square meter being the circle rate prescribed by the second respondent for residential properties. Consequently, the Sub Registrar opined that the instrument should be subjected to additional stamp of Rs.7,14,650/-. Taking note of the aforesaid report, the second respondent assumed jurisdiction and issued a notice dated 30 August 2012 informing the appellant that proceedings in respect of the adequacy of stamp duty paid on the instrument in question were pending before him and that prima facie it appears that the appellant has evaded

stamp duty to the extent of Rs.7,14,650/-. This notice accordingly called upon the appellant to participate and show cause why additional stamp duty together with penalty be not imposed upon him. The appellant filed his response in the proceedings on 28 December 2012. During the pendency of the proceedings, he is stated to have gifted the property comprised in the instrument to his wife Smt. Vijaya Jain on 17 December 2012.

4. During the course of the proceedings before the second respondent, an order came to be passed on 23 October 2013 calling upon the Sub Registrar to conduct a fresh site inspection of the property and submit an actual status report. Pursuant to the aforesaid order, the Sub Registrar is stated to have submitted a report dated 16 November 2013 recording therein that the property in question appeared to have been put to use as farm land. The second respondent upon a consideration of the material before him has proceeded to hold that the land in question falls in the vicinity of the Greater NOIDA industrial development area where land is largely being used for residential and commercial purposes. He proceeded to hold that bearing in mind the area of the property, it was not possible to be utilized for agricultural purposes and that the appellant himself owned no premises in the vicinity of the land in question, which may lend credence to the contention that the property was to be utilized for agricultural purposes only. On a consideration of the aforesaid facts, the second respondent accepted the initial report submitted by the Sub Registrar on 7 December 2012 and proceeded to pass the order which was impugned in the writ petition.

5. To complete the narration of facts it becomes apposite to note that during the pendency of proceedings before the second respondent, the appellant on 17 December 2012 gifted the property to his wife Smt. Vijaya Jain. This gift deed too was subjected to proceedings under Section 47-A of the Act by the second respondent. Smt. Vijaya Jain was also foisted with a demand of additional stamp duty. The order passed by the second respondent against Smt. Vijaya Jain, was subjected to challenge in a writ petition which too came to be dismissed by the learned Single Judge on the ground that she had an equally efficacious remedy of filing an appeal under Section 56. The judgment rendered by the learned Single Judge on that occasion fell for consideration before a Division Bench of the Court in a special appeal2 which ultimately came to be allowed by judgment and order dated 1 September 2015. The judgment of the Division Bench, we may note formed part of the record of the writ proceedings from which the present Special Appeal emanates.

6. Dealing with the correctness of the view taken by the learned Single Judge in relegating the appellant therein to pursue the alternative remedy, this Court in Smt Vijaya Jain found that the proceedings taken against her were liable to be set aside not just on account of violation of the principles of natural justice but also on the ground of the same having been initiated and continued in breach of the procedure prescribed under the Act and the orders passed by the second respondent suffering from non application of mind and the law as laid down by this Court.

7. On the issue of alternative remedy, the Division Bench in Smt

Vijaya Jain noticed the law as enunciated by the Supreme Court in Government of Andhra Pradesh and others Vs. Smt. P. Laxmi Devi3 and Har Devi Asnani Vs. State of Rajasthan4, and held as under:-

" The existence of an alternative statutory remedy as has been consistently held by the Courts is not a rule of inflexible character nor is it an inviolable condition. The Courts vested with the power and jurisdiction under Article 226 of the Constitution of India have always viewed this rule as a self imposed restriction rather than a rule which is to be blindly adhered to and which brooks of no exception. Some of the well settled exceptions to the rule of a petitioner being relegated to an alternative remedy are where the principles of natural justice have been violated or where orders are made without jurisdiction."

"The law as authoritatively laid down by the Supreme Court in the aforementioned two judgments clearly establishes that a petitioner before the High Court is not liable to be relegated to the alternative remedy as a matter of rule. If in the facts of a particular case it is established that the principles of natural justice have been violated or that the order has been rendered without jurisdiction or if it is disclosed to the Court that grave injustice has been caused to the petitioner and it is found that his relegation to the alternative remedy would perpetuate injustice and cause prejudice, it is always open to this Court to exercise its prerogative constitutional powers and to issue an appropriate writ striking at the offending action. This principle stands extended in light of the abovementioned precedents to a case where the petitioner is foisted with an exorbitant and arbitrary demand in which case his relegation to the alternative remedy would not be justified."

8. We are, with respect, of the firm opinion that the learned Single Judge has yet again fallen in error in dismissing the writ petition and relegating the appellant to the alternative remedy.

9. In the facts of the present case, we may note that the initial stamp duty which stood paid on the instrument by the appellant was Rs. 1,07,600/-. The order of the second respondent held the appellant liable to pay additional stamp duty as well as penalty totaling Rs.8,93,313/-. This we may note represents an increase of eight times over the initial stamp duty which was paid on the instrument. This was, therefore, clearly one of the exceptional situations which were envisaged by the Supreme Court in Smt. P. Laxmi Devi and Har Devi Asnani as instances where the petitioner was not liable to be relegated to the alternative remedy of an appeal or a revision under Section 56 of the Act.

10. We further find that the proceedings taken against the appellant were clearly without jurisdiction, violative of the procedure prescribed under the Act and there existed no justification in the second respondent invoking the powers conferred by sections 47A or 33 of the Act. We proceed to set forth our reasons for arriving at the above conclusions hereinafter.

11. Pausing here we deem it appropriate to first briefly notice the objections which were taken by the appellant before the second respondent.

12. Referring to the deed in question, it was pointed out that the land

was recorded as agricultural and the purpose disclosed in the sale deed also held it out to be for agricultural purposes. The appellant had contended that there was no material before the second respondent to assume that the land was residential on the date of execution of the instrument or to presume that it would be put to residential use in the future. The appellant then placed reliance upon the master plan of NOIDA, orders passed by the National Green Tribunal (NGT) as also upon the Government Orders issued by the State, all of which restrained construction activities in flood plain areas. It was submitted before the second respondent that the land was in the flood plain area of the Hindon river and therefore in light of the various injunctions operating thereupon, the property could never be put to residential use. These objections stood reiterated in the writ petition preferred by the appellant. Dealing with the order of the National Green Tribunal [NGT] the appellant stated: -

"17. That the National Green Tribunal passed an order dated 20.05.2013 in O.A. No. 89/2013 whereby it was held that: -

"---It is an admitted position in law that construction upon flood plain area is prohibited. It not only affect the natural flow of the river but even causes environment problems besides raising risk to human life and property."

---Similar order and injunction shall operate in regard to river Hindon as well."

13. Referring to the Government Order dated 16 March 2010, it was stated: -

"The learned Tribunal also relied upon the notification dated 16.03.2010 issued by the Chief Secretary of Uttar Pradesh to all the Authorities including the police in the State of Uttar Pradesh to ensure that no constructions whatsoever is raised on the flood plain zone and whichever constructions have been raised should be removed. The relevant extract of the said notification state as under:-

"1. Clear depiction of flood plain zones along rivers as flood affected areas in the Master Plans and to prevent any constructions in these areas, these areas should be reserved as Green. It should be ensured to ban all kinds of constructions in flood plain zones under the Zoning Regulations of the concerned cities.

2. No NOC will be granted, under the RBO Act, U.P. Urban Planning & Development Act 1973 and Industrial Development Act 1973, to any kind of construction inside the flood plain zone and nor will be the lay-out plans of such constructions be approved. To stop such kind of illegal constructions, effective action would be taken under the provisions of the above acts....."

14. We accordingly proceed to deal with the issue of jurisdiction exercised by the respondents under the following broad heads.

VALIDITY OF THE NOTICE DATED 30 AUGUST 2012

15. A plain reading of the notice indicates that the second respondent had accepted the report of the Sub Registrar and already formed an opinion that the instrument was liable to be taxed with additional stamp duty. There was no opportunity provided to the appellant to show cause why the second respondent may not assume jurisdiction under section

47A of the Act as mandated under Rule 7 of the U.P. Stamp (Valuation of Property Rules) 1997. The appellant was neither apprised of the basis nor provided the material upon which the Collector formed the opinion that the property comprised in the instrument was undervalued or that additional stamp duty was payable thereon. Dealing with this aspect of the matter the Division Bench in Smt Vijaya Jain held: -

"From the provisions extracted above, it is apparent that the Collector proceeds under sub section (3) of Section 47-A read with rule 7 when he has reason to believe that the market value of the property comprised in the instrument has not been truly set forth and that in the opinion of the Collector, circumstances exist warranting him to undertake the enquiry contemplated under rule 7. What we however find from the notice dated 09 September 2013 is that the Collector has proceeded to record, albeit prima facie, that the instrument in question has been insufficiently stamped to the extent of Rs.8,89,000/-. The notice apart from referring to a note dated 20 May 2013, received from the Assistant Inspector General of Registration neither carries nor discloses any basis upon which the Collector came to the prima facie conclusion that the appellant was liable to pay Rs. 8,89,000/ as deficit stamp duty. In our opinion a notice of this nature must necessarily disclose to the person concerned the basis and the reasons upon which the Collector has come to form an opinion that the market value of the property has not been truly set forth. In the absence of a disclosure of even rudimentary details on the basis of which the Collector came to form this opinion, the person concerned has no inkling of the case that he has to meet. A notice in order to be legally valid and be in compliance with the principles of natural justice must necessarily disclose, though not in great detail, the case and the basis on which action is proposed to be taken against the person concerned. Not only this and as is evident from a bare reading of rule 7, at the stage of issuance of notice, the Collector has to proceed on the basis of material which may tend to indicate that the market value of the property has not been truly and faithfully disclosed in the instrument. The stage of computation of market value comes only after the provisions of sub rules (2) (3) and (4) of rule 7 come into play. At the stage of issuance of notices, the Collector calls upon the person concerned to show cause "as to why the market value of the property.... be not determined by him.....

In the facts of the present case, we find that the Collector had already prejudged the issue by recording that the appellant had paid deficit stamp duty to the extent of Rs.8,89,000/-."

16. It is apparent that the notice on the basis of which proceedings were initiated against the appellant suffered from the same fundamental flaws and defects as were noticed by the Bench in Smt. Vijaya Jain. We may also note that the requirements of a valid show cause notice were lucidly explained by the Supreme Court in Oryx Fisheries (P) Ltd. Vs. Union of India5 in the following terms: -

"27. It is no doubt true that at the stage of show cause, the person proceeded against must be told the charges against him so that he can take his defense and prove his innocence. It is obvious that at that stage the authority issuing the charge-

sheet, cannot, instead of telling him the charges, confront him with definite conclusions of his alleged guilt. If that is done, as has been done in this instant case, the entire proceeding initiated by the show cause notice gets vitiated by unfairness and bias and the subsequent proceedings become an idle ceremony.

31. It is of course true that the show cause notice cannot be read hypertechnically and it is well settled that it is to be read reasonably. But one thing is clear that while reading a show cause notice the person who is subject to it must get an impression that he will get an effective opportunity to rebut the allegations contained in the show cause notice and prove his innocence. If on a reasonable reading of a show cause notice a person of ordinary prudence gets the feeling that his reply to the show cause notice will be an empty ceremony and he will merely knock his head against the impregnable wall of prejudged opinion, such a show cause notice does not commence a fair procedure..."

17. We find in the facts of the present case that not only was there a complete non disclosure of the relevant material to which the appellant could respond to establish his innocence, the notice itself was couched in tenor and language which would have led any person to face the specter of what the Supreme Court described as the "impregnable wall of prejudged opinion".

INVOCATION OF SECTION 47A

18. Section 47A (3) as a plain reading of the provision would indicate comes into operation if the Collector has before him material which may lead him to believe that the market value of the property comprised in an instrument has not been truthfully disclosed. In the present case the Collector proceeded in the matter solely on the basis of the report of the Sub Registrar dated 7 February 2012. This report doubted the valuation of the property on the ground that in the area abutting it, various residential houses had come up and that Greater NOIDA had become a development hub. Bearing in mind the location of the plot and its likely use, the Sub Registrar opined, it would be inappropriate to value the property at agricultural rates. We find that the very bedrock upon which the opinion of the Sub Registrar based his report was faulty and could not have consequently formed the basis for further action under section 47A (3).

19. We may note that on the date of execution of the instrument the land was admittedly recorded as agricultural. In fact the Khasra of the property remained unchanged throughout and continued to represent the land as recorded for agricultural purposes. The respondents were in our opinion wholly unjustified in initiating proceedings based on an unsubstantiated assumption that the property in future was likely to be put to non-agricultural use.

20. The perceived or presumed use to which a buyer may put the property in the future can never be the basis for adjudging its value or determining the stamp duty payable. The Act, we may note is a fiscal statute. The taxable event with which it concerns itself is the execution of an instrument which is chargeable to duty. The levy under the statute gets attracted the moment an instrument is executed. These propositions clearly flow from a plain

reading of the definition of the words "chargeable", "executed" and "instrument" as carried in the Act. In the case of an instrument which creates rights in respect of property and upon which duty is payable on the market value of the property comprised therein, since the tax liability gets fastened immediately upon execution it must necessarily be quantified on the date of execution. The levy of tax or its quantum cannot be left to depend upon hypothetical or imponderable facets or factors. The value of the property comprised in an instrument has to be adjudged bearing in mind its character and potentiality as on the date of execution of the instrument. For all the aforesaid reasons we fail to find the existence of the essential jurisdictional facts which may have warranted the invocation of the powers conferred by section 47A (3). We are therefore of the firm opinion that the initiation of proceedings as well as the impugned order based upon a presumed future use of the property for residential purposes was wholly without jurisdiction and clearly unsustainable. Dealing with this aspect of the matter and after noticing the consistent line of precedent on the subject the Division Bench in Smt Vijaya Jain observed: -

"This Court on more than one occasion has held that the market value of the land is not liable to be determined with reference to the use to which a buyer intends to put it in future. The market value of the property is to be determined with reference to its character on the date of execution of the instrument and its potentiality as on that date.

xxx xxx xxx

The above principles of law enunciated in the aforementioned judgments have been consistently followed by this Court. We however find that the order of the Collector relies upon no evidence which would support imposition of residential rates on a property which was stated to be agricultural on the date of execution of the instrument. "

ADDITIONAL REASON

21. We find that the proceedings taken against the appellant were even otherwise liable to be quashed outright. The reason which compels us to arrive at the above conclusion is this.

22. The response filed before the second respondent clearly asserted that the property in question fell within the flood plain area of the Hindon river. The order of the NGT, NOIDA Master Plan as well as the Government Order clearly restrained all residential activities in this area. There was therefore no basis for the Sub Registrar or for that matter the second Respondent presuming that the property was liable to be treated as for residential purposes and taxed at residential rates. For this additional reason also we find that the proceedings initiated against the appellant and the order impugned in the writ petition are rendered unsustainable.

23. For all the aforesaid reasons we find merit in the instant appeal. We are of the opinion that the learned Single Judge clearly erred in dismissing the writ petition and relegating the appellant to pursue the alternative remedy.

24. We accordingly allow the special appeal and set aside the judgment and order of the learned Single Judge dated 21 December 2015. We consequently also allow the writ petition and quash the order of the second

respondent dated 26 October 2015 and all proceedings taken against the appellant.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.01.2016

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

First Appeal from Order No. 165 of 2016

National Insurance Company Ltd. Appellant
Versus
Ashish Kumar Patel & Ors. Respondents

Counsel for the Appellant:
Manish Kumar Nigam

Counsel for the Respondents:
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Motor Vehicle Act 1988-173-appeal against award by Tribunal-on ground-where in vehicle in excess passengers traveling-without valid driving license-insurance company not responsible-held-Tribunal fastened liability upon the appellant-up to extent of authorized capacity-can not be interfered-appeal dismissed.

Held: Para-8
So far as the submission of the learned counsel for the appellant disputing the liability of the Insurance Company to pay the awarded amount is concerned, I find that it is wholly undisputed that authorized seating capacity of the offending vehicle was six while passengers travelling in the vehicle were 17 but the Insurance Company can escape its liability to pay compensation with respect to the authorized number of passengers travelling in the offending vehicle. That apart, in the impugned award, the appellant-Insurance Company has been granted right of recovery from the owner of the vehicle of the awards over and above the awards of six persons i.e. the awards which may be given in respect of the persons over and above the authorized sitting capacity of the offending vehicle.

Case Law discussed:
TAC 2014 (3) SC 29; JT 2011 (3) SC 149; JT 2004 (1) SC 15:2004 (2) SCC 1; JT 2007 (10) SC 209:2007 (7) SCC 445.

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Shri Manish Kumar Nigam, learned counsel for the appellant.

2. This appeal has been filed challenging the award dated 14.10.2015 in M.A.C.P. No.145 of 2013 passed by the Motor Accident Claims Tribunal/Additional District Judge, Court No.1, Chandauli awarding a sum of Rs.74,150/- to the claimant-respondent on account of serious injuries on 5.10.2013 in an accident caused by the vehicle (Magic) bearing Registration No.UP-45 T-1563 in which the injured and some other passengers were travelling.

3. Learned counsel for the appellant submits that the authorized seating capacity of the offending vehicle was 6 while 17 passengers were travelling and, therefore, the Tribunal has committed a manifest error of law in fixing the liability of the Insurance Company to pay compensation instead of the liability of the owner of the vehicle in question. He submits that driver of the offending vehicle was not having a valid driving licence. Hence in view of the decision of the Hon'ble Supreme Court in the case of United Indian Insurance Co. Ltd. vs. Sujata Arora and others, TAC 2014 (3) SC 29, the appellant has no liability to pay the awarded amount.

4. I have carefully considered the submission of the learned counsel for the appellant.

5. Briefly stated the facts of the present case are that on 5.10.2013 the claimant-respondent was travelling in a vehicle (Magic) bearing Registration No. UP45 T-1563. Several other passengers were also travelling in the said vehicle, which caused an accident at about 11.30 P.M. in which the claimant-respondent injured. An F.I.R was lodged at about 4.00 A.M. on the next date i.e. 6.10.2013. Thus, the F.I.R was lodged after few hours of the accident. The claim petition was filed by the claimants-respondents, who are successors of the deceased.

6. In the impugned award, the Tribunal has considered oral as well as documentary evidence and recorded a finding of fact with regard to the occurrence of the accident as aforementioned in which the aforesaid claimant-respondent received serious injuries. It also recorded the finding of fact that the offending vehicle was covered with valid documents including the Insurance Policy and the driver of the vehicle was having a valid driving licence. The Tribunal also considered the contention of the appellant as being raised before this Court as aforenoted but rejected the said contention relying upon the judgment of Hon'ble Supreme Court in the case of United India Insurance Co. Ltd. vs. K.M. Poonam & others, JT 2011 (3) SC 149. The Tribunal computed award of Rs.74,150/-. The quantum of award is not disputed before this Court but the dispute is only with regard to the liability of the Insurance Company to pay compensation. The case of the appellant Insurance Company is that the Insurance Company is not liable to pay compensation under the facts and circumstances of the case and instead the owner of the offending vehicle is liable to pay the awarded amount.

7. In the case of United Indian Insurance Co. Ltd. vs. Sujata Arora and others (supra), heavily relied by the learned counsel for the appellant; it was held that where the Tribunal has recorded a finding that the vehicle, at the relevant point of time; was not being driven by the person holding a valid driving licence, then, it amounts to violation of terms and conditions of insurance policy and no liability can be fastened on the Insurance Company. In the impugned award, the Tribunal has recorded a finding of fact that the driving licence of the driver of the offending vehicle was filed in evidence, which established that driving licence was effective from 12.4.2012 to 11.2.2014 while the date of accident was 5.10.2013, and thus, as on the date and time of the accident, the driving licence of the driver of the offending vehicle was valid and effective and no evidence contrary to it could be filed by the appellant-Insurance Company. Thus, the judgmenet relied by the learned counsel for the appellant does not support the case of the appellant on the facts of the present case.

8. So far as the submission of the learned counsel for the appellant disputing the liability of the Insurance Company to pay the awarded amount is concerned, I find that it is wholly undisputed that authorized seating capacity of the offending vehicle was six while passengers travelling in the vehicle were 17 but the Insurance Company can escape its liability to pay compensation with respect to the authorized number of passengers travelling in the offending vehicle. That apart, in the impugned award, the appellant-Insurance Company has been granted right of recovery from the owner of the vehicle of the awards over and above the awards of six persons

i.e. the awards which may be given in respect of the persons over and above the authorized sitting capacity of the offending vehicle.

9. The view taken by the Tribunal in the impugned award is well supported by the law laid down by Hon'ble Supreme Court in the case of United India Insurance Co. Ltd. vs. K.M. Poonam & others (supra) in which it has been held as under:

20. The law as regards the liability of insurers towards third parties killed or injured in accidents involving different types of motor vehicles, has been crystallized in the several decisions of this court referred to hereinabove. The kind of third party risk that we are concerned with in this case involves purported breach of the conditions contained in the insurance agreement executed by and between the insurer and the insured.

21. From the decision in Baljit Kaur's1 case (supra), which was later also articulated in Anjana Shyam's2 case (supra) what emerges is that a policy of insurance, in order to be valid, would have to comply with the requirements of Chapter XI of the Motor Vehicles Act, 1988, which deals with insurance of motor vehicles against third party risks. Section 146 of the Act stipulates that no person shall use, except as a passenger, or cause or allow any other person to use, a motor vehicle in a public place, unless there is a valid policy of insurance in relation to the use of the vehicle complying with the requirements of the said Chapter. Section 147 of the Act is an extension of the provisions of Section 146 and sets out the requirements of policies and the limit of their liability. Section 147 (1) (a) provides that a policy of insurance must be issued by a person who is an authorized insurer. Section 147 (1) (b) provides that a policy of insurance must be a policy which insures the person or class of persons specified in the policy to the extent specified in sub-section (2). Sub-section (2) of Section 147 indicates that subject to the proviso to sub-section (1) which excludes the liability of the insurer in certain specific cases, a policy of insurance referred to therein must cover any liability incurred in respect of any accident, inter alia, for the amount of liability incurred.

22. However, in order to fix the liability of the insurer, the provisions of Section 147 have to be read with Section 149 of the Act which deals with the duty of the insurer to satisfy judgments and awards against persons insured in respect of third party risks. Although, on behalf of the Insurance Company it has been sought to be contended that no third party risks were involved in the accident and that the persons travelling in the ill-fated vehicle were gratuitous passengers, the Insurance Company cannot get away from the fact that the vehicle was insured for carrying six persons and the liability of the Insurance Company was to pay compensation to the extent of at least six of the occupants of the vehicle, including the driver.

23. Sub-section (1) of Section 149 of the Motor Vehicles Act, 1988, makes it amply clear that once a certificate of insurance is issued under sub-section (3) of Section 147, then notwithstanding that the insurer may be entitled to avoid or cancel the policy, it shall pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured, payable thereunder, as if he was the judgment debtor, in respect of the

liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments. Sub-*section (2), however, places a fetter on the payment of any sum by the insurer under sub-section (1) in respect of any judgment or award unless, the insurer had notice of the proceedings in which the said judgment or award is given and an insurer to whom such notice is given shall be entitled to be made a party thereto and to defend the action on the grounds enumerated therein involving a breach of a specified condition of the policy.*

24. The liability of the insurer, therefore, is confined to the number of persons covered by the insurance policy and not beyond the same. In other words, as in the present case, since the insurance policy of the owner of the vehicle covered six occupants of the vehicle in question, including the driver, the liability of the insurer would be confined to six persons only, notwithstanding the larger number of persons carried in the vehicle. Such excess number of persons would have to be treated as third parties, but since no premium had been paid in the policy for them, the insurer would not be liable to make payment of the compensation amount as far as they are concerned. However, the liability of the Insurance Company to make payment even in respect of persons not covered by the insurance policy continues under the provisions of sub-section (1) of Section 149 of the Act, as it would be entitled to recover the same if it could prove that one of the conditions of the policy had been breached by the owner of the vehicle. In the instant case, any of the persons travelling in the vehicle in excess of the permitted number of six passengers, though entitled to be compensated by the owner of the vehicle, would still be entitled to receive the compensation amount from the insurer, who could then recover it from the insured owner of the vehicle.

25. As mentioned hereinbefore, in the instant case, the insurance policy taken out by the owner of the vehicle was in respect of six passengers, including the driver, travelling in the vehicle in question. The liability for payment of the other passengers in excess of six passengers would be that of the owner of the vehicle who would be required to compensate the injured or the family of the deceased to the extent of compensation awarded by the Tribunal.

(Emphasis supplied by me)

26. Having arrived at the conclusion that the liability of the Insurance Company to pay compensation was limited to six persons travelling inside the vehicle only and that the liability to pay the others was that of the owner, we, in this case, are faced with the same problem as had surfaced in Anjana Shyam's case (supra). The number of persons to be compensated being in excess of the number of persons who could validly be carried in the vehicle, the question which arises is one of apportionment of the amounts to be paid. Since there can be no pick and choose method to identify the five passengers, excluding the driver, in respect of whom compensation would be payable by the Insurance Company, to meet the ends of justice we may apply the procedure adopted in Baljit Kaur's case (supra) and direct that the Insurance Company should deposit the total amount of compensation awarded to all the claimants and the amounts so deposited be disbursed to the claimants in

respect to their claims, with liberty to the Insurance Company to recover the amounts paid by it over and above the compensation amounts payable in respect of the persons covered by the Insurance Policy from the owner of the vehicle, as was directed in Baljit Kaur's case.

27. In other words, the Appellant Insurance Company shall deposit with the Tribunal the total amount of the amounts awarded in favour of the awardees within two months from the date of this order and the same is to be utilized to satisfy the claims of those claimants not covered by the Insurance Policy along with the persons so covered. The Insurance Company will be entitled to recover the amounts paid by it, in excess of its liability, from the owner of the vehicle, by putting the decree into execution. For the aforesaid purpose, the total amount of the six Awards which are the highest shall be construed as the liability of the Insurance Company. After deducting the said amount from the total amount of all the Awards deposited in terms of this order, the Insurance Company will be entitled to recover the balance amount from the owner of the vehicle as if it is an amount decreed by the Tribunal in favour of the Insurance Company. The Insurance Company will not be required to file a separate suit in this regard in order to recover the amounts paid in excess of its liability from the owner of the vehicle.

10. In view of the above discussions, I do not find any merit in this appeal. Consequently, the appeal fails and is hereby dismissed.

11. The amount deposited before this Court shall be remitted to the Tribunal concerned for adjustment.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.02.2016

BEFORE
THE HON'BLE SURENDRA VIKRAM SINGH RATHORE, J.
THE HON'BLE PRATYUSH KUMAR, J.

Criminal Appeal No. 261 of 2014
and Criminal Appeal No. 262 of 2014

Ashfaque ...Appellant
Versus
State of U.P. ...Respondents

Counsel for the Appellant:
Rajbaksh Singh

Counsel for the Respondents:
Govt. Advocate

(A)Criminal Appeal-against conviction offence under Section 489-B IPC life imprisonment-with fine Rs. 25000/- and 489-C IPC, 7 years Respondent -1 with fine Rs. 7000/-on ground for same offence twice punishment not permissible-argument that mere possession of counterfeit currency-can not be termed as accused-held-since denial the charges-no explanation about possession of such currency given-appellant failed discharge their burden of proof-as per Section 106 of evidence act inference drawn by Trail Court-proper-findings warrant no interference-but when major punishment of life imprisonment's there-minor punishment u/s 489-uncalled for -set-a-side.

Held: Para-26
Since the appellants had preferred to plead total denial,they had not cared to explain as to why such currency notes were in their possession though according to provisions contained in Section 106 of the Evidence Act the burden was on them to explain it. Their failure to do so raises an adverse inference against them and for such

inference we conclude that their possession was not mere conscious possession, they meant either to use the counterfeit currency notes or transport them.

(B)Criminal Appeal-offence under Section 489-B conviction of life imprisonment with fine of Rs. 25000/- considering young age of appellant-having no previous criminal history-punishment of life imprisonment held-too much harsh-reduced to 10 years-reasons discussed.

Held: Para-30
The appellants were connected with international criminals or with terrorist organizations. To this extent we find the reasoning of the learned trial Judge is erroneous. Appellant Ashfaque was aged about 25 years and appellant Jaikam was aged about 28 years, keeping in view their age we think that in the present matter imprisonment for life is very harsh sentence because it means the appellants will remain confined in jail till the end of their natural lives that too on the basis of conjectures and surmises. It is their first conviction, their age also persuades us to reduce their sentence.

Case Law discussed:
[1995 Supreme Court Cases (Crl) 222]; [1995 CRI.L.J. 2659 (Supreme Court), 2659]; [2005 (1) Supreme Court Cases 237]; [2001 (9) Supreme Court Cases 642]; [1979 (4) Supreme Court Cases 723]; AIR 2000 SC 1691; 1999 Cri.L.J. 942; 1962 (2) Cri. L.J. 765.

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

1. Both the appeals arise out of the same judgment and order dated 10.02.2014 passed in Sessions Trial No. 16 of 2013 [State Vs. Ashfaque and another], they have been heard together and are disposed of by a common order.

2. In the aforesaid appeals the appellants Ashfaque and Jaikam have been convicted and sentenced as under:

U/s 489-B IPC : Life Imprisonment with fine of Rs.25,000/- each
: In default of payment of fine two years RI.

U/s 489-C IPC : Five years RI with fine of Rs.7,000/- each
: In default of payment of fine six months' RI.

3. In the present case facts of the prosecution case may be summarized as under:

That on 26.09.2012 at 8.25 PM at GRP Faizabad on the basis of recovery memo, chick FIR was scribed, case crime no. 63 of 2012, under Sections 489-B & 489-C IPC was registered and requisite entry was made in the report of the general diary. According to the recovery memo, SI Brijesh Kumar Singh, the then Station Officer, was on patrol duty at Railway Station, Faizabad along with a police party to prevent the commission of any crime, make search for criminals and unwanted elements and objectional articles. Thus received the information from the informer that two persons carrying counterfeit currency notes had come to the station and they were trying to pass off the counterfeit currency notes. When the police party lead by him reached near second class waiting room, in the passenger hall near ticket booking window, they saw two persons sitting on a cement slab and on the pointing out of the informer when those persons were spoken to, they ran towards west side, at about 5.05 PM they were arrested and disclosed their names as Ashfaque and Jaikam. Both resident of District Bharatpur (Rajsthan). They confessed that they had counterfeit currency notes which they were bringing from Farrkka (West Bengal) to Gurgaon (Haryana) by

Farrakka Express. When they came to know that ahead checking was made, they deboarded there and were trying to pass off fake currency notes. When asked, no passenger consented to be a witness, they with due formality searched the accused persons, during search they recovered seven bundles of fake currency notes amounting to Rs.3,50,000/- wrapped in a cloth sheet from a plastic bag held by Ashfaque. Thereafter details of those notes were noted down. From the search of co-accused Jaikam from his right hand one cloth bag was taken and searched and from there fake currency notes of Rs.3,00,000/- were found wrapped in a Lungi. Details of these notes were also noted down. Recovery memo was prepared. Arrested persons along with seized property were deposited in the police station and the said case crime number was registered.

4. During the investigation the seized currency notes were sent for examination to Currency Printing Press, Nasik (Maharashtra), where the notes were found counterfeit. After investigation charge-sheet was submitted.

5. The appellants were charged by the Court of Session, under Sections 489 (Kha) and 389 (Ga) IPC. The appellants denied the charges and claimed to be tried.

6. In order to prove the charges on behalf of the prosecution in documentary evidence, besides other papers Recovery Memo Ext. Ka-1, Memo Ext. Ka-2, Ka-3, FIR Ext. Ka-4, Copy of Report Ext. Ka-5, Report Ext Ka-6 and Site Plan & Currency Note Press Report Ext. Ka-8, Ka-9 & Ka-10 were filed. In the oral evidence five witnesses were examined. Thereafter statements of the appellants were recorded under Section 313 CrPC wherein they denied the facts stated by the prosecution witnesses. According to them, they were falsely implicated due to enmity. According to appellant-Ashfaque on 26.09.2012 by Marudhar Express he was going to Varanasi, at Railway Station, Faizabad GRP personnel de-boarded him, they took his ticket and Rs.30,000/- cash and locked him in the lockup. After many requests he was released but when he demanded money back the Station Officer got annoyed and framed him in the present matter. According to appellant Jaikam, he was also going in the same manner and he was falsely implicated in the present case. The only variation in his statement is that from him Rs.25,000/- were taken.

7. After hearing the arguments the learned trial Judge convicted the appellants and sentenced them as above.

8. We have heard Sri Raj Baksh Singh, learned counsel for the appellants and Ms. Ruhi Siddiqui, learned A.G.A. for the State and perused the record.

9. On behalf of the appellants it has been submitted that learned trial Judge has wrongly believed the prosecution case, no recovery was made from the possession of the appellants. No independent witness has been examined on behalf of the prosecution. He further submits that according to the prosecution version only fake currency notes were recovered from the possession of the appellants, their use has not been even alleged by the prosecution. The conviction of the appellants under Section 489-B IPC is itself bad in law.

10. On behalf of the State these arguments have been repelled.

11. 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."

12. 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."

13. Recovery Officer Brijesh Kumar Singh P.W.1 has supported the prosecution version and proved the recovery memo Ext. Ka-1. He has identified the case property including plastic bag, cloth bag, cloth sheet and Lungi, material Exts. 1 to 5 (four articles wrongly exhibited as five). He has also identified bundles of fake currency notes recovered by him.

14. Sub Inspector Rajendra Prasad Misra, P.W.2 was a member of the force lead by Sri Brijesh Kumar Singh P.W.1 at the relevant date and time. He also supported the prosecution version.

15. Head Constable Ram Bujhawan Chaudhary P.W.3 is the scribe of chick FIR. He has proved chick FIR Ext. Ka-4 and other police papers.

16. Sub-Inspector Sudhakar Pandey P.W.4 is the IInd Investigating Officer, who gave details of the steps taken by him in the course of investigation. He has proved the charge-sheet Ext. Ka-7.

17. Sub Inspector Hari Shankar Prajapati P.W.5 is the Ist Investigating Officer, who gave details of steps taken by him during the course of investigation and proved the site plan Ext. Ka-8.

18. In the statement of Brijesh Kumar Singh P.W.1 and Sub Inspector Rajendra Prasad Misra P.W.2, certain discrepancies have been pointed out on behalf of the appellants. It is admitted fact that no two police personnel can perceive, retain in memory and describe the same actually in the same language whatever they had perceived together. Considering this human factor we think the indicated discrepancies cannot be made basis to reject the prosecution evidence.

19. Both these witnesses have signed the recovery memo, their departure for patrolling stood corroborated by the report of the general diary, their presence at the relevant place, time and date cannot be doubted upon. During cross-examination no major contradiction had occurred. Merely on the basis of non examination of independent witness we cannot reject the testimonies of these two witnesses. More so, when reason for not taking independent witness have been mentioned in the recovery memo, we find that learned trial Judge has rightly believed them.

20. From the report of the Currency Printing Press, Nasik (Maharashtra) Ext. Ka-5, it also stands proved that the recovered currency notes were counterfeit. From the evidence of these two witnesses recovery of these fake notes from the possession of the appellants also stands proved, thus, we notice that conviction of the appellants under Section 489-C IPC has been rightly made by the learned trial Judge.

21. On behalf of the appellants their conviction and sentence under Section 489-B IPC has been challenged on the basis that mere possession would not be enough to convict them under Section 489-B IPC. On behalf of the appellants in support of this argument following cases have been referred.

1. K. Hasim Vs. State of Tamil Nadu [2005(1) Supreme Court Cases 237]. In

paras 48 and 49 of the report difference between the ingredients constituting offence punishable under Sections 489-B & 489-C IPC have been enumerated. We can refer these two paras gainfully for our consideration, they read as under:

"48.Similarly Section 489 B relates to using as genuine forged or counterfeited currency notes or bank notes. The object of Legislature in enacting this section is to stop the circulation of forged notes by punishing all persons who knowing or having reason to believe the same to be forged do any act which could lead to their circulation.

49.Section 489C deals with possession of forged or counterfeit currency notes or bank notes. It makes possession of forged and counterfeited currency notes or bank notes punishable."

2. Umashanker Vs. State of Chhattisgarh [2001 (9) Supreme Court Cases 642]. In support of his argument learned counsel for the appellants has placed reliance on para 7 of the report, which reads as under:

"7. Sections 489-A to 489-E deal with various economic offences in respect of forged or counterfeit currency-note or bank-notes. The object of Legislature in enacting these provisions is not only to protect the economy of the country but also to provide adequate protection to currency-notes and bank-notes. The currency-notes are, in spite of growing accustomedness to the credit cards system, still the backbone of the commercial transactions by multitudes in our country. But these provisions are not meant to punish unwary possessors or users."

3. M. Mammutti Vs. State of Karnataka [1979 (4) Supreme Court Cases 723]. This case has been referred in support of the argument that the appellants were not specifically asked about their knowledge whether recovered currency notes were fake or not.

22. The learned Additional Government Advocate has submitted that possession of fake currency notes of Rs.3,50,000/- by appellant Ashfaque and Rs.3,00,000/- by appellant Jaikam is in itself an evidence that they were carrying the fake notes to use them as genuine. He has further submitted that failure of the appellants to explain such huge recovery from their possession is also an evidence that the appellants had mens rea to use fake currency notes as genuine.

23. In support of his argument, learned Additional Government Advocate has referred the provisions contained in Sections 106 and 114(h) of the Evidence Act. Before proceeding further we would like to reproduce the provisions contained in Sections 106 and 114(h) of the Evidence Act, they read as under:

Section 106 - When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Section 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.

The court may presume-----

114(h)-that if a man refuses to answer a question: which he is not compelled to answer by law, the answer, if given, would be unfavourable to him."

24. To elaborate the thrust of the argument advanced by the learned Additional Government Advocate is that it was for the appellants to explain how they come in possession of counterfeit currency notes and they had no knowledge that those are counterfeit notes.

25. The case law referred by the learned counsel for the appellants is of no help to the appellants because here the question is whether conviction of the appellants in addition to Section 489-C IPC in Section 489-B IPC is legal or not ? None of the cases referred by him throws any light on this point as against that we find that the evidence of recovery of counterfeit currency notes from the appellants is relevant and admissible in this reference also. Simple discovery of counterfeit notes from the appellants does not stand proved from the evidence of recovery but also their knowledge and their state of mind that is knowledge about fake currency is also established from that evidence. On this point our view stand fortified by the explanation given by the Apex Court in the case of State of Maharashtra Vs. Damu Gopi Nath Shinde and others [AIR 2000 SC 1691] wherein Apex Court has observed as under:

"36. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact it becomes a reliable information. Hence the legislature permitted such information to be used as evidence by restricting the admissible portion to the minimum. It is now well settled that recovery of an object is not discovery of a fact as envisaged in the section. The decision of the Privy Council in Pulukuri Kottaya v. Emperor AIR 1947 PC 67 is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect.

37. No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered". But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. In this case, the fact discovered by PW 44 is that A-3 Mukinda Thorat had carried the dead body of Dipak to the spot on the motorcycle.

38. How did the particular information led to the discovery of the fact? No doubt, recovery of dead body of Dipak from the same canal was antecedent to the information which PW 44 obtained. If nothing more was recovered pursuant to and subsequent to obtaining the information from the accused, there would not have been any discovery of any fact at all. But when the broken glass piece was recovered from that spot and that piece was found to be part of the tail lamp of the motorcycle of A-2 Guruji, it can safely be held that the Investigating Officer discovered the fact

that A-2 Guruji had carried the dead body on that particular motorcycle up to the spot.

39.In view of the said discovery of the fact, we are inclined to hold that the information supplied by A-2 Guruji that the dead body of Dipak was carried on the motorcycle up to the particular spot is admissible in evidence. That information, therefore, proves the prosecution case to the abovementioned extent."

26. After dealing with this whether the appellants had possessed the necessary mens rea, the second aspect is whether recovery of large number of counterfeit currency notes are sufficient to establish that their possession amounts to an offence punishable under Section 489-B IPC. This section prohibits use of or trafficking with the counterfeit currency notes. Since the appellants had preferred to plead total denial,they had not cared to explain as to why such currency notes were in their possession though according to provisions contained in Section 106 of the Evidence Act the burden was on them to explain it. Their failure to do so raises an adverse inference against them and for such inference we conclude that their possession was not mere conscious possession, they meant either to use the counterfeit currency notes or transport them. In the case of Rayab Jusab Sama Vs. State of Gujarat [1999 Cri. L. J. 942] the Division Bench of Gujarat High Court has held the possession of large number of fake currency notes to be a case of active transportation of such notes. The observation made by the Division Bench in that case also substantiates the view formed by us. Para-10 of the report reads as under:

10.The learned counsel for the appellant contended that the prosecution had failed to prove the offence under S. 489-B of the Indian Penal Code even if it is held that the offence of possession the fake currency notes under S.489-C is proved. This submission is wholly erroneous because the evidence clearly establishes that the appellant was found carrying 250 fake currency notes on a public road in the city of Bhuj concealed in a Thela beneath cloth pieces as alleged in the charge. He was, therefore, transporting the said currency notes at the time when he was apprehended with them. Therefore, this is not a case of mere dormant possession, but, it is a case of active transportation of the currency notes, which would fall within the expression 'traffics in such currency notes.' Section 489-B of the Indian Penal Code clearly contemplates the cases where the counterfeit currency notes are received from any other person as also the cases where a person traffics in such currency notes knowing or having reason to believe the same to be forged or counterfeit. In our opinion, these ingredients of the offence under S.489-B are clearly established against the appellant. He was not only carrying 250 counterfeit currency notes on 9.4.1996 but he had concealed 101 other such counterfeit currency notes which he later discovered before the Panchas on 12.4.1996. It is, therefore, clearly established that the appellant was trafficking in these counterfeit currency notes which he had received from some source. The appellant is, therefore, rightly held guilty of the offences under Ss. 489-B and 489-C of the Indian Penal Code by the trial Court and we are in complete agreement with the reasoning adopted by the trial Court for reaching its conclusions on this count. We are not concerned in this appeal, as noted above, with the offences under the Passport Act for which the accused was acquitted."

27. In view of above we come to the conclusion that the arguments to challenge the conviction of the appellants under Section 489-B IPC also fail and charge against the appellants under Section 489-B IPC stands proved beyond reasonable doubt.

28. Here we would like to see and explain that though we are in agreement with the findings recorded by the learned trial Judge that the possession and trafficking of the counterfeit currency notes against the present appellants are established beyond doubt and they have been rightly convicted under Sections 489-B & 489-C IPC but from this juncture we disagree with the learned trial Judge that both the appellants should have been punished on both counts. The offence punishable under Section 489-B IPC is a major offence and offence punishable under Section 489-C IPC is a minor offence. When a person is convicted and sentenced under Section 489-B IPC his conviction under Section 489-C IPC has been held to be not warranted in law. A person cannot be punished twice for the same offence. After convicting the appellants the learned trial Judge should have punished the appellants only for one offence i.e. major offence. In a similar case Justice K.S. Hegde (as His Lordship then was) speaking for the Division Bench of Mysore High Court, has observed in para 33 of the report that if a person has been convicted under Section 489-B IPC, his conviction under Section 489-C IPC becomes redundant vide V. Govindrajalu and others Vs. State of Mysore 1962 (2) Cri. L. J. 765].

29. In view of above we come to the conclusion that we would like to affirm the conviction of the appellants under Section 489-B and 489-C IPC but we would like to set aside the sentence awarded to the appellants under Section 489-C IPC.

30. The appellants have been awarded imprisonment for life under Section 489-B IPC. It is true that the offence punishable under Section 489-B IPC is punishable with imprisonment for life or with imprisonment for a term which may extend to ten years. In this way, imprisonment for life is the maximum sentence which could be awarded under Section 489-B IPC. Now we have to see whether learned trial Judge has rightly exercised his discretion while sentencing the appellants, we have perused the reasons recorded by him to award maximum sentence. The learned trial Judge has noticed that trafficking in counterfeit currency notes jeopardize the economic condition of the country, it indicates that the appellants had connection with international criminals and terrorist organizations. When we have perused the whole of the record but we could not find any material which shows that the appellants were connected with international criminals or with terrorist organizations. To this extent we find the reasoning of the learned trial Judge is erroneous. Appellant Ashfaque was aged about 25 years and appellant Jaikam was aged about 28 years, keeping in view their age we think that in the present matter imprisonment for life is very harsh sentence because it means the appellants will remain confined in jail till the end of their natural lives that too on the basis of conjectures and surmises. It is their first conviction, their age also persuades us to reduce their sentence, the Hon'ble Apex Court in the case of Samir Mustafabhai

Bajariya vs. State of Gujarat decided on 26.04.2013 has reduced the rigorous punishment awarded under Section 489-B IPC from 8 years to almost 4 years but in the present case a large number of fake currency notes have been recovered, in such situation, we think instead of imprisonment for life, imprisonment of ten years RI would serve the ends of justice. To this extent appeals deserve to be allowed.

31. Accordingly, both the appeals are partly allowed. The conviction of the appellants under Sections 489-B & 489-C IPC is affirmed and their sentences awarded under Section 489-C are set aside. Sentence of imprisonment for life awarded under Section 489-B IPC are altered to undergo rigorous imprisonment of ten years.

32. To the aforesaid extent the impugned judgment and orders of the trial court dated dated 10.02.2014 passed in Sessions Trial No. 16 of 2013 [State Vs. Ashfaque and another] are modified.

33. Office is directed to certify this order to the court concerned forthwith for compliance and to send back the lower court record.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.01.2016

BEFORE
THE HON'BLE V.K. SHUKLA, J.
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Writ-A No. 370 of 2016

Santosh Kumar Upadhyay ...Petitioner
Versus
State of U.P. & Ors. . ..Respondents

Counsel for the Petitioner:
Rakesh Kumar Tiwari

Counsel for the Respondents:
C.S.C., Nisheeth Yadav

The Uttar Pradesh Public Services (Reservation for physically handicapped, dependent of freedom fighters & Ex-servicemen)(Amendment Act 2015 Section-2)-enforced w.e.f. 07.04.2015-keeping in view of judgment dated 26.08.2014 by Hon'ble High Court-petitioner appeared as General candidate-declared successful in preliminary examination as well as in written examination in pursuance of advertisement dated 28.01.2015-U.P. Combined State/Upper Subordinate Examination (General/Special recruitment) 2015-dependent of freedom fighters certificate issued on 21.04.2015-during process of examination claimed 2 % reservation under freedom of fighter's quota-held-"yes"-deny the benefit of being descendant of freedom fighter having lineage through married daughter-can not be approved-necessary direction for treating dependent of freedom fighter-issued.

Held: Para-18

Consequently, in the present case also, keeping in view the peculiar facts of case as is clearly reflected here that a declaration has been made by this Court on 26.8.2014 and by ignoring the same advertisement in question has been issued and, thereafter, amendment in question has been made that has been held to be clarificatory in nature, then even if that at the point of time when preliminary examination has been held, petitioner has proceeded to fill up the form as general category candidate as at the said point of time even though judgment in the case of Isha Tyagi (supra) has been there, respective certificates were not being issued to the incumbents by the authorities concerned and certificates in question have been issued only after amending act has been introduced, in view of this, to deny the benefit of being Descendant of Freedom

Fighters having his/her lineage through married daughter cannot be approved of by us.

(Delivered by Hon'ble V.K. Shukla, J.)

1. Santosh Kumar Upadhyay is before this Court for following reliefs;

I. Issue a writ, order or direction in the nature of mandamus commanding and directing the respondents to provide the benefit of two percent (2%) reservation quota and weightage of the dependants of the freedom fighter to the petitioner in the selection procedure of U.P. Combined State/Upper Subordinate Examination (General/Special Recruitment) 2015 so that justice be done.

II. Issue a writ, order or direction of in the nature of mandamus commanding and directing the respondent concerned to decide the representation/application dated 30.5.2015 pending till now before the respondent no. 2, within a span of limited time period as prescribed and fixed by this Hon'ble Court.

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. Award the cost of writ petition in favour of the petitioner.

2. Brief background of the case, as is emanating in the present case, is that petitioner claims that he is grandson (daughter's son) of the freedom fighter Late Sri Badri Narayan Upadhyaya s/o Late Dukharan Upadhyaya r/o Village Kodha, Pargana Ghisua, Tehsil Machlishahar, District Jaunpur and petitioner has come up with the case that U.P. Public Service Commission advertised for the recruitment of the vacancy of U.P. Combined State/Upper Subordinate Examination (General/Special Recruitment) 2015 and in the said direction the advertisement in question has been published on 28.1.2015. The last date of submission of the application was 28.2.2015. Petitioner applied for consideration of his candidature under the general category. The aforesaid recruitment process has to be completed in three tier system (i) preliminary examination (ii) mains examination and (iii) interview. Petitioner has been allotted roll no. 046472 and he was issued admit card and he undertook the preliminary examination and by his sheer labour qualified the preliminary examination. Petitioner, at the point of time, after being declared as successful in preliminary examination filled up the form to make mains examination and at the said point of time petitioner claims benefit of being dependant of freedom fighter. Thereafter, petitioner has undertaken the mains examination and has cleared the same and, thereafter, petitioner has been asked to face the interview by letter dated 7.12.2015, which has been scheduled to be held on 7.1.2016 and prior to it on 4.1.2016 present writ petition in question has been filed and it has been taken up on 7.1.2016 and therein prayer of petitioner has been that he should be treated as "Dependant of Freedom Fighter" by virtue of being son of daughter of freedom fighter Late Sri Badri Narayan Upadhyaya in pursuance of certificate dated 21.5.2015 issued by the competent authority and similar treatment, as has been extended to Markandey Pratap Narayan Singh, be also extended to him.

3. On the presentation of writ petition in question we asked the counsel representing the Commission in question as well as learned Standing Counsel to obtain necessary instructions in the matter and pursuant thereto requisite instructions have been obtained and the instructions in

question are to the effect that as the date of submission of application was 28.2.2015 and the gazette notification in respect to the amendment in U.P. Public Services (Reservation for Physically Handicapped, Dependant of Freedom Fighters and Ex Service Man) Act, 1993, was made on 7.4.2015 and the certificate issued to the petitioner in respect to the dependant of a freedom fighter was issued on 21.4.2015 in the light of the aforesaid amendment, once the process of examination is on then midway petitioner cannot be permitted to change his category, as is being sought to be done in the present case and, accordingly, selection has to be made on the terms and conditions of the advertisement and, as such, no relief or reprieve should be given to the petitioner.

4. State, on the other hand, in the present case, is not disputing the judgment of this Court in the case of Isha Tyagi Vs. State of U.P. and others, Writ Petition No. 41279 of 2014, decided on 26.8.2014 and the issuance of notification, so issued, thereafter, on the basis of instructions in question, present petition has been taken up for final hearing and disposal.

5. Sri Rakesh Kumar Tiwari, Advocate, appearing for the petitioner, submitted with vehemence that petitioner cannot be discriminated and in all eventuality petitioner is eligible for being extended the benefit of 2% reservation quota and the weightage of being dependant of freedom fighter in selection process of U.P. Combined State/Upper Subordinate Examination (General/Special Recruitment) 2015, so that justice be done and discrimination be not perpetuated vis.a.vis. dependants of freedom fighter amongst themselves based on gender.

6. Countering the said submission Sri Nisheeth Yadav, Advocate, contended that petitioner has proceeded to apply for consideration of his candidature as a general category candidate and, in view of this, petitioner cannot be permitted to change his category after the last date mentioned in the advertisement in question has already been over and selection process is on and, in view of this, once instructions in question are binding, this Court, in case, allows any relief, same would tantamount to altering the terms and conditions of the advertisement in question, whereas no change is permissible after the cut of date and the judgment relied upon is not a judgment in rem, as such, writ petition is liable to be dismissed.

7. Learned Standing Counsel, on the other hand, has accepted the situation that there is a judgment holding the field of gender discrimination and remedial measures have already been undertaken by the State Government by making necessary amendments in the statute.

8. After respective arguments have been advanced the factual situation that is so emerging that the State Government has taken a policy decision to grant a horizontal reservation of 2% to the descendants of freedom fighters and, at the point of time, when such policy decision has been taken the State Government in its wisdom has qualified the condition of eligibility by stipulating that a son or a daughter would be entitled to the benefit of the reservation as well as grandson (son of the son) and unmarried granddaughter (daughter of son of freedom fighter) would be inclusive in the definition of descendants of freedom fighters. While defining the descendants

of freedom fighters unmarried daughter was entitled to the benefit of 2% horizontal reservation and married daughter and her children were not at all entitled to receive the same benefit. In the said direction the challenge has been made before this Court in Writ Petition No. 41279 of 2014 (Isha Tyagi Vs. State of U.P. & others) wherein a granddaughter of freedom fighter of Tehsil-Deoband, District Saharanpur, questioned the validity of the said exclusion by contending that it has the impact of gender discrimination and this Court entertained such a plea that exclusion of a granddaughter is plainly an act of hostile discrimination and finding favour with the said plea, proceeded to allow the writ petition in question in following terms;

"The State Government has taken a policy decision to grant a horizontal reservation of 2% to the descendants of freedom fighters. While doing so, the State Government has qualified the condition of eligibility by stipulating that a son or a daughter would be entitled to the benefit of the reservation. However, it has been stated in the relevant condition that the law department had opined that this benefit can be extended only to an unmarried daughter of a freedom fighter. Consequently, whereas the son's son would be eligible to apply for admission, the children of a daughter stand excluded. Exclusion of a grand daughter is plainly an act of hostile discrimination which is violative of the fundamental right guaranteed under Articles 14 and 15 of the Constitution. The condition which has been imposed by the State does not prescribe financial dependence. In fact, the clarification is to the effect that it is not necessary that the son of a freedom fighter should be financially dependant upon him. The basis and object of the horizontal reservation of 2% is to recognise the seminal role in the freedom struggle played by freedom fighters. It is in recognition of their contribution to the freedom struggle that a benefit of reservation is extended to descendants of freedom fighters. This being the rationale, there is no reason or justification to exclude a married daughter and consequently the children of a married daughter. Once a decision has been taken to extend the benefit of horizontal reservation to descendants of freedom fighters, whether the descendant is a son or a daughter should make no difference whatsoever. In fact, any discrimination against a daughter would be plainly a discrimination on grounds of gender. The guarantee under Article 15 of the Constitution is broad enough to encompass gender discrimination and any discrimination on grounds of gender fundamentally disregards the right to equality, which the Constitution guarantees.

In National Legal Services Authority Vs Union of India1, the Supreme Court held that any discrimination on the basis of gender identity would be contrary to Articles 14, 15 and 21 of the Constitution:

"82. Article 14 has used the expression "person" and Article 15 has used the expression "citizen" and "sex" so also Article 16. Article 19 has also used the expression "citizen". Article 21 has used the expression "person". All these expressions, which are "gender neutral" evidently refer to human beings. ...Gender identity as already indicated forms the core of one's personal self, based on self-identification, not on surgical or medical procedure. Gender identity, in our view, is an integral part of sex and no citizen can be discriminated on the ground of gender identity. ...

83. We, therefore, conclude that discrimination on the basis of sexual

orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, ..."

It would be anachronistic to discriminate against married daughters by confining the benefit of the horizontal reservation in this case only to sons (and their sons) and to unmarried daughters. If the marital status of a son does not make any difference in law to his entitlement or to his eligibility as a descendant, equally in our view, the marital status of a daughter should in terms of constitutional values make no difference. The notion that a married daughter ceases to be a part of the family of her parents upon her marriage must undergo a rethink in contemporary times. The law cannot make an assumption that married sons alone continue to be members of the family of their parents, and that a married daughter ceases to be a member of the family of her parents. Such an assumption is constitutionally impermissible because it is an invidious basis to discriminate against married daughters and their children. A benefit which this social welfare measure grants to a son of a freedom fighter, irrespective of marital status, cannot be denied to a married daughter of a freedom fighter. The progeny of the children of a freedom fighter cannot be be excluded on the grounds of gender. Grandchildren, irrespective of gender, must be treated on an equal footing. Whether grandchildren should at all be entitled to the benefit of a welfare scheme is a matter of policy for the State to decide. However, what is clearly not open to the State is to confine the benefit to grandchildren of a particular category, based on the gender of the parent or the gender of the child. Marriage does not have and should not have a proximate nexus with identity. The identity of a woman as a woman continues to subsist even after and notwithstanding her marital relationship. The time has, therefore, come for the Court to affirmatively emphasise that it is not open to the State, if it has to act in conformity with the fundamental principle of equality which is embodied in Articles 14 and 15 of the Constitution, to discriminate against married daughters by depriving them of the benefit of a horizontal reservation, which is made available to a son irrespective of his marital status. Consequently, in the present case, we are of the view that the opinion of the law department of the State, which forms the basis of the condition which is in question, is just not sustainable and is fundamentally contrary to basic constitutional norms.

In the circumstances, we order and direct that the benefit of the horizontal reservation of 2% for descendants of freedom fighters shall extend both to descendants of a freedom fighter tracing their lineage through a son or through a daughter irrespective of the marital status of the daughter. Neither a married daughter nor her children would be disqualified from receiving the benefit of the reservation which is otherwise available to them in their capacity as descendants of a freedom fighter. Whether, in a given case including the present, an applicant is truly a descendant of a freedom fighter is undoubtedly for the authority to verify.

In the present case, the learned counsel appearing for the petitioner has stated that the process of counselling is still going on. In the event that the counselling process is still underway, we direct that the claim of the petitioner shall, subject to due verification as regards its authenticity, be considered under the category of the horizontal reservation of

2% provided for descendants of a freedom fighter.

The writ petition is, accordingly, allowed in the aforesaid terms. There shall be no order as to costs."

9. The said judgment in question clearly proceeds to make a declaration that the benefits of horizontal reservation of 2% for descendants of freedom fighters shall extend both to descendants of a freedom fighter tracing their lineage through a son or through a daughter irrespective of the marital status of the daughter. Neither a married daughter nor her children would be disqualified from receiving the benefit of the reservation which is otherwise available to them in their capacity as descendants of a freedom fighter. However, it was left open as to whether in a given case including the present, an applicant is truly a descendant of a freedom fighter is undoubtedly for the authority to verify. The judgment in question thus on its face value is of declaratory nature wherein a declaration has been made by this Court that the benefits of horizontal reservation of 2% for descendants of freedom fighters shall extend both to descendants of a freedom fighter tracing their lineage through a son or through a daughter irrespective of the marital status of the daughter. Neither a married daughter nor her children would be disqualified from receiving the benefit of the reservation which is otherwise available to them in their capacity as descendants of a freedom fighter. The said judgment has been permitted to attain finality and even in principle amendment has been introduced, which is as follows;

"No. 453(2)/LXXIX-V-1-15-1(ka)-14-2015
Dated Lucknow, April 7, 2015

In pursuance of the provisions of clause (3) of Article 348 of the Constitution of India, the Governor is pleased to order the publication of the following English translation of the Uttar Pradesh Lok Seva (Sharirik Roop se Viklang, Swatantrata Sangram Senaniyon Ke Ashrit Aur Bhootpurva Saninikon Ke Liye Arakshan) (Sansodhan) Adhiniyam, 2015 (Uttar Pradesh Adhiniyam Sankhya 6 of 2015) as passed by the Uttar Pradesh Legislature and assented to by the Governor on April 6, 2015.

The Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependant of Freedom Fighters and Ex Service Man) (Amendment) Act, 2015

(U.P. Act No. 6 of 2015)

[As passed by the Uttar Pradesh Legislature]

AN

ACT

further to amend the U.P. Public Services (Reservation for Physically Handicapped, Dependant of Freedom Fighters and Ex Service Man) Act, 1993.

IT IS HEREBY enacted in the Sixty-sixth year of the Republic of India as follows:

1. This Act may be called the Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependant of Freedom Fighters and Ex Service Man) (Amendment) Act, 2015.

2. In section 2 of the Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependant of Freedom Fighters and Ex Service Man) Act, 1993, in section 2 of U.P. Act No. 4 of 1993 clause (b) for sub-clause (ii) the following sub-clause shall be substituted namely:-

"(ii) grand son (son of a son or daughter) and grand daughter (daughter of

a son or daughter) (married or unmarried)."

STATEMENT OF OBJECTS AND REASONS

The Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993 (U.P. Act no.4 of 1993) has been enacted to provide for the reservation of posts in favour of physically handicapped, dependants of freedom fighters and ex-servicemen. Clause (b) of section 2 of the said Act defines the word "dependant". In accordance with the said definition son and daughter (married or unmarried) and grand son and grand daughter (son or daughter of a son) (married or unmarried) are the dependants of a freedom fighter. The Hon'ble High Court, Allahabad has in writ petition no.41279/2014. Isha Tyagi vs. State of U.P. held in their order dated August 26, 2014 that gender based discrimination is unconstitutional. In the light of the said order, it has been decided to amend the said Act to include the son and daughter of a daughter of a freedom fighter.

The Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) (Amendment) Bill 2015 is introduced accordingly."

10. Much emphasis is being laid in the present case that pursuant to the judgment of this Court amendment has been introduced on 7.4.2015 and pursuant thereto certificate in question has been issued in favour of petitioner of being descendant of freedom fighter and the provisions of U.P. Public Services (Reservation for Physically Handicapped, Dependant of Freedom Fighters and Ex Service Man) (Amendment) Act, 2015, U.P. Act No. 6 of 2015, has been enforced w.e.f. 7.4.2015 and, as such, amending act would apply prospectively and, accordingly, benefit claimed by the petitioner cannot be accorded and the judgment in question is not a judgment "in rem" rather judgment is "in personam"

11. The judgment of this Court in the case of Isha Tyagi (supra) clarifies the position that there is hostile gender discrimination when married daughter and her children have been disqualified from receiving the benefit of reservation. In this backdrop arguments advanced by U.P. Public Service Commission that it is a case of prospective ruling and further the amendment in question would be enforceable from the date it has been brought in the statute book cannot be accepted as gender discrimination has been there since the inception of said provision and this Court has proceeded to clarify the legal position vide order dated 26.8.2014 clearly mentioning therein the benefits of horizontal reservation of 2% for descendants of freedom fighters shall extend both to descendants of a freedom fighter tracing their lineage through a son or through a daughter irrespective of the marital status of the daughter. Neither a married daughter nor her children would be disqualified from receiving the benefit of the reservation which is otherwise available to them in their capacity as descendants of a freedom fighter. In the said case the process of counselling was on, this Court directed consideration of candidature of the said candidate under the category of horizontal reservation of 2% provided for descendants of freedom fighters as discrimination has to be remedied and not to be perpetuated. The judgment of this Court in the case of Isha Tyagi (supra) has to be accepted as of declaratory nature and it has to be accepted that right from the

inception when policy decision has been taken to grant horizontal reservation of 2% to the descendants of freedom fighters, gender discrimination persisted whereas marital status of daughter ought not to have made any difference. The said judgment in question declares the correct law and once the judgment in question nowhere proceeds to mention that it would be applied prospectively then it has to be accepted that the judgment in question clarifies the legal position and is declaratory in nature. The amending act in question i.e. U.P. Act No. 6 of 2015 cannot be accepted as prospective in nature, inasmuch as, in the facts of the case, it has to be held to be correction of an obvious drafting error based on gender discrimination. The said amending act brings the granddaughter (daughter of a son) (married or unmarried) within the fold of descendant of freedom fighter. The said amending act is not at all prospective in nature as even without amending such provision, this Court has already clarified the legal position and the said provision would have to be read and interpreted, as has been sought to be corrected by the amendment. The judgment in the case of Isha Tyagi (supra) has to be accepted as declaratory and amendment in question is nothing but clarificatory in nature, that clarifies the situation as it ought to have been right from the inception of provision.

12. Consequently, in the facts of the case, once this Court has already clarified the legal position on 26.8.2014 in the case of Isha Tyagi (supra) clearly providing therein that the benefits of horizontal reservation of 2% for descendants of freedom fighters shall extend both to descendants of a freedom fighter tracing their lineage through a son or through a daughter irrespective of the marital status of the daughter, then, thereafter, as the judgment in question was judgment in rem, the declaration made therein would bind all the parties who were before the Court and even who were not before the Court. To accept the preposition that the said judgment is in personam is too far fetched, as here the said judgment has been delivered after hearing the State of U.P. and State of U.P. has been a party therein, then each and every advertisement issued, thereafter, ought to have been issued by taking note of that judgment. U.P. Public Service Commission is a State agency authorised to conduct Civil Services Examination for entry level appointments to the various civil services of Uttar Pradesh. The agency's charter is granted by the Constitution of India. Articles 315 to 323 of Part XIV of Constitution, titled services under the Union and the States,,provide for Public Service Commission for the Union and for each State. U.P. Public Service Commission cannot say that as U.P. Public Service Commission was not a party in the case of Isha Tyagi (supra), said judgment is not binding upon them.

13. Here accepted position is that the advertisement in question, that has been so made, is dated 28.1.2015 and last date of submission of applications was 28.2.2015 and this much is accepted position that by the said time though judgment has been delivered by this Court but the authorities concerned on the spot were not issuing certificate in line with the aforementioned judgment and it was only when the amending act has been issued the certificate in question has been issued by the authorities concerned. Here, this much is accepted position that the last date of submission of application was 28.2.2015 and at the said point of time certificate in question was not being issued by the State respondents in line with the judgment of this Court, petitioner

proceeded to apply for consideration of his candidature as general category candidate and, thereafter, amending act has been introduced and in consonance with the same certificate has been issued in favour of petitioner of being descendant of a freedom fighter and petitioner in his turn, at the point of time, when he has proceeded to fill up the form of mains examination, this fact is accepted that he has proceeded to claim the benefit of descendant of freedom fighter and petitioner has also undertaken the mains examination in question and has qualified the same.

14. In normal course of business this fact cannot be disputed that the terms and conditions of the advertisement cannot be permitted to be altered and the said terms and conditions have a mandatory characteristic. The situation, that is so emerging in the present case, is that a candidate cannot be asked to perform and discharge impossible task as here in spite of the fact that there has been a declaration by this Court clearly providing therein to extend the benefit of horizontal reservation of 2% for descendants of freedom fighters tracing their lineage through a son or through a daughter irrespective of the marital status of the daughter, in spite of said binding precedent at no point of time any attempt or endeavour was made by the State to implement the said judgment and bring the advertisement in question in line with the said judgment in question. The advertisement in question ought to have contained the reference of the judgment of this Court and as far as State is concerned, State Government is conceding to the situation that there has been a judgment of this Court and that they have proceeded to amend the definition in question. We have already proceeded to take view that the judgment of this Court is declaratory in nature and the amending act in question has to be accepted as clarificatory in nature, in such a situation and in this background for the fault of the State for not ensuring compliance of the judgment of this Court a candidate cannot be put to disadvantageous situation, inasmuch as, at the relevant point of time as definition in question has not been amended by means of amending act the authorities on the spot were not issuing the certificate to the incumbents who have lineage through married daughters of freedom fighters of being descendants of freedom fighters and, in such a situation, once act in question has been amended and, thereafter, certificate has been issued and based on the same petitioner has filled up the form of the mains examination under the category of Descendant of Freedom Fighter, then it may be true that there was a last cut of date but such a situation has to be dealt with in just and equitable manner.

15. We at this juncture would also make a mention that in identical set of circumstances faced with identical situation wherein U.P. Public Service Commission was a party, as State has not at all been resisting the prayer, this Court in Writ Petition No. 24988 of 2015 (Markandey Pratap Narayan Singh Vs. State of U.P. & others), allowed the writ petition on 1.5.2015 by directing the Secretary, U.P. Public Service Commission as follows;

"A bare perusal of the aforementioned judgment and order would go to show that the law on the subject has been clarified that neither a married daughter nor her children would be disqualified from receiving the benefit of the reservation which is otherwise available to them in their capacity as descendants of a freedom fighter and in the said case this Court proceeded to

mention that as the process of counseling is still ongoing, the claim of petitioner shall, subject to due verification as regards its authenticity be considered under the category of the horizontal reservation of 2% provided for descendants of a freedom fighter.

Once such has been the verdict of this Court and the said verdict had attained the finality then in such a situation merely on the ground that in preliminary examination no such declaration has been made, cannot be a ground to non-suit the candidature of petitioner under the aforementioned category of 'Dependent of Freedom Fighter'.

Consequently, in the facts of the case, the order dated 18 April 2015 passed by the Secretary, Public Service Commission, U.P. at Allahabad is not being approved and same is hereby quashed and set-aside. The candidature of petitioner be considered under the category of 'Dependent of Freedom Fighter' subject to due verification as regards its authenticity.

Writ petition is allowed, accordingly.

No order as to costs."

16. We posed specific question to the counsel appearing for U.P. Public Service Commission as to whether the order dated 1.5.2015 has been subjected to challenge before the Apex Court and the answer has been in 'No'. State is not at all resisting the request of petitioner. We have already taken the view that the judgment in the case of Isha Tyagi (supra) is declaratory in nature to the effect that descendants of freedom fighters would get the benefit of horizontal reservation of 2% tracing their lineage through a son or through a daughter irrespective of the marital status of the daughter. Once such is the factual situation that U.P. Public Service Commission has acquiesced to the order dated 1.5.2015 and has not questioned the validity of the aforementioned order, and State is not resisting the request of petitioner, then there is no reason or occasion for us to take a different or contrary view, as has been expressed by this Court in the case of Isha Tyagi (supra), Markandey Pratap Narayan Singh (supra).

17. At this juncture we also proceed to take note of the judgment of the Apex Court in the case of U.P. Public Service Commission vs Satya Narayan Sheohare & Ors, 2009 (5) SCC 473, wherein the writ petitioners were general category candidates when recruitment notification dated 4.3.2000 was issued. Subsequent to the same, the said general category candidates became OBC candidates, when the act was amended on 7.7.2000 i.e. before commencement of written test on 4.8.2000, in the said case a Division Bench of this Court in Writ Petition No. 28193 of 2000, Amrita Singh Vs. State of U.P., decided on 7.5.2001 gave benefit of reservation. Apex Court in the said case held that as the process of selection was deemed to have been initiated when the written test was started and as the Schedule-I to the Act was amended prior to the commencement of written test, the writ petitioners should be treated as OBC candidates, therein also OBC status was accorded after last cut of date and in peculiar facts of the case as they were transitional provisions, benefit of the same has been extended.

18. Consequently, in the present case also, keeping in view the peculiar facts of case as is clearly reflected here that a declaration has been made by this Court on 26.8.2014 and by ignoring the same advertisement in question has been issued and, thereafter, amendment in question has been made that has been held to be clarificatory in nature, then even if that at the point of time when preliminary examination

has been held, petitioner has proceeded to fill up the form as general category candidate as at the said point of time even though judgment in the case of Isha Tyagi (supra) has been there, respective certificates were not being issued to the incumbents by the authorities concerned and certificates in question have been issued only after amending act has been introduced, in view of this, to deny the benefit of being Descendant of Freedom Fighters having his/her lineage through married daughter cannot be approved of by us.

19. Writ petition is allowed, accordingly. Respondents are directed to treat the candidature of petitioner under the category of "Dependant of Freedom Fighter" subject to due verification as regards its authenticity and his result be also declared, accordingly.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.01.2016

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE YASHWANT VARMA, J.

Special Appeal Defective No. 847 of 2015

C/M Shri Lal Bahadur Shashtri Junior High School ...Appellant
Versus
Bapu Shiksha Samiti & Ors. .Respondents

Counsel for the Appellant:
Balwant Singh

Counsel for the Respondents:
C.S.C., Arun Kumar, Rajeev Misra

High Court Rules, 1952-Chapter VIII Rule-5-Special Appeal against interim order-by Learned Single Judge-granted stay without discussion of fact or reasons-held-maintainable-neither the party nor the Appellate Court could understand the reason justifying the grant of interim order-liberty to move fresh for interim protection before Single Judge.

Held: Para-1
Even at the interlocutory stage, it is necessary for the Court to bear in mind the basic principles governing the grant of an interim injunction, namely, the issue of a prima facie case, balance of convenience and irreparable harm.

(Delivered by Hon'ble Dr. Dhananjaya Yeshwant Chandrachud C.J.)

1. The impugned order of the learned Single Judge which is of an interlocutory nature furnishes absolutely no reason as to why the learned Single Judge has stayed the operation of the order dated 29 May 2015 passed by the District Basic Education Officer, Gorakhpur. The order neither records the submission nor does it carry any prima facie evaluation of facts. Even at the interlocutory stage, it is necessary for the Court to bear in mind the basic principles governing the grant of an interim injunction, namely, the issue of a prima facie case, balance of convenience and irreparable harm.

2. Absent any reason whatsoever, neither the parties nor, for that matter, the appellate court would have the benefit of understanding the basis on which the interlocutory order has been passed.

3. For these reasons, we allow the special appeal and set aside the impugned order dated 12 June 2015 passed by the learned Single Judge. However, we grant liberty to the original petitioner to move the learned Single Judge afresh for the grant of protective interim relief.

4. The special appeal is, accordingly, disposed of. There shall be no order as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.01.2016

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE MRS. VIJAY LAKSHMI, J.

Capital Case No. 962 of 2007
Connected with

Capital Case No. 903 of 2007

Vikas Sharma @ Moni & Anr. ...Appellants
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ashok Kumar Rai, Apul Misra, P.N. Misra, P.S. Pundir, R.K. Rai, Ravindra Nath Rai, V.P. Srivastava

Counsel for the Respondents:
Govt. Advocate, D R Chaudhary, I.K. Chaturvedi, M S Yadav, Rajul Bhargava

Criminal Capital Appeal-conviction of death sentence u/s 302, 34 IPC-with fine of Rs. 20,000 on each appellant-life imprisonment with fine of Rs. 10000 on each under section 364 and 201-prosecution comprehensively and reliably established the chain of circumstances-with help of oral as well as documentary evidences-presence of appellant and intention of committing crime the gruesome manner-try to destroy evidence established-conviction of Trail Court affirmed-considering age of accused-and no previous criminal record-not likely to be danger to society-offence not premeditated-being circumstances evidence-except death sentence all other sentences given by Trail Court need no interference-Appeal partly allowed.

Held: Para-15
On 30.11.2003 the fingerprint expert Dr. Rajendra Singh collected finger prints from the dressing table, wooden, almirah, stainless steel kettle, T.V. Stand, the mirror of dressing table and washbasin of room no. 209 in presence of the witnesses and the I.O. who prepared its memo (Ex. Ka. 18). The site plan of the hotel room and bathroom attached to it was also prepared by the I.O. which is Ex. Ka. 32 on the record.

Case Law discussed:
(1983) 1 SCC 143; 2013 (14) SCC 434; (2014) 6 SCC 716; (2012) 6 SCC 174; 1955 AIR 801; AIR 1994 SC 1733; 2002 (I) UPCr R 384; AIR 2002 (SC) 2920; (1983) SCC 143; (2005) 11 SCC 600; (1983) 1 SCC 143; 2005 SCC (Cri) 1938; (1980) 2 SCC 684; (2014) 4 SCC 375.

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

1. Both these criminal appeals, arising out of the same judgment and order dated 1.2.2007 passed by Additional Sessions Judge (F.T.C. Ist), Muzaffar Nagar in S.T. No. 184 of 2004 (State of U.P. Versus Rajesh Saini and others), were connected vide order dated 13.2.2007 of this Court and are hereby decided by this common judgment.

2. The facts in brief, if the case of the prosecution were true, reveal the tragic case of one young boy Abhishek alias Lovey, who was kidnapped for ransom and was chopped off into two parts by the accused appellants, one of whom (appellant - Vikas Sharma) the boy used to call 'uncle'. After his murder the accused appellants buried both those parts separately into the sugarcane fields.

3. The brief facts of the case as unfolded during trial are that on the fateful day i.e. 27.11.2003 the father of the deceased boy - informant Pradeep Kumar Garg, who is a practicing advocate in Tehsil Court, Jansath, district Muzaffar Nagar, had gone to

tehsil Jansath for his work leaving his wife, daughter and son, deceased Abhishek, at his home. At about 3.30 P.M. his wife rang him up and informed that just after he had left, accused Vikas Sharma, (who was a friend of Pradeep Kumar's younger brother Manoj Garg and was working as a typist of Tehsil Court Jansath), had come to their house and had taken away Abhishek with him but Abhishek had neither reached his school nor had yet returned. Hearing this, the informant at once rushed to the place where typist Vikas Sharma (A-1) used to sit at the tehsil court campus, to inquire from him about the whereabouts of his son but Vikas Sharma was not found on his seat. The informant then rushed to his home and asked about Abhishek from his wife and daughter, both of whom, while weeping informed that Abhishek had not yet returned. The informant alongwith his wife started to search his son. During search his brother-in-law (Behnoi) Rakesh Agrawal informed that he had seen Abhishek and accused/appellant Vikas Sharma going towards Prakash Chowk at about 10.00 A.M. The informant and his wife searched their son at Prakash Chowk but his whereabouts remained untraced. Searching their son when they reached at Mahaveer Chowk, Pramod Sharma, Advocate and Anuj Kumar (PW-3) met them who informed them to have seen Abhishek in the company of accused/appellants Vikash Sharma, Rajesh Saini, Aashu and Arvind, standing in front of Swagat Hotel at about 10.30 A.M. The informant and his wife searched their son in Swagat Hotel and some other hotels also but in vain. When the whereabouts of Abhishek remained untraced till the morning of 28.11.2003 i.e. the next day of Abhishek's disappearance, the informant lodged a written report at P.S. Nai Mandi, Muzaffar Nagar on 28.11.2003 at 9.15 a.m. narrating all the aforesaid facts and expressing therein his apprehension about abduction of his son for ransom by all the accused/appellants. In the F.I.R. itself he also mentioned the names of villages of appellants Rajesh and Aashu as Kasba Jansath and village Aadampur, P.S. Khatauli, district Muzaffar Nagar, respectively.

4. On the basis of the aforesaid written report (Ext. Ka. 1), a criminal case was registered at Crime No. 541 of 2003 at P.S. Nai Mandi, District Muzaffar Nagar under Section 364 I.P.C. against all the appellants. Check F.I.R. (Ext. Ka. 4) was prepared and the investigation got started. The I.O. obtained a photograph of deceased Abhishek from the informant (Material Ext. 1) and searched for all the accused persons named in the F.I.R. but none of them was found at his residence. The I.O. then recorded the statements of witnesses Pramod Sharma and Rakesh Agrawal who had lastly seen the deceased Abhishek in the company of accused persons. The I.O. reached Swagat Hotel with the photograph of Abhishek and enquired from the hotel employees, who informed the I.O. to have seen Abhishek on 27.11.2003 when he was going towards room no. 209 of hotel. The I.O. checked the hotel register and found that room no. 209 was booked in the name of some Rohit Gupta, resident of 208/7, Lohia Nagar, Ghaziabad at a rent of Rs. 400/- per day, having its check-in time at 10.15 a.m. on 26.11.2003 and check out time at 3.00 P.M. on 27.11.2003. The hotel register was taken into custody and its recovery memo (Ex. Ka. 21) was prepared. However, on verification, the name and address of occupant of room no. 209 i.e. Rohit Gupta was found to be fake and false. The verification report of identity of Rohit Gupta is available as Ex. Ka. 38 on the record.

5. On 28.11.2003, the I.O. once again visited Kasba Jansath in search of appellants but with no result. Ultimately, on the information of a "Mukhbir", the appellants Rajesh, Aashu and Vikas were arrested by the I.O. from the bus stand of Kasba Jansath in the morning of 29.11.2003,. At the time of their arrest, the informant Pradeep Garg - the father of deceased alongwith several other residents of Jansath Kasba also reached there. On enquiry, the aforesaid appellants confessed their guilt in presence of informant and the public gathered at the spot. They informed the I.O. that on 27.11.2003 they had kidnapped Abhishek and had taken him to room no. 209 of Swagat Hotel, giving him allurement of showing some pornographic movie. Appellant Arvind Saini was also with them. On reaching the hotel room they bolted the room from inside. They had an intention to take at least Rs. 10 lacs from Abhishek's father as ransom. When Abhishek tried to run outside the room apprehending something fishy, all of them overpowered him. They caught hold of him and made assault on his neck by a scissor. As a result of injury, Abhishek became unconscious. Then they dragged him inside the bathroom attached to the hotel room. Inside the bathroom, they tied his hands and legs with a rope and then they chopped off his body into two parts. Thereafter, they kept both the parts in two separate polythene bags and packed the polythene bags into two suitcases. Accused Rajesh Saini had already booked a taxi from 'Shikhar Car Service' which was an Amabassador Car No. UGA 8551 with its driver Saleem. They kept those suitcases into its dicky and the taxi drove towards village Khatauli with the appellants Rajesh and Arvind. At Khatauli they threw the mobile phone of deceased Abhishek into Ganga canal after breaking it. Arvind Saini alighted from the taxi at the gate of Railway Crossing, Khatauli and proceeded towards his village Adampur. Rajesh Saini took both the suitcase to his shop "Sunny Cloth House" situated at Kasba Jansath. Co-accused Vikash Sharma and Aashu Gupta had already reached at that shop. Rajesh Saini's real brother accused Raj Kumar and cousin brother accused Kailash were also present there. All of them emptied the suitcases inside the shop. They kept both the polythene bags containing two parts of dead body alongwith other incriminating articles in two separate plastic sacks. At about 8.00 P.M. Rajesh brought a tractor. Those sacks were taken to the jungle by that tractor and were buried down under the sugarcane fields of Vishnu Sahai and Dinesh Kamboj.

6. On the aforesaid confessions of the appellants Rajesh, Aashu Gupta and Vikas Sharma, the police took them to the cane fields of Vishu Sahai, where at about 10.30 A.M. accused Rajesh Saini dug out the loose soil from a place and took out a plastic sack having a zipped bag inside it. When the zip of the bag was opened, the upper part of Abhishek's body was found inside it which was identified by informant Pradeep Garg as that of his son Abhishek. One pair of shoes, jeans with belt, one shirt with one front button missing, one sandow baniyan, all blood stained, one pair of scissors, 3 blades of wood cutter ('aari') alongwith one blood stained "Aari" one pair of new plastic gloves and one pair of used plastic gloves, one used piece of soap and a plastic rope were also recovered from the bag (material ex. 2 to 21 on the record). After that the accused Vikas Sharma, Aashu Gupta and Rajesh Saini pointed out towards the field of Dinesh Kamboj situated at the

other side of 'Mend' stating that the other part of body was buried in that field. The police took accused Aashu Gupta and Vikas Sharma to the field of Dinesh Kamboj where both of them after removing the loose soil from a place took out a while polythene bag. Inside that bag the lower part of Abhishek's body was found tied with a nylon rope, which was also identified by the father as that of his son.

7. On recovery of both the parts of dead body of Abhishek, sections 302 and 201 of I.P.C. were added in this case. The recovery memo Ex. Ka. 2 and Ka. 3 were prepared on which the signatures of all the three accused appellants, at whose instance the recovery was made and the signatures of witnesses were obtained. The inquest proceedings were conducted and the body was sent for post-mortem examination.

8. The post-mortem examination of the dead body was conducted on 29.11.2003 at 7.30 P.M. by two doctors.

9. Post-mortem report (Ex. Ka. 6) reveals that on external examination of the dead body the doctor found that it was a well built body kept in two halves in two separate transparent white plastic.

10. The horrifying description of ante-mortem injuries, according to the post-mortem report is as follows :-

I. Incised wound 13 X 2.5 cm. trachea deep on right side of neck 6 cms. connected from thyroid cartilage in front of neck and to the right side of neck from middle of chin in front 5 cms. below from right ear where trachea is present. All soft tissues muscles, trachea oesophagus and right carotid artery are cutted through and through. Clotted blood is present in all injury.

II. Incised wound 38 x 22 cms. X through and through on mid of abdomen 2 cms. above from unblinking 10 cms. below from zyphord angle. All soft tissue, muscle, abdomen and scera are cutted through and through, Lumber vertical also cut through and through clotted blood is present in all injury.

The external examination report is as under : -

Well built body. Body is received in two separate sealed clothes and in two halves. On opening seals body found in two halves. On opening sealed clothes both halves are found in two separate transparent white plastic two pieces.

Upper half

Eye close. Tongue protruded out slightly and clinches in between both jaws teeths. a frothy blood is coming out from nostrils. A fiber rope is tied around neck and left wrist. A red thread is tied on around right wrist.

Lower Half

A rope of same caliber (Rassi joot ki) is tied on both upper part of thigh and both ankle both knee were bending with the help of rope. Internal viscera are visible on both halves. Rigor mortise is absent on all over body. Dried blood smear is present on all over body at place and with green colour. Visible viscera and cuted muscles are smeared noted on with green eye colour. A tuft of black hairs are present in both hands finger which are sealed packet and from scale hair are sealed in second packet.

11. The cause of death was found to be shock and haemorrhage as a result of antemortem injuries.

12. It is nghoteworthy that the doctor while conducting post mortem, also found black human hairs entangled inside both the clenched fists of deceased Abhishek. The doctor opened the fists and kept those hairs in a sealed envelop for sending it for forensic examination. The hair samples of appellants Rajesh, Vikas, Aashu and Arvind were also taken for comparison with those hairs and sent to FSL, Agra in separate envelops. Some hairs, found inside room no. 209 of hotel during search, were also sent for chemical examination. The report of FSL, Agra is Ex. 65 on the record. According to which blood stains were found on the hairs found from the closed fists of deceased. However, no definite opinion could be given about the similarity of those hairs found inside the fists of deceased with those of appellants. All those samples of hairs kept in separate envelops were produced in the Court during trial and were marked as material exhibits 28 to 31.

13. At the instance of appellants Rajesh, Aashu and Vikas the suitcases were recovered from the godown situated at the basement of "Sunny Cloth House". Both the suitcases were produced in court and were marked as material Exs. 32 and 33. The recovery memo of suitcases having signature of appellants and witnesses is Ex. Ka. 9 on the record.

14. From the almirah kept in room no. 209 of the hotel, the I.O. recovered a button with black thread in its holes, having resemblance with the remaining buttons of the shirt of the deceased which he was wearing at the time of his death and which was recovered with his dead body with one front button missing. One blood stained hanky was also found in the hotel room. From the bathroom attached to room no. 209, one blood stained blade of 'aari' was recovered which had been kept hidden behind the cistern of its commode. The pieces of blood stained tiles and blood stained wooden door were also taken into possession by the I.O. The recovery memo of all these articles having signature of appellants and the witnesses is Ex. Ka. 20 on the record.

15. On 30.11.2003 the fingerprint expert Dr. Rajendra Singh collected finger prints from the dressing table, wooden, almirah, stainless steel kettle, T.V. Stand, the mirror of dressing table and washbasin of room no. 209 in presence of the witnesses and the I.O. who prepared its memo (Ex. Ka. 18). The site plan of the hotel room and bathroom attached to it was also prepared by the I.O. which is Ex. Ka. 32 on the record.

16. The remaining accused persons Kailash, Arvind and Raj Kumar were arrested on 2.12.2003 from Hindustan Petrol Pump, Jansath. During search a ring made of yellow metal having the name 'Lovey' engraved on it, was recovered from the pant pocket of appellant Arvind.

17. The site plan of place of arrest was prepared Accused Rajkumar informed that the CD player he had brought to hotel for the purpose of showing pornographic movie to deceased, had been concealed by him as per instructions of accued Rajesh. At the instance of accused Rajkumar, the I.O. recovered one Sony CD player, material (Ex. 80), a remote (material Ex. 82), a converter (material Ex. 81), wire material (Ex. 83 to 86) and recovery memo of all these articles Ext. Ka. 112 was prepared on which the signatures of accused Raj Kumar and witnesses were obtained.

18. On conclusion of the investigation, the I.O. submitted charge-sheet against 6 persons including the appellants. The case being exclusively triable by the court of Sessions, was committed to it where charges under sections 364, 302 read with Section 34 and 201 of I.P.C. were framed against the appellants. Charge under Section 201 was framed against accused Raj Kumar and Kailash for aiding the appellants in concealing the dead body. All the accused persons denied the charges and claimed their trial.

19. During trial, the prosecution, in order to prove its case examined 13 witnesses in all. Apart from it, 68 documents (Ex. 1 to 68) and 132 articles (material Ex. 1 to 132) were also produced in Court by the prosecution in support of oral testimony of the witnesses.

20. After conclusion of prosecution evidence the statements of accused/appellants under Section 313 Cr.P.C. were recorded in which the appellants admitted the fact that Vikas Sharma was working as typist at Tehsil Court Jansath where the informant Pradeep Kumar Garg used to practice as an advocate. They also admitted that the samples of their hairs and finger prints were taken before CJM but all of them denied the remaining allegations and counter allegations and alleged their false implication by the police. All of them also alleged that the police forcibly compelled them to confess their guilt.

21. In their defence, the appellants produced one defence witness Vinay Kumar as DW-1. As documentary evidence photocopy of Newspaper "Royal Bulletin" dated 29.11.2003 and photocopy of newspaper "Amra Ujala" dated 29.11.2003 was produced by them challenging the date and time of their arrest and recovery at their instance as doubtful. Apart from the above mentioned documents photo copies of some letters of police officers and original receipt of registered letters sent to Human Rights Commission were also filed by the appellants.

22. The learned court below, after a detailed appreciation of evidence, adduced by both sides, found the prosecution case reliable and worthy of credit. Accordingly it held all the appellants guilty and convicted them under Section 302/34, 364 and 201 of I.P.C. The appellants were awarded death sentence alongwith fine of Rs. 20,000/- for their conviction under Section 302/34. The sentence of life imprisonment and fine of Rs. 10,000/- under Section 364 I.P.C., in default of fine two years additional R.I. and 7 years R.I. with fine of Rs. 10,000/- under Section 201 and in default of fine 1 year additional R.I. was awarded to all the appellants.

23. Being aggrieved by their conviction and sentence the appellants are before us, challenging the legality and correctness of the judgment and praying for their acquittal.

24. The points for determination in this appeal are : -

(a) As the instant case rests on circumstantial evidence whether all the circumstances have been fully proved and established by the prosecution in such a way so as to form a complete chain pointing only towards the guilt of appellants and towards no other hypothesis ?

(b) Whether the trial court has rightly appreciated the evidence while arriving at the decision of conviction ?

(c) Whether the death sentence awarded by the trial court is excessive ?

25. As point nos. a and b are inter related, therefore, we are discussing both these points together.

26. Before dealing with the issues involved in aforesaid points, it is considered expedient to have a birds eye view of the statements of relevant prosecution witnesses.

27. The prosecution, in order to prove its case, has produced 13 witnesses in all, out of which 8 witnesses are of fact and the remaining are formal.

28. Pradeep Kumar Garg who is the father of the deceased and the first informant has been produced as P.W. 1, who has supported the prosecution case by his oral testimony stating that on 27.11.2003 he had left for Tehsil Jansath, as per his usual routine. At about 3.30 P.M. his wife rang him up on his office phone no. 234491 and informed that Vikas Sharma had come sometime after his leaving for his office and he had taken away Abhishek with him, but Abhishek had not yet returned. She also informed that Abhishek had not even gone to his school. When she tried to contact Abhishek on his mobile number, she did not get any response. Hearing this, the informant immediately rushed to the seat of Vikas Sharma at Tehsil Court, Jansath, but Vikas Sharma was not found on his seat. Then he rushed to the house of Vikas Sharma where his mother informed that Vikas had not come to home since yesterday. Thereafter, the informant went to his home situated at Jansath from where he took his younger brother Manoj Garg with him and returned to his home at Muzaffar Nagar. On returning home when he again asked from his wife and daughter whether Abhishek had returned or not, both of them while weeping replied in negative. The informant and his wife proceeded to search their son on a motorcycle. During search his brother-in-law Rakesh Agarwal informed him that when he was going to his shop in the morning he had seen Abhishek at about 10.00 A.M. going towards "Prakash Chowk" with appellant Vikas Sharma. The informant reached "Prakash Chowk" and tried to search his son. From "Prakash Chauk" he proceeded towards Mahavir Chowk. At Mahavir Chowk Advocate Pramod Sharma and one Anuj Kumar informed him to have seen Abhishek standing in front of Swagat Hotel along with Vikas Sharma, Rajesh Saini, Arvind and Aashu Gupta. PW-1 has stated that he knows the appellants Rajesh Saini, Vikas Sharma and Aashu Gupta since prior to the occurrence. Pointing out towards the appellants present in the court and identifying all of them as accused persons, PW-1 has further stated that thereafter he went to Swagat Hotel along with his wife, but failed to get any information about his son. Leaving his wife at home he again went to tehsil Jansath and on the same night he visited the houses of appellants Aashu Gupta, Rajesh Saini and Vikas Sharma, but no one was found at his house. Therefore, the informant returned to Muzaffar Nagar. Next day i.e. on 28.11.2003 early in the morning at about 5.00 A.M. he once again reached Jansath and visited the houses of appellants Rajesh Saini, Vikas Sharma and Aashu Gupta situated at Jansath but neither any of them were found nor any information was

received about informant's missing son. The informant, under the apprehension that his son Abhishek might have been kidnapped for ransom by the appellants because of his sound financial condition and apprehending that his son's life might be in danger, went to Police Station Nai Mandi and lodged a written report (Ex. Ka-1) at 9.15 A.M.

29. PW-1 has further stated that he had informed the police that at the time of occurrence Abhishek was wearing a gold ring having the word "Lovey" engraved on it, Abhishek was aged about 18 years and he was a student of Class XI. The police had come to his house and had interrogated his wife and daughter and had prepared the site plan of his house. He had also given a photograph of Abhishek to the police (Material Ext. 1). He has further stated that on 29.11.2003 at about 8.00-9.00 A.M. he started from his house and when he reached at the road proceeding towards Kasba Jansath, he saw large number of crowd gathered at the road. He was informed that the police had arrested Rajesh Saini, Vikas Sharma and Aashu Gupta. On reaching there he saw all the three appellants in police custody. When the police inquired from the appellants about the occurrence, they jointly disclosed that they had abducted Abhishek for ransom and had killed him inside the room no. 209 of Swagat Hotel. They further informed that Arvind Saini was also involved in the murder of Abhishek. The appellants told that they had chopped off Abhishek into two parts and had buried down both the parts of his body separately into the sugarcane fields of Vishnu Sahai and Dinesh Kamboj. While confessing their guilt the appellants Rajesh, Aashu and Vikas stated that they could help the police to recover the dead body from those fields.

30. P.W. 1 has further stated that after such disclosure, the police took the appellants by its jeep to the fields of Vishnu Sahai where the appellant Rajesh Saini dug the loose soil from a place first from his hands and then by a spade and took out a white plastic sack, when the sack was opened a zipped bag was found inside it. On opening its zip, the upper part of the dead body of Abhishek was found inside it wrapped in a transparent polythene sheet. Besides it, the clothes of deceased Abhishek including a blue jeans a shirt having white, light brown and blue coloured checks with one front button missing, a belt, a vest, shoes, one saw (aari) along with three blades having blood stains, one pair of scissors, one pair of new gloves and one pair of used gloves having blood stains were also found in the bag. On seeing his son's body he started crying and identified his son's body. Thereafter, appellants Vikas Sharma and Aashu Gupta were taken to the fields of Dinesh Kamboj where after removing the loose soil from a place one more white sack was taken out, inside which the lower part of the body of Abhishek was found wrapped in a transparent polythene sheet having blood stains all over it. The recovery memo of all articles and the dead body was prepared by the I.O. and the signatures of appellants Rajesh Saini, Vikas Sharma and Aashu Gupta and also his signature, were taken on recovery memo. PW-1 has proved these recovery memos in the Court as Ex. Ka-2 and Ex. Ka-3.

31. This witness (PW-1) has faced lengthy and grueling cross examination by several learned defence counsels appearing for different accused appellants. During cross examination he has admitted that he had not received any

call from the appellants demanding any ransom. He has also admitted that the fact that his son Abhishek was killed inside hotel room had come to his knowledge for the first time by the confessional statement of appellants.

32. PW-2 Anshu Garg, mother of the deceased Abhishek, in her statement has stated that on 27.11.2003 at about 8.45 A.M. typist Vikas Sharma alias Moni had come to her house and asked her to send Abhishek with him stating that he would come back after sometime. Her husband, as per his usual daily routine, had gone to Tehsil Jansath for practicing. As she was not feeling well, she had asked Abhishek to take leave from his school. Her daughter Abhilasha Garg had gone to her school. At about 9.15 A.M. she went to sleep after taking some medicine. Thereafter she woke up at about 2.45 P.M. and found that Abhishek had not yet returned. She tried to contact on Abhishek's mobile number by the mobile phone of her landlord, but his phone was found switched off. When her daughter returned from school she told her about Abhishek. She again called on his mobile phone, but still it was found switched off. Thereafter, PW-2 has narrated the same facts, as stated by PW-1.

33. PW-3 is Anuj Kumar, who was working as a Deed Writer at Tehsil Jansath at the time of occurrence. He is the witness who has seen the deceased lastly in the company of appellants Vikas, Aashu and Rajesh. He has stated that on 27.11.2003, he alongwith Pramod Sharma, Advocate, was going on a rickshaw when they saw deceased Abhishek alias Lovey standing with appellants Vikas Sharma, Aashu Gupta, Rajesh Saini and Arvind Saini in front of Swagat Hotel. He has stated that he knows all these accused appellants since prior to the occurrence. PW-3 has further stated that when they were returning from Kutchehry at about 6.30 P.M. he met Pramod Sharma, Advocate, near Prakash Chowk and both of them proceeded towards Mahavir Chowk on a rickshaw. At Mahavir Chowk they met Pradeep Garg, Advocate, and his wife coming slowly on a motorcycle. Both of them were appearing tensed and perturbed. Both of them told that they were searching for their missing son Abhishek and he (P.W. 3) informed them to have seen Abhishek in the company of appellants. PW-3 has further stated that on the next day i.e. 28.11.2003 at about 7.00 A.M. Pradeep Garg had come to his house and had asked him to accompany him to police station for lodging the report. Reaching at Police Station Mandi, Pradeep Garg wrote the F.I.R. in his own handwriting and gave it to "Diwanji".

34. PW-4 Constable Clerk Jagbeer Singh, who has prepared the check F.I.R. (Ex. Ka-5). He has stated that at 9.15 A.M. on 28.11.2003 he was on duty when on the basis of a written report lodged by Pradeep Kumar Garg, Advocate, he prepared the F.I.R.

35. PW-5 is Dr. R. Dayal, who has conducted the postmortem of the deceased. He has stated about the ante mortem injuries and the articles received with the dead body of Abhishek and also about the hairs found his closed fists. He has proved the post-mortem report (Ex. Ka. 6).

36. PW-6 Rakesh Kumar Agarwal, is the second witness of "last seen" evidence. He is also a witness of recovery of dead body. He has stated that on 27.11.2003 he

was going towards his shop situated at Sanjay Marg, Patel Nagar. At about 10.00 A.M., when he reached in front of roadways, he saw Abhishek going towards Prakash Talkies along with Vikas Sharma. He has further stated that at 6.00 P.M. on the same day when he was sitting in his shop, his brother-in-law Pradeep Garg and his wife Ansu came to his shop on a motorcycle searching their son Abhishek. He had informed them that when he was going to his shop, he had seen Abhishek at 10.00 A.M. in the company of appellants. PW-6 has further stated that on 29.11.2003 when they were searching Abhishek at Tehsil Jansath and had reached at the bus station of Tehsil, they saw a large crowd gathered there and found that the police had arrested Rajesh Saini, Ashu Gupta and Vikas Sharma. He had accompanied the appellants and police to the field of Vishnu Sahai and had witnessed the recovery of two parts of body of Abhishek from the fields of Vishnu Sahai and Dinesh Kamboj at the pointing out of the appellants. He has further stated that the inquest of dead body was conducted before him. He was also a witness of inquest. He has identified his signatures on inquest report (Ext.Ka-7). He has further stated that the inquest proceedings were started at about 1.00 P.M. and were concluded at about 3.30 P.M.

37. PW-7 S.L. Lawaniya is the first I.O. of this case who has stated that the case was registered on 28.11.2003 in his presence. He recorded the statement of informant Pradeep Kumar Garg at the police station and thereafter went to the house of informant and recorded the statements of Abhishek's mother and sister. He prepared the site plan (Ex. Ka-8) and interrogated the complainant's landlord Sri Satya Narain Agarwal and also some of his neighbors. Thereafter, the investigation of this case was taken up by Inspector B.P.S. Solanki. On 29.11.2003, he came to Muzaffar Nagar along with Inspector Solanki and recorded the statements of witnesses. On 29.11.2003 at about 10.00 A.M. on the information of some 'Mukhbir' the accused Aashu Gupta, Rajesh Saini and Vikas Sharma were arrested from the Bus Stand of Jansath and all of them confessed their guilt before the huge crowd gathered at the bus station. The relevant part of the statement of P.W. 6 (the first I.O.) is extracted below :

".....सबेरे करीब 10.00 बजे दि0 29.11.2003 को मुखबिर द्वारा सूचना मिली मेरे सामने मिली थी। कि मुलजिमान आशु गुप्ता, राजेश सैनी विकास शर्मा जानसठ बस अड्डे पर खड़े है। तुरन्त हम लोग वहॉ पहुॅचे उपरोक्त तीनो मुलजिमान को पकड़ लिया पूछताछ को तो तीनो ने सार्वजनिक रूप से भीड़ इकट्ठा हो गयी थी भीड़ के सामने बताया था मुलजिमान ने बताया कि दि0 27.11.2003 को हम तीनों और अरविन्द सैनी हत्या मे शामिल थे। स्वागत होटल मे हत्या कर शव को दो हिस्सो मे काटकर दो अलग –2 सूटकेसों मे भरकर जनसठ के जंगल में दबा दिया है। वह जगह हम चल कर बता सकते है। इस सूचना पर हम उपरोक्त तीनो मुलजिमान को साथ लेकर जानसठ के जंगल में रामराज वाले रोड पर विष्णु सहाय व दिनेश काम्बोज के खेतों मे ले गये, वहॉ आगे आगे चलकर अभियुक्तों ने मृतक अभिषेक का शव दो हिस्सों में धड़ वाला हिस्सा विष्णु सहाय के ईख के खेत से व पैरो वाला हिस्सा दिनेश काम्बोज के खेत से करीब 10–30, 11.00 बजे दिन बरामद करा दिये थे। फर्द बरामदगी इन्सपेक्टर साहब ने बनाई थी। जो मौके पर बनाई थी मेरे भी हस्ताक्षर कराये थे। लाश के अलावा लाश के साथ प्लास्टिक का बैग आदि सामान जो बरामद हुआ था। उसकी फर्द अलग से बनाई थी। तथा गवाहान के दस्तखत भी कराये थे। मुलजिमान तीनो को कापी दी थी। हम पुलिस कर्मचारीगण 3.00 बजे तक मौके पर रहे। .....ए अभियुक्तो की निशानदेही पर कस्बा जानसठ से राजेश सैनी की दुकान से सन्नी क्लाथ हाउस से दो सूटकेस बरामद कराये थे। जिनमे मृतक के शव को रखकर ले गये थे। सूटकेसों की फर्द बनायी थी। मेरे दस्तखत कराये थे। सील हुई मोहर किये थे। जिस पर फर्द मेरे सामने है जिस पर इक्ज क–9 डाला गया। मुजजिमों को फर्द को नकल दी थी। रात में हम थाने नई मंडी पहुॅचे मुलजिमों को थाना ले आया। सबेरे करीब 7.15 बजे मुलजिमों को राजेश सैनी विकास शर्मा व आसु गुप्ता को स्वागत होटल में लेकर आये उन्होने होटल बताया कमरा नं0209 बताया उसकी निशानदेही की जिसकी फर्द बनायी फर्द पर मेरे हस्ताक्षर है। दिनांक 30.11.2003 को सबेरे हम

स्वागत होटल में आये थे। पेपर नं0 10/5 पर मेरे दस्तखत है जिसपर इक्ज क–10 डाला गया। उसके बाद होटल मे ही टेलीफोन से सूचना देकर एफ.एस.एल. की टीम बुला ली थी। फिर मैं वापस आ गया था। फिर दिनांक 2.12.2003 को मै प्रभारी निरीक्षक के साथ तफ्तीश व शान्ति व्यवस्था में अलमासपुर चौराहे पर था। वहॉ मुखबिर से सूचना मिली थी कि मुलजिमान अरविन्द सैनी कैलाश व राजकुमार हिन्दुस्तान पेट्रोल पम्प के पास बाई पास पर खड़े है। तो शाम को करीब 5.00 बजे तीनों मुलजिमों अरविन्द सैनी राजकुमार व कैलाश को पकड़ लिया अभियुक्तगण की जामा तलाशी ली जामा तलाशी पर अरविन्द सैनी से सोने की अंगूठी करीब 5 ग्राम की जिस पर लवी (लवी) लिखा था। बरामद हुई। गिरफ्तारी व बरामदगी की फर्द बनाई थी। मेरे सामने है। जिस पर मेरे दस्तखत है। मै शिनाख्त करता हूॅ। जिस पर इक्ज क–11 डाला गया। कापी मुलजिमान को दी थी। उसी दिन अभियुक्त राजकुमार को निशानदेही से राजेश सैनी को ट्यूबवैल से 10. 30 बजे सी.डी. प्लेयर व कनवर्टर बरामद किया था जिसकी फर्द इन्सपेक्टर साहब ने बनाई थी। पढ़कर मैने भी दस्तखत किये थे मेरे सामने मुलजिम को कॉपी दी थी।

38. P.W. 8 Mohd. Salim is the a taxi driver on whose Ambassador Car No. UJA 6551, the dead body of Abhishek was carried in two suitcases from Swagat Hotel to the shop of appellant Rajesh Saini "Sunny Cloth House" situated at Kasba Jansath. The statement of P.W. 8 is reproduced as under :-

"मैं कार ड्राइवर हूॅ। मेरी अपनी कार हैं जो है शिखर कार सर्विस से हैं इसी में चलाता हूॅ। 27.11.2003 को मेरी गाड़ी वाया खतौली होते हुये जलसा के लिये बुक हुई थी। शाम के 4.1/2 – 5 बजे मै अपनी टैक्सी यू.जे. ए. 6551 अम्बेसडर कार लेकर स्वागत होटल पर पहुॅचा था। स्वागत होटल के बाहर ही दो बैग रखे थे। मैने डिग्गी खोल दी उन्होने रख दिया। एक लड़का बैग के पास बाहर ही खड़ा था। एक गाड़ी बुक करके लाया था। उन्होने बैग मेरी गाड़ी की डिग्गी मे रखे थे। मेरे पूछने पर उन्होने बताया था कि हम कपड़ा व कुछ वेटरों का सामान लेकर जा रहे है। मैं सामान व दोनो आदमियों को लेकर खतौली गया। खतौली आते हुए सुगड चुंगी के पास रूके थे। उन्होने वहॉ थैले लिये थे। एक लड़का खतौली फाटक पर उतर गया था। रेलवे के फाटक के पास उतरा था। दूसरे को लेकर मै जानसठ गया था। जानसठ में बाजार में कपड़े की दुकान पर पहुॅचे थे, कपड़े की दुकान पर वह आदमी उतर गया था। तथा दोनों बैग भी वहीं उतार लिये थे। इसके बाद मै गाड़ी लेकर मुजफ्रनगर आ गया था। रास्ते मे मुझे किसी का नाम पता नही चला था। वे आपस में रिश्तेदार थे मुझे अब ध्यान नही कि इनमे क्या रिश्तेदारी थी। गवाह ने दोनो बैग देखा था कहा कि ये ही वे बैग हैं जो मेरी गाड़ी में स्वागत होटल से जानसठ को गये थे। वस्तु प्रदर्श 32 व 33 डाले गये।"

39. P.W. 9 Manoj Kumar is the photographer who had taken photographs of the dead body at the time of its recovery from the fields of Vishnu Sahai and Dinesh Kamboj. He has proved the photographs and their negatives in the court and all those have been marked as material as Exs. 34 to 59.

40. P.W. 10 is Zaheear Shah who is a witness of recovery of two suitcases from the shop of appellant Rajesh Saini. Some relevant part of his statement is reproduced below :

....."दिनांक 29.11.2003 की बात है शाम करीब 4, – 4.1/2 बजे का वाका है मै जानसठ में अपने रिश्तेदार इश्त्याक के यहॉ जा रहा था जानसठ बाजार में मिठाई की दुकान से मिठाई खरीदने लगा इसी बीच एक पुलिस की गाड़ी आयी उसमे तीन मुलजिम जिनके नाम राजेश सैनी आशु गुप्ता व विकाश शर्मा जो हाजिर अदालत पुलिस की हिरासत में थे। पुलिस जीप से उतर कर राजेश सैनी अपनी कपड़े की दुकान पर गया और दुकान से दो बड़ी अटैची जिनमे एक काफी बड़ी थी एक छोटी थी निकालकर लाया और बताया कि इन्ही अटैचियों में वकील साहब के लड़के की लाश दो टुकड़े मे भरकर लाये थे। (ओब्जेक्टेड बाई डिफेन्स काउंसिल) पुलिस ने मौके पर ही लिखत पढ़त की थी। मेरे हस्ताक्षर उस पर कराये थे।

.....फर्द इक्ज क–9 देखकर व सुनकर गवाह ने कहा कि यही वह कागज है जो पुलिस ने मौके पर लिखा था फर्द पर गवाह ने अपने दस्तखत पहचाने।"

41. P.W. 11 is S.I. Rajveer Singh. He is the police official who has conducted the inquest proceedings and has sent the dead body for post-mortem. He is also a witness of recovery of dead body and recovery of tractor from the house of appellant Rajesh Saini on which the dead body was carried towards the field of Vishnu Shai and Dinesh Komboj.

He was posted at P.S. Jansath at the time of occurrence and had accompanied the police force to the place of recovery. He has stated that as at the time of inquest, both the fists of deceased were tightly closed therefore he could not take out the hairs although he had seen the hairs in the fists of deceased.

42. P.W. 12 is Dr. Rajendra Singh, Scientist, Forensic Lab who has stated that on receiving the telephonic call of Officer In-charge, P.S Mandi he reached at Swagat Hotel on 30.11.2003 alongwith his team. Police Inspector B.P.S. Solanki and some other police officials, employees of hotel, accused Vikas Sharma, Rajesh Saini and Aashu Gupta and some people were also present at that time at the hotel. He reached the room no. 209 of Swagat Hotel and opened its lock. He has further deposed that the accused Vikas Sharma had informed that it was the same room where they had chopped off the deceased and kept the two parts of his body into separate polythene covers and after that into two suitcases. Thereafter they washed the room. He has further stated that he inspected the room and collected finger prints from the almirah, dressing table, mirror, T.V. stand, T.V. table, steel kettle and mirror of bathroom etc. He has further stated that some black coloured hairs were found entangled in the right side corner of the table. Some hairs were also found under the T.V. Stand and almirah. One white coloured hanky was found under the almirah and one button with black thread was found under the almirah. One red coloured Bindi and black coloured hairpin were also found from the dressing table. All these items were kept in a sealed cover and their respective memos were prepared. All these items were marked as material Exts. 60 to 67. During his cross examination he has stated that the lock of room no. 209 was opened in his presence.

43. P.W. 13 Braj Pal Singh Solanki is the second I.O. of this case. Some of the relevant parts of his statements are extracted below :

.....गवाहान के कथनों से अपहृत अभिषेक गर्ग को उपरोक्त चारो अभियुक्तगणों के साथ स्वागत होटल के सामने खड़ा देखा गया था इसलिए मैं निरीक्षक स्वागत होटल पहुॅचा। श्री प्रदीप गर्ग द्वारा अपने बेटे अभिषेक का दिया फोटो को स्वागत होटल के कर्मचारियों को दिखाया। तो वहॉ मौजूद वेटर त्रिलोक सिंह ने कहा कि यह लडका जिसका फोटो दिखा रहे है दिनांक 27.11.03 को द्वितीय तल पर स्थित कमरा नं0209 में जाते हुवे देखा गया है। एतिहात के तौर पर स्वागत होटल के विजिटर रजिस्टर का अवलोकन किया तो कमरा नं0 209 में दिनांक 16.11.03 को क–751 पर, फिर कहा कि दिनांक 26.11.03 को श्री रोहित गुप्ता निवासी 208/7 लोहिया नगर गाजियाबाद उम्र करीब 22 वर्ष अंकित थी। रोहित गुप्ता की इन्ट्री का आने का समय सवा दस बजे सुबह था तथा उसके जाने का समय दिनांक 27.11.03 को 3.1/2 बजे दिन में था। तथा 400/ किराया अंकित था। तथा एक हस्ताक्षर भी बने हुये थे। होटल मालिक अशोक कुमार एवं मेरे द्वारा मूल रजिस्टर के पेज पर चैक करके अपने हस्ताक्षर बनाये गये थे तथा उस रजिस्टर के दो पेजो की छाया प्रतिलिपि करायी थी जिसको कब्जे पुलिस लेकर फर्द बनायी थी और उन दोनों रजिस्टर की छाया प्रति की कब्जे पुलिस लिया था फर्द पत्रावली पर कागज संख्या 10/9 है फर्द को देखकर व पढ़कर गवाह ने कहा कि यही वह फर्द है जो मैने लिखी थी मेरे लेख में है गवाह को पढ़कर सुनाकर उसके भी हस्ताक्षर कराये थे फर्द मेरे लेख व हस्ताक्षर में है इस पर इक्ज0 क–21 डाला गया।

.....अगले दिनांक 29.11.03 को मैने मय हमराही फोर्स के अभियुक्तगणों की तलाश की इसी दौरान द्वारा मुखविर सूचना मिली कि कस्बे के आसू विकास व राजेश सैनी, जानसठ बस अड्डे पर खड़े हैं और कहीं जाने के लिए तैयार हैं इस पर मैंने मय हमराही फोर्स के जानसठ बस अड्डे पर प्रातः 10 बजे आसू, विकास व राजेश को पूछताछ हेतु रोक लिया पूछताछ पर उक्त तीनों ने बताया कि हम तीनों व अरविन्द निवासी मोचडी जो राजेश का साला है ने मिलकर प्रदीप गर्ग वकील साहब से फिरौती वसूली करने के लिए उनके लड़के अभिषेक गर्ग का अपहरण किया और स्वागत होटल के कमरा नं0 209 में अभिषेक की शरीर के दो टुकड़े कर पैकिंग करके अलग–अलग कस्वा जानसठ के जंगल में विष्णु सहाय व दिनेश कम्बोज के ईख के खेतों में खड्डे खोदकर दबा दिये हैं। हमारा इरादा अभिषेक गर्ग की हत्या करके प्रदीप वकील साहब से 10 लाख रूपये फिरौती

वसूलने का था। दिनांक 27.11.03 को शाम से ही वकील साहब, विकास व अभिषेक को तलाश करने लगे थे। तीनों ने ही बताया कि हम अपहृत अभिषेक के शरीर के दोनो हिस्से को बरामद करा सकते हैं। इस बीच में कस्बे से काफी भीड़ इकट्ठा हो गयी थी। प्रदीप गर्ग भी आ गये थे थाना जानसठ से इन्सपैक्टर नरेश चन्द्र एस.एस.आई. राजवीर सिंह मय पुलिस बल के आ चुके थे। हम लोगों दोनो सरकारी जीपों के तीनो मुलजिमान, आसू, विकास, राजेश सैनी को आज न्यायालय में हाजिर है के बताये रास्ते पर सुरेश सैनी की ट्यूबवैल के पास जीपों को रूकवाया। वहॉ से जनता के दो गवाह अशोक व प्रदुम्न कुमार तथा हम लोग, के आगे आगे चलकर उत्तर दक्षिण मेड़ पर चलकर मेड़ से 10 मीटर पूरव की तरफ खेत ईख श्री विष्णु सहाय में पहुॅचे और वहॉ से मुलजिम राजेश ने भुरभुरी मिट्टी को हाथ से हटाया और विष्णु सहाय से लिए फावड़े से मिट्टी को हटाकर गड् ण्ण्ण्ण्ण्मौके पर रूबरू गवाहान श्री अशोक व प्रदुप्न, शरीर के दोनों हिस्सों की फर्द बरामदगी बनायी थी और गवाहान को पढ़कर सुनाकर उनके दस्तखत कराये थे प्रदीप गर्ग के भी दस्तखत कराये थे और तीनों मुलजिमान की फर्द की नकल देकर उनके भी हस्ताक्षर कराये थे। गवाह ने पत्रावली पर फर्द बरामदगी इक्ज0 क–2 को देखकर कहा कि यही वह फर्द है जो मेने लिखी थी और मेरे लेख व हस्ताक्षर में है। मौके से बैग आरी, ब्लेड, कैची, खून आलूदा आदि जो लाश के टुकडों के साथ बरामद हुये थे, कब्जे पुलिस लेकर मैने गवाहान के सामने फर्द तैयार की थी और मुलजिमान को फर्द की नकल देकर उनके भी हस्ताक्षर फर्द पर कराये थे। पत्रावली पर फर्द बरामदगी इक्ज0 क–3 हैं जिसको देखकर गवाह ने कहा कि यह मेरे लेख व हस्ताक्षर में है। और इस फर्द के द्वारा जो सामान मौके से बरामद हुआ था वह भी आज न्यायालय में मौजूद है जो मैटे0 इक्ज0 2 से मैटे0 इक्ज0 20 तक है।''

The I.O. has also stated about the recovery of the ring having "Lovey" engraved on it, from the possession of appellant Arvind after his arrest on 2.12.2003.

44. No other witness was produced by the prosecution. After conclusion of prosecution evidence, the statement of all the appellants were recorded under Section 313 Cr.P.C. during which all of them denied the allegations and stated about their false implication. All of them admitted the fact that Vikas Sharma works as a typist at Telhil Court Jansath and informant P.K. Garg is a practicing lawyer in that tehsil court but denied the other facts. When they were asked as to how their finger prints were found at different places inside room no. 209 of Swagat Hotel, they simply stated that this is a matter relating to the evidence hence they could not say anything about it. Appellant Rajesh admitted that his photo was published in Royal Bulletin and Dainik Jagran on 29.11.2003. All the appellants stated that the police arrested them from their house and falsely implicated them. However, all of them admitted that the samples of their hairs and fingerprints had been taken before the C.J.M.

45. In their defence the appellants have produced one witness Vinay Kumar as DW-1, a deed writer working at Tehsil Jansath who has stated about the newspaper Dainik Jagran dated 29.11.2003 in which the photographs of informant Pradeep Garg, his brother Subhash Garg, Mahendra Singh, C.O., Pramod Sharma, Advocate and also of appellant Rajesh Saini were published. He has stated that all these photographs were taken prior to taking of the appellants to the jungle. He has stated that after having come to know about the recovery of dead body he had gone to the jungle and found the dead body being dug out from the ground. The photographers were taking its photos. None of the appellants was present there. D.W. 1 has further stated that the accused appellant Vikas is his real brother-in-law. On 27.11.2003 he was working in Tehsil Jansath for the whole day. He has further stated that Vikas was typing at Kutchehry till 9.30 A.M. on 28.11.2003.

46. Thus, this witness has tried to demolish the prosecution story about arrest of appellant Rajesh on 29.11.2003

from Bus Stand of Jansath. He has also stated about the alibi of appellant Vikas Sharma. No other witness has been produced by the defence.

47. Sri V.C. Srivastava and Sri P.S. Pundir, learned counsel for the accused appellants, during their oral arguments and by filing written submissions have challenged the prosecution case and the findings recorded by learned trial court mainly on the following grounds : -

(i) There is delay in lodging the F.I.R. The date of occurrence, according to the prosecution story, is 27.11.2003. The informant is living in Nai Mandi and the distance of Police Station Nai Mandi is only 1.5 km. from his home. In the F.I.R. Itself, the informant has stated that on 27.11.2003 the witness Rakesh Agrawal had told him about the deceased Abhishek seen in the company of appellant Vikas. The witnesses Pramod Sharma, advocate and Anuj had also informed him about Abhishek being seen in the company of appellants Vikas, Rajesh and Aashu in front of Swagat Hotel. These informations were received by the informant till the evening of 27.11.2003 but the F.I.R. has been lodged on the next day i.e. on 28.11.2003 at 9.15 A.M. The prosecution has not explained this delay properly.

(ii) The recovery of dead body at the instance of accused appellants is doubtful. The body had already been recovered at the time of lodging of the F.I.R. which fact is evident from the photograph published in the newspaper dated 29.11.2003 showing the appellant Rajesh Saini in police custody with a suitcase. The submission of learned counsel for the appellants is that the dead body had been recovered on 28.11.2003 and not on 29.11.2003 because it is impossible to publish the news of an incident, in the morning newspapers, which has taken place on the same day. Learned counsel has contended that this fact also finds corroboration with the overwriting on the date mentioned in inquest report and also on the "Parcha" in CD relating to the statement of accused persons under Section 161 Cr.P.C.

(iii) There is inordinate delay in sending the special report to Magistrate which is obvious from the initials of Magistrate on the check F.I.R. which shows that the Magistrate had seen this report on 2.12.2003. This delay makes the prosecution story doubtful.

(iv) None of the accused appellants has tried to abscond from the place of occurrence after the incident as appellant nos. 1 to 3 were arrested from Jansath and appellant no. 4 was arrested from a place near Hindustan Petrol Pump by pass.

(v) There are so many latches and lacunas in the investigation which is evident from the statement of I.O. Sri B.P.S. Solanki examined as P.W. 13 in this case. The I.O. has not interrogated any of the employees of Swagat Hotel. During search of room no. 209 of Swagat Hotel i.e. the place of murder of deceased Abhishek as per prosecution story, a Bindi stuck on the mirror of dressing table, a hair clip and some strands of long hairs were also found entangled in the furniture which show the involvement of some woman in the occurrence but the I.O. has not made any investigation in this direction. The recovery of these articles indicates that the deceased might have been in long touch of some professional sex worker who could have been involved in the said occurrence. It may also be possible that the deceased had fallen in love with some girl and the family members of the girl being opposed to it, had caused the murder of the deceased to save the honour of their family.

(vi) There is no evidence on record of demanding any ransom from the father of the deceased as the father of the deceased/informant has admitted this fact that he did not receive any call regarding any such demand of ransom.

(vii) The forensic science lab report shows that no definite opinion could be given about the similarity of hairs taken from the accused-appellants and the hairs found in the closed fists of deceased Abhishek.

(viii) The blades of "Aari" recovered by the police were found twisted at some places which fact makes the alleged weapon of murder wholly unreliable specially in the light of the statement of PW-5 - the doctor conducting the post-mortem who has stated that the edges of all the incised wounds of the deceased's body were clean cut. Learned counsel have contented that clean cut wounds were not possible with those blades, twisted from places.

(ix) The evidence led by the prosecution shows that the appellants are alleged to have made joint disclosure after their arrest, which is not contemplated under Section 27 of the Indian Evidence Act. Therefore, the joint disclosure and the recovery made in pursuance of that disclosure is not admissible in evicence. In this regard learned counsel for the appellants have placed reliance on the law laid down by Apex Court in Mohd. Abdul Hafeez Vs. State of A.P.; (1983) 1 SCC 143.

(x) This case rests entirely on circumstantial evidence and the true and real circumstances were not investigated properly by the I.O. so as to bring to light the real culprit. The chain of circumstances is incomplete and it can not be said that the circumstances of this case conclusively point out towards the culpaility of appellants so as to arrive at a definite conclusion that in all human probability the act must have been done by the accused persons and by none other.

On the aforesaid grounds, learned counsel for the appellants have submitted that the prosecution story in this case, being based on imagination, conjectures and surmises, is highly doubtful. Therefore it is liable to be discarded; the impugned judgment sentencing the appellants to the maximum punishment, is liable to be set aside and the appeal deserves to be allowed.

48. Per contra, learned A.G.A. has contended that the prosecution has successfully proved the existence of all the incriminating circumstances in this case pointing conclusively towards the appellants and the chain of events is so complete that it does not leave any reasonable doubt with regard to the complicity of the appellants in this case. Learned A.G.A. has submitted that the latches and lacunas on the part of I.O. will not give any benefit to the accused persons as per law laid down by Hon'ble Apex Court in a catena of judgments. There is no delay in lodging the F.I.R. which has been promptly lodged without any delay. The lodging of FIR in the morning of next day i.e. on 28.11.2003 at 9.15 A.M. appears natural in view of the fact that after having received the information about his son from the witnesses who had last seen the deceased in the company of appellants, all of whom had prior acquaintance with the informant/the father of victim, he firstly visited their houses in search of his son and when he could not find him, he lodged the F.I.R., naming all the appellants.

49. The submission of learned A.G.A. is that the deceased was lastly seen in the company of the accused-appellants Rajesh,

Aashu and Vikas by the witnesses who have proved this fact by their testimonies in court. Therefore, the accused appellants were duty bound to explain that when and under what circumstances they parted with the company of the deceased but the accused appellants have not given any explanation or any proper reply to this question put to them under Section 313 Cr.P.C. and have tried to avoid the questions by giving evasive answers or by giving answer by a general denial. The submission of learned A.G.A. is that the general denial and the evasive answers given by the accused persons during their statements recorded under Section 313 Cr.P.C. provide the missing link, if any, in the chain of circumstances.

50. Advancing his arguments further, learned A.G.A. has submitted that all the prosecution witnesses of fact are throughout cogent and consistent while deposing in court. There appears no material contradictions in their statements, the witnesses have no motive to falsely implicate the appellants in this case. The weapon of murder i.e. 'aari' fully corroborates the nature of injuries i.e. clean cut incised wounds. Learned A.G.A. has vehemently argued that the blade of 'aari' could have been twisted at some places during its use while cutting the body into half and it was not an 'aari' with twisted blades. The submissions of learned A.G.A. is that the appellants have committed brutal murder of a young boy, therefore, the appeal being devoid of merits be dismissed and the conviction and sentence awarded by learned trial court be affirmed.

51. Learned counsel from both sides have placed before us several judgments of Hon'ble Apex Court in support of their rival contentions. We have carefully perused all those judgments.

52. As every criminal case stands on its own peculiar facts, the verdict given in any criminal case can not be blindly relied on while deciding any other criminal case having different set of facts. However, if any legal principle is laid down, that will apply in every case and we are drawing our conclusions, keeping in view the legal principles laid down by Hon'ble Apex Court in all those cases laid before us by learned counsel for both the parties.

53. The facts of this case clearly show that the entire prosecution case in the instant appeal, rests on circumstantial evidence. The legal principles relating to circumstantial evidence have been well established by the Hon'ble Supreme Court in a series of judgments. In the case of Rohtash Kumar Vs. State of Haryana; 2013 (14) SCC 434, the Hon'ble Apex Court has reiterated the law as follows :-

i. The prosecution must establish its case beyond reasonable doubt, and cannot derive any strength from the weaknesses in the defence put up by the accused.

ii. The circumstances on the basis of which the conclusion of guilt is to be drawn, must be fully established. The same must be conclusive in nature, and must exclude all posible hypothesis, except the one to be proved.

iii. Facts so estabhlished must be consistent with the hypothesis of the guilt of the accused, and the chain of evidence must be so complete, so as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused, and must further show, that in all probability the said offence must have been committed by the accused."

54. Now the question is whether all the facts and circumstances of the case in

hand have been fully established by the prosecution and are of such conclusive in nature so as to leave no doubt that the murder of deceased Abhishek, within all human probability has been committed by the appellants only and by none else ? In other words, whether the chain of circumstances is so complete so that no other inference can be drawn except that of the guilt and culpability of the appellants ?

55. On a careful scrutiny of the impugned judgment in the light of evidence available on record, as discussed in detail in the earlier part of this judgment, we are of the firm view that all the circumstances of this case have been successfully established by the prosecution by means of oral and documentary evidence and there appears no illegality or perversity in the findings recorded by learned trial court regarding the culpability of the appellants. All the witnesses are throughout cogent and consistent during their testimony in court. All the witnesses, including even the formal witnesses like I.O., the doctor and the fingerprint expert have been extensively cross examined by learned defence counsel but nothing could be extricated from them so as to make the prosecution case unreliable. Some minor discrepancies occurring in their statements should be over looked in wake of the well settled legal principle laid down by Apex Court in a catena of judgments. In Shankar Vs. State of Karnataka, the law has been reiterated by the Apex Court as under :

"Minor contradictions, inconsistencies, embellishment or improvements on trivial matters which do not affect the core of prosecution case, should not be made a ground on which the evidence can be rejected in its entirely."

56. It is also noteworthy that none of the material witnesses has any previous enmity with the appellants. On the other hand the victim's family had friendly terms with the appellants and the victim used to call appellant Vikas "Chacha". The rest of the appellants are also well acquainted and previously known persons. There is no reason why anyone would falsely implicate his close friend ?

57. As the pages of prosecution story are unfolded one after another, the sequence of events comes to light forming a complete chain conclusively pointing out only towards the guilt of appellants and towards no other possibility. All the links in the chain of circumstances and events as is clearly evident from a perusal of the evidence discussed in detail in earlier part of this judgment may be summarised here as under :-

(i) Admittedly the appellant Vikas Sharma was working as a typist in the same court campus of tehsil Jansath, where the father of deceased Abhishek used to practice as an advocate.

(ii) Appellant Vikas Sharma was a friend of Manoj Garg, the real uncle of deceased Abhishek, and Abhishek used to call him "uncle".

(iii) Being a family friend appellant Vikas Sharma was on visiting terms with the family members of deceased Abhishek.

(iv) On the date of occurrence appellant Vikas Sharma came to the house of Abhishek and asked his mother to send Abhishek with him. The mother permitted Abhishek to go with Vikas without any hesitation or fear in her mind obviously

due to the reason that Vikas Sharma was just like a family member.

(v) Abhishek was given allurement of showing some pornographic movie by the appellants which fact is evident from the recovery of CD player at the instance of accused persons.

(vi) It is but natural for a young boy of 18 years to become curious and he may be easily allured for seeing such movie.

(vii) After Abhishek left with appellant Vikas Sharma, his mother who was not feeling well, took some medicine and went to sleep. Under the influence of medicine she slept till 2.45 P.M. when she got awake and did not find Abhishek, she immediately tried to contact her husband who being a practicing lawyer at tehsil court, Jansath was at Tehsil Jansath at that time.

(viii) Her mobile phone was not working so she contacted her husband by mobile phone of her landlord and informed him about Abhishek. On receiving such information the father of the deceased Pradeep Garg, advocate, immediately returned back to his house and asked about Abhishek from his wife and daughter.

(ix) The father came to know that Abhishek had yet not returned. He was also informed that Abhishek had not even gone to his college. Hearing this the father alongwith his wife started searching his son. During search he was informed by witnesses Rakesh Agrawal (W-6) to have seen Abhishek going with appellant Vikas towards Prakash Chowk.

(x) The parents of deceased Abhishek proceeded towards Prakash Chowk, but did not find their son there. On proceeding further, witnesses Pramod Kumar Sharma and Anuj Kumar (PW-3) met them and informed that they had seen Abhishek in the company of appellants Vikas Sharma, Rajesh Saini, Aashu Gupta and Arvind in front of Swagat Hotel.

(xi) The parents searched their son in Swagat Hotel and at other places but in vain.

(xii) Leaving his wife at home, the father of deceased once again rushed to tehsil Jansath in the night of 27.11.2003 and went to the houses of appellants Aashu Gupta, Rajesh and Vikas but none of them was found at his house.

(xiii) The father returned back to Muzaffar Nagar and on the next day i.e. on 28.11.2003 in the early morning at about 5.00 A.M. he once again visited the houses of appellants Rajesh, Vikas and Aashu but neither any one was found nor any information about Abhishek was received.

(xiv) Apprehending that his son might have been abducted for ransom or might have been killed, the father lodged the F.I.R. at 9.15 A.M. on 28.11.2003 naming all the appellants.

(xv) The police arrested Vikas Sharma, Rajesh Saini and Aashu Gupta from the bus stand of tehsil Jansenist at about 10.00 A.M. On 29.11.2003.

(xvi) The bus stand, being a public place, a large crowd gathered there at the time of their arrest. The informant also reached there and before the crowd, the informant and the police, all the three appellants confessed their guilt by stating that they had abducted Abhishek for ransom and had killed him. They also stated that they had chopped off Abhishek in two parts and had buried the two parts separately under the sugar cane fields of Vishnu Sahai and Dinesh Kamboj and they could help the police in discovery of dead body.

(xvii) The police took the appellants in a jeep towards the fields of Vishnu Sahai and Dinesh Kamboj and in presence of several witnesses including the informant, both the

parts of dead body of Abhishek were recovered at the instance of the appellants.

(xviii) Several incriminating articles like Aari, 3 blades of Aari having blood stains on it, green coloured jute rope tied on the legs, hands and neck of the deceased, used soap, plastic hand gloves, clothes and shoes and socks of the deceased, he was wearing at the time of occurrence, were also found inside the same polythene bags in which the parts of the dead body had been kept.

(xix) The father of the deceased, who was present on the spot at the time of recovery, identified the body as that of his son.

(xx) The dead body was sent for post-mortem. The description of ante-mortem injuries in the post-mortem report shows that Abhishek was alive at the time when he was chopped of into two parts.

(xxi) During investigation the I.O. took into custody the visitor's register of Swagat Hotel and it was found that room no. 209 of Swagat Hotel was booked in the name of some other person namely Rohit Gupta. On inquiry, the address of Rohit Gupta given in the register was found fake and false.

(xxii) Recovery of CD player and the wires leads etc. from the tube well at the instance of Raj Kumar, the brother of appellant Rajesh, finds corroboration with the recovery memo Ex. Ka. 12 having signatures of appellants - Rajesh and Rajkumar on it.

(xxiii) Both the suit cases have been recovered by the police from the shop of appellant Rajesh Saini. Recovery of suitcases at the instance of accused is found fully proved by the testimony of P.W. 10- Zaheer Shah.

(xxiv) The gold ring having "Lovey" engraved on it was recovered from the possession of the appellant Arvind who was arrested on 2.12.2003. "Lovey" was the pet name of deceased Abhishek.

(xxv) The father of deceased Abhishek being a financially sound person, the possibility of abduction of his son for ransom cannot be ruled out.

(xxvi) There is ample evidence on record that the appellants and the deceased had been lastly seen together.

(xxvii) Although there is no evidence on the record with regard to the fact that on which date and when the demand of ransom was made and even assuming for the sake of arguments that the appellants had not abducted Abhishek for ransom, the fact that Abhishek was taken away by the appellant Vikas Sharma from his house and Abhishek was lastly seen in the company of appellants Vikas, Aashu and Rajesh, has been well established by the prosecution through its cogent and convincing evidence.

(xxviii) The post-mortem of deceased Abhishek has been conducted on 29.11.2003 at 7.30 P.M. and the probable time since death as mentioned in the postmortem report is about two days which means that Abhishek might have been killed in the evening of 27.11.2003. This clearly indicates that the time gap between the death of Abhishek and when he was lastly seen in the company of accused appellants is very small. The Hon'ble Supreme Court in the case of Mahavir Singh Vs. State of Haryana; (2014) 6 SCC 716 has held as under :-

"The theory of "last seen together", normally comes into play only in a case where the time gap between the point of time when accused and deceased were seen alive and when deceased was found dead is small. When said time gap is very small, there may not be any possibility that any person other than the accused, may be the author of crime."

(xxix) The accused appellants have given no explanation as to when and where the deceased Abhishek parted with their company.

(xxx) It is noteworthy that in reply to question no. 2 put to the appellant, that accused Vikas Sharma had visiting terms with informant's family and Abhishek used to call Vikas "Chacha', Vikas Sharma has stated that this is wrong (गलत है) in total contradiction of the statement of the defence witness Vinay Kumar (D.W. 1) who has stated that he, Vikas and informant's brother Manoj Garg were classmates and Vikas had visiting terms with informant's family.

(xxxi) All the appellants have given evasive answers to the questions put to them under Section 313 Cr.P.C. by simply stating "गलत है" or "मालूम नही".

(xxxii) In answer to the question as to why this criminal case was instituted against them, Vikas Sharma stated that the police had committed "maarpeet"

(xxxiii) The aforesaid answers given by the appellants to the question asking for the reason about their false implication in this case, neither appear satisfactory nor inspire confidence.

(xxxiv) Admittedly there was no previous enmity between the appellants and the informant's family. To the contrary there existed family terms between informant's family and appellant Vikas. All the appellants are named in the F.I.R. There is no reason as to why the family of victim would falsely implicate innocent persons while exonerating the real culprit in such a heinous murder case.

(xxxv) The fingerprint expert had collected the finger prints from various places of room no. 209 of Swagat Hotel i.e. the place of occurrence. The fingerprints of accused-appellants were also taken before C.J.M. The fingerprint expert Dr. Rajendra Singh has been produced as P.W. 12. He is an independent witness and has categorically stated that the fingerprints collected from the room of Swagat Hotel got matched with the fingerprints of accused appellants.

(xxxvi) The presence of all the appellants at room no. 209 of Swagat Hotel is well established by their finger prints found at various places. This fact is sufficiently proved by the testimony of fingerprint expert P.W. 12 who is an independant witness and who has no reason to falsely implicate the appellants. All the appellants in reply to question numbers 61 and 63, asked in respect of evidence collected by fingerprint expert and his report have simply stated " पता नही" "कुछ नही".

(xxxvii) In Munna Kumar Upadhyay Vs. State of A.P.; (2012) 6 SCC 174 the Hon'ble Supreme Court has held as under :

"Fingerprints of accused are found present at crime scene, at place where accused was not supposed to be present in the normal course and the accused fails to explain existence of his fingerprints at such place, this circumstance points towards his involvement in crime."

(xxxviii) Learned counsel for the appellants have laid much stress on the fact that the accused persons were taken to the room no. 209 of Swagat Hotel by the I.O. before their finger prints were collected by the fingerprint expert and that was the reason why their fingerprints were found at the room.

(xxxix) We do not find any merit in the aforesaid arguments for the reason that I.O.-PW-13, during his cross examination has explained this situation satisfactorily. The question put to I.O. in this regard and their answers are reproduced below :

"प्रश्न– क्या मुलजिमान कमरा नं0 209 में अन्दर गये।

उत्तर– जी नहीं।

प्रश्न– क्या कमरे में जाने के बाद मुलजिमान ने आगे–आगे चलकर बताया कि यह बाथरूम हैं।

उत्तर– मुलजिमान ने प्रवेश करते ही इशारे से बताया कि यह बाथरूम हैं। कमरे में आगे–आगे नही चले।"

(xl) The taxi driver (PW-8), the photographers (PW-9), the two investigating officers (PW-7 & PW-13), P.W. 10 Zahir Shah, who is the witness of recovery of both suitcases from Sunney Cloth House, and P.W. 3 Anuj Kumar, the witness of last seen, all of them are entirely independent witnesses, having no enmity with any of the accused persons. There appears no reason for them to come to court and support the prosecution case just for falsely implicating the appellants.

58. Thus, the sequence of all the events appears to have formed a complete chain with no unreasonable time gap in between and with no link missing. Moreover, the appellants by giving evasive replies during their statements under Section 313 Cr.P.C., have provided the missing links, if any.

59. In the case of Deonandan Mishra Vs. State of Bihar; 1955 AIR 801 decided as far back in 1955, the Hon'ble Apex Court has laid down the law which has been reiterated in its several judgments that :

"A false explanation of circumstances by the accused in his examination may itself serve as a link to complete the chain of events leading to his conviction."

60. The testimony of defence witness - D.W.1 does not inspire confidence in us for the reason that D.W. 1 has stated about the alibi of appellant Vikas whereas Vikas himself has not uttered a single word about this during his statement under Section 313 Cr.P.C. D.W. 1 has also stated about the newspaper reports and the defence on the basis of his statement and the news and photographs published in some newspapers of 29.11.2003 showing the appellant Rajesh Saini in police custody has assailed the trustworthiness of prosecution case in respect of date of arrest of appellants. Learned counsel for the appellants has tried to assail the prosecution story of arrest of appellants on 29.11.2003 on the ground that if they were arrested on 29.11.2003 and the dead body was recovered on 29.11.2003, how could the news about the recovery at the instance of accused appellants was published in newspaper dated 29.11.2003.

61. Though we, do not find any force in the aforesaid arguments in wake of the well settled legal position that newspaper reports are only hearsay evidence and they are not substantial piece of evidence as has been held by the Apex Court in the case of Quamarul Islam Vs. S.K. Kanta; AIR 1994 SC 1733 that :

"Newspaper reports by themselves are not evidence of the contents thereof. Those reports are only hearsay evidence. These have to be proved and the manner of proving a newspaper report is well settled. Newspaper, is at the best secondary evidence of its contents and is not admissible in evidence without proper proof of the contents under the Evidence Act."

However, in the interest of justice, we perused all the newspapers' cutting available on record which clearly show that in none of these newspaper cuttings there is any report about recovery of dead body.

In the report of 'Dainik Jagran' the file photo of deceased Abhishek and the photo of

police party alongwith some villagers searching for Abhishek is published. Some other photographs in this newspaper include the photos of father of deceased, of the crowd gathered at police station, of appellant Rajesh Saini alongwith a police constable and photo of an empty suitcase. The news report published in this newspaper clearly indicates that the S.S.P., Muzaffar Nagar had given statement before the journalists that he is unable to say anything about the occurrence unless the dead body is recovered which clearly indicates that dead body had not been recovered till 28.11.2003. So far as the photograph of appellant Rajesh Saini in the newspaper is concerned, it appears that the police might have interrogated him before his arrest and during interrogation he might have been taken to the fields. In this regard the explanation of I.O. in reply to question put to him during his cross examination appear satisfactory. The I.O. has stated that :-

"प्रश्न– क्या अभियुक्तगण से पूछताछ करने के बाद आपने उनको इसलिए हिरासत में नहीं लिया चूंकि आपकी निगाह में उस वक्त तक उनके खिलाफ कोई जुर्म की सत्यता प्रमाणित नहीं होती थी।

उत्तर– यह सही नहीं है बल्कि सत्य यह है कि तीनों मुल्जिमान के कथन की सत्यता सही नहीं हो जाती तब तक मुल्जिम को हिरासत में नहीं लिया जाता।"

It is noteworthy that the headings of all these news items too, clearly indicate the involvement of appellants in this case. The caption in 'Dainik Jagran' is ष दोस्त गद्दार, किस पर करे एतवार". In another newspaper the news has been published with the caption "अपने ही दीपक ने उजाड़ दिया अंजुमन उनका" . If the newspaper report is to be believed then the prosecution story becomes all the more reliable.

62. So far as the argument with regard to absence of motive is concerned, the prosecution, from the very beginning, has come with a clear case that the motive behind the crime was abduction of deceased Abhishek for ransom and when the deceased after reaching inside the hotel room and smelling something fishy, tried to resist, he was overpowered and thereafter brutally murdered by the appellants. Although the father of the deceased has fairly admitted that he had not received any phone call for demand of ransom but in the F.I.R. he has clearly expressed his apprehension about the abduction of his son by the appellants. In the case of Sewa Vs. State of U.P.; 2002(I) UPCrR 384 a Division Bench of this Court has held that motive may be known only to the offender and none else and for the reason alone that the motive has not been proved by the prosecution, the entire prosecution case cannot be discarded as suspicious.

63. In Mani Kumar Thapa Vs. State of Sikkim; AIR 2002 (SC) 2920 the Supreme Court has held that "when the prosecution case is proved against the accused by other circumstantial evidence, necessity to prove motive is not required."

64. During the course of argument, the defence has pointed out towards, some contradictions and omissions in the statements of witnesses in order to demolish their credibility. However, all these are minor contradictions and minor discrepancies are bound to occur in every case, due to the normal errors of observations, namely errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence.

65. Sri V.C. Srivastava, learned counsel for the appellants has repeatedly

contended that a hook was also found entangled in the button of shirt of deceased recovered with his dead body which indicates the involvement of some woman in this crime because normally hook is found only in ladies garments.

66. We do not find any force in such argument. The presence of appellants in the company of deceased in room no. 209 of Swagat Hotel has been found fully proved. What happened on that fateful day is only within the knowledge of appellants, but none of them have stated a single word. Moreover, the defence has not cross examined the I.O. on this point that whether he had made any investigation in such direction i.e. about involvement of any woman in this case, therefore, now the defence can not be permitted to raise this issue.

67. In Mahavir Singh's case (supra) also the Apex Court has observed as under :-

"It is a settled legal proposition that in case the question is not put to the witness in cross examination who could furnish explanation on a particular issue, the correctness or legality of the said fact/issue could not be raised."

69. Learned counsel has tried to assail the prosecution case on one more ground by relying on the case of Abdul Hafeez Vs. State of A.P.; (1983) SCC 143 and has challenged the prosecution case about recovery of dead body at the instance of appellants by haranguing that it was a joint disclosure which is not admissible.

70. There appears no force in the aforesaid arguments.

71. In State (NCT of Delhi) Vs. Navjot Sandhu; (2005) 11 SCC 600 the Hon'ble Supreme Court has laid down the law as under :

"Before parting with the discussion on the subject of confessions under Section 27, we may briefly refer to the legal position as regards joint disclosures. This point assumes relevance in the context of such disclosures made by the first two accused viz. Afzal and Shaukat. The admissibility of information said to have been furnished by both of them leading to the discovery of the hideouts of the deceased terrorists and the recovery of a laptop computer, a mobile phone and cash of Rs. 10 lacs from the truck in which they were found at Srinagar is in issue. Learned senior counsel Mr. Shanti Bhushan and Mr. Sushil Kumar appearing for the accused contend, as was contended before the High Court, that the disclosure and pointing out attributed to both cannot fall within the Ken of Section 27, whereas it is the contention of Mr. Gopal Subramanium that there is no taboo against the admission of such information as incriminating evidence against both the informants/accused. Some of the High Courts have taken the view that the wording "a person" excludes the applicability of the Section to more than one person. But, that is too narrow a view to be taken. Joint disclosures to be more accurate, simultaneous disclosures, per se, are not inadmissible under Section 27. 'A person accused' need not necessarily be a single person, but it could be plurality of accused. It seems to us that the real reason for not acting upon the joint disclosures by taking resort to Section 27 is the inherent difficulty in placing reliance on such information supposed to have emerged from the mouths of two or more

accused at a time. In fact, joint or simultaneous disclosure is a myth, because two or more accused persons would not have uttered informatory words in a chorus. At best, one person would have made the statement orally and the other person would have stated so substantially in similar terms a few seconds or minutes later, or the second person would have given unequivocal nod to what has been said by the first person. Or, two persons in custody may be interrogated separately and simultaneously and both of them may furnish similar information leading to the discovery of fact. Or, in rare cases, both the accused may reduce the information into writing and hand over the written notes to the police officer at the same time. We do not think that such disclosures by two or more persons in police custody go out of the purview of Section 27 altogether. If information is given one after the other without any break almost simultaneously, and if such information is followed up by pointing out the material thing by both of them, we find no good reason to eschew such evidence from the regime of Section 27."

72. In paragraph 146 of the aforesaid judgment, the Apex Court has discussed the case of Mohd. Abdul Hafeez Vs. State of A.P.; (1983) 1 SCC 143 (supra) cited by learned counsel for the appellants and has held that :

"there is nothing in this judgment which suggests that simultaneous disclosures by more than one accused do not at all enter into the arena of Section 27, as a proposition of law."

73. Accordingly we do not find any illegality in the admissibility of joint disclosure statement by the appellants in this case specially in view of the fact that the dead body alongwith other incriminating articles and the 'aari' used as weapon of murder have been recovered by the police after such disclosure.

74. The Apex Court in the case of A.N. Venkatesh and another Vs. State of Karnataka; 2005 SCC (Cri) 1938 has held that even if the disclosure statement is held to be not admissible under Section 27 due to some reason, still it is relevant under Section 8 of the Evidence Act. The evidence of the circumstances, simpliciter, that the accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found is admissible under Section 8 irrespective of the fact whether the statement made by the accused falls within the purview of Section 27 or not. Even if, the disclosure statement is held to be not admissible under Section 27 of Evidence Act, still it is relevant under Section 8 of Evidence Act.

75. Keeping in view all the facts and circumstances of the case we are of the considered opinion that the prosecution has been able to comprehensively and reliably establish the chain of circumstances. The evidence produced by the prosecution does not leave any major loop holes in the case of prosecution. With the help of its oral and documentary evidence, the presence of appellants at the scene of crime, their intention of committing the crime, the gruesome manner in which they committed the murder and later on tried to destroy or conceal the evidence, the recovery of blood stained clothes of the deceased alongwith several other incriminating articles like the 'Aari', rope, handgloves,

blades of aari, piece of soap etc. alongwith dead body of Abhishek cut into two parts and finally the conduct of appellants of absconding from their houses, all these facts have been well established by the prosecution. The learned trial court also after a detailed appreciation of evidence, has found the chain of circumstances complete and conclusively indicating towards the guilt of appellants. We do not find any error in the findings arrived by learned trial court, so far as the conviction of all the appellants under Sections 302/34, 364 and 201 I.P.C. is concerned.

76. Accordingly, the conviction of all the appellants in the aforesaid sections of I.P.C. is hereby affirmed.

77. Now we proceed to examine the propriety of sentence imposed by the trial court. The trial court has awarded death sentence to all the appellants for their conviction under Section 302/34 I.P.C. and a fine of Rs. 20,000/- has also been imposed on each of them. For their conviction under Section 364 I.P.C. they have been awarded life imprisonment alongwith a fine of Rs. 10,000/- imposed on each. In default of payment of fine further imprisonment of two years has been awarded to all of them. Seven years R.I. alongwith a fine of Rs. 10,000/- has been awarded to all the appellants for their conviction udner Section 201 I.P.C. and in default of payment of fine one year imprisonment is awarded to all of them. All the sentences are to run concurrently.

78. Except death penalty, all the aforesaid sentences and fine as awarded by the trial court neither appear excessive nor unreasonable to us in view of the gravity and heinous nature of the offence in this case. However, the death sentence awarded by learned trial court appears excessive in view of the legal position that death sentence should be awarded in rarest of rare cases and the courts should follow the guidelines as laid down by Hon'ble Supreme Court in a series of judgments. The Apex Court in the landmark case of Bachan Singh, (1980) 2 SCC 684 has laid down the guidelines and the sentencing norms. In a recent judgment rendered in the case of Sunil Dutt Sharma Vs. State (Government of NCT of Delhi); (2014) 4 SCC 375 the Apex Court has reiterated the law relating to death penalty and has summarized the circumstances under which life imprisonment should be awarded instead of death penalty.

79. According to the Apex Court the mitigating factors under which the sentence of life imprisonment instead of death sentence is to be awarded, are as follows :

(I) The young age of the accused.

(II) The possibility of reforming and rehabilitating the accused.

(III) The accused had no prior criminal record.

(IV) The accused was not likely to be a menace or threat or danger to society or the community.

(V) A few other reasons need to be mentioned such as the accused having been acquitted by one of the courts.

(VI) The crime was not premeditated.

(VII) The case was one of circumstantial evidence.

80. Testing the facts of the instant appeal on the touch stone of guidelines as cited above and on consideration of the totality of circumstances, we are of the firm view that the present case does not

fall within the category of 'rarest of rare cases' attracting death penalty due to presence of two factors as cited above.

81. First, the present case, undisputedly is one of the circumstantial evidence and second, all the appellants have no prior criminal antecedent. Therefore, it appears expedient in the interest of justice that the extreme punishment of death penalty awarded to the appellants under Section 302/34 I.P.C. be substituted with sentence of imprisonment for life.

82. Accordingly the appeal is partly allowed. The impugned judgment and order dated 1.2.2007 is modified to the extent that the death penalty awarded to the appellants under Section 302/34 I.P.C. is converted to imprisonment for the whole of the remaining natural life of the appellants, subject however to the condition that the prisoner would be eligible to any commutation and remissions that may be granted by the Hon'ble President and the Hon'ble Governor under Articles 72 and 161 of the Constitution of India or of the State Government under Section 433-A of the Code of Criminal Procedure for good and sufficient reasons.

83. Subject to the aforesaid observations the appeal is partly allowed. The reference No. 6 of 2007 for confirming the death sentence is rejected.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.01.2016

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, J.
THE HON'BLE YASHWANT VARMA, J.

Special Appeal No. 966 of 2015

Devendra Singh ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Yogesh Agarwal

Counsel for the Respondents:
C.S.C.

Uttar Pradesh Secondary Education Services Selection Board Act 1982-Section 17 (2)(3)-Petitioner/Appellant being selected candidate as principle not allowed to join in the year 1984-management taken every conceivable effort to resist the joining right from filing writ petition and dismissing as withdrawn-against Civil suit seeking permanent injunction getting decree against statutory-protection-total in action on part of Director under Section 17-failure to comply such direction being criminal offence punishable under Section 22 of the Act-held-appellant not to blamed for failure on part of statutory authorities-entitled for salary from the date of initial selection-without touching the direction of Single Judge-director to hold enquiry and take decision within3 months.

Held: Para-7
There has been a clear failure on the part of the authorities to enforce their statutory powers including the power which has been conferred upon the Director under Section 17(3) of the Act. Under Section 17(2), the Director is empowered to direct the management to appoint the selected candidate and to pay him salary from the date specified in the order. The salary is recoverable as arrears of land revenue from the property belonging to or vested in the institution under sub-section (3) of Section 17. These statutory powers have been conferred for a salutary public purpose. Failure to comply with a direction under Section 17 is a criminal offence under Section 22 of the Act. The Director was obligated, upon being informed by the appellant, to have taken recourse to the

provisions of Section 17(3) of the Act by issuing a direction to the Management of the College to pay arrears of salary and then proceeding to recover them as arrears of land revenue through the Collector. The appellant cannot be blamed for the failure of the statutory authorities to comply with their provisions. The conduct of the Management in obtaining an injunction in a proceeding to which the appellant was not even impleaded, speaks volumes of the manner in which the rights of a duly selected candidate have been defeated for no fault of his.

(Delivered by Hon'ble Dr. Dhananjaya Yeshwant Chandrachud, C.J.)

1. This special appeal arises from a judgment of the learned Single Judge dated 4 December 2015.

2. The appellant filed a writ petition1 in 2013 in order to challenge an order passed by the District Inspector of Schools, Mainpuri on 30 May 2012 declining to grant him arrears of salary for the period during which he had not worked as Principal of Dayanand Inter College, Ghiror, District Mainpuri2 and seeking a mandamus for the payment of arrears of salary from 1985 till the date of his superannuation on 30 June 2011 and consequential retiral benefits. The learned Single Judge allowed the writ petition in part by directing that the appellant would be entitled to salary with effect from 30 June 2006 which was the date on which the appellant joined as Principal of the College pursuant to a letter of appointment issued by the Committee of Management3 on 19 July 2006. Consequential benefits and retiral dues were directed to be determined on that basis. The appellant is aggrieved since his wider claim for the payment of salary from 1985 and for the computation of retiral benefits on that basis has not found acceptance of the learned Single Judge.

3. The appellant was selected by the Uttar Pradesh Secondary Education Service Selection Commission (now replaced by the Uttar Pradesh Secondary Education Services Selection Board4). The name of the appellant was recommended by the Board on 20 December 1984 in pursuance of which the District Inspector of Schools issued a communication on 9 January 1985 to the Manager of the College for the issuance of a letter of appointment to the appellant. A writ petition5 was filed in 1984 by the Manager of the College challenging the advertisement in pursuance of which the appellant had applied for the post of Principal, in which an interim order was passed on 9 October 1984 by which it was directed that the selection may proceed but the letter of appointment will not be issued until further orders. The interim order held the field until the petition was dismissed as withdrawn on 16 December 1989. Consequent upon the dismissal of the writ petition, the appellant moved an application on 21 December 1989 to the District Inspector of Schools for the issuance of a letter of appointment and the District Inspector of Schools on 23 December 1989 directed the Management of the College to appoint the appellant. The Management having failed to comply, the District Inspector of Schools again issued a letter on 27 February 1990 to the Management for appointment of the appellant but the appellant was not appointed. The appellant moved a representation before the Regional Director of Education on 13 March 1990 who once again issued a direction to the Management of the College on 15 May 1990. The Management of the College instituted a suit6

before the Civil Court for a permanent injunction restraining the State from appointing the Principal selected for the College by the Board. The appellant applied for impleadment which was rejected and eventually the suit was decreed by the grant of a permanent injunction on 10 April 1991.

4. Nearly sixteen years thereafter on 19 June 2006, the Management issued a letter of appointment to the appellant who claims to have joined on the post of Principal on 30 June 2006. The District Inspector of Schools declined to attest the signatures of the appellant on the ground that the appointment of the appellant was contrary to the decree of the Civil Court. The appellant filed a writ petition7 which was dismissed by a learned Single Judge on 8 July 2008. The appellant then filed a special appeal8. A Division Bench of this Court by an order dated 18 January 2012 allowed both the special appeal and Writ Petition No 25950 of 2006 by setting aside the judgment of the learned Single Judge dated 8 July 2008. The appellant then filed Writ-A No 21939 of 2013 seeking the payment of salary with effect from 1985 and the computation of his retiral dues on that basis in which the judgment dated 4 December 2015 has been passed which has given rise to the present special appeal.

5. Section 10 of the Uttar Pradesh Secondary Education Services Selection Board Act, 19829 requires the management to notify vacancies to the Board in the prescribed manner. Under Section 11, the Board, upon the notification of a vacancy, has to prepare a panel. The panel is required to be intimated to the management of the institution upon which under sub-section (4) of Section 11 the management shall, within a period of one month from the receipt of intimation, issue a letter of appointment to the selected candidate. Where a selected candidate is not appointed by the management within the period provided, Section 17 envisages an enquiry by the Director, upon which under sub-section (2) a direction is to issue to the management to appoint the selected candidate and to pay salary. The amount of salary, if any, due to the teacher is upon a certificate issued by the Director recoverable by the Collector as arrears of land revenue.

6. In the present case, the record before the Court would indicate that the Management made almost every conceivable effort to defeat the claim of the selected candidate. Initially in 1984, a writ petition was filed by the Manager of the College in which an interim order was passed which operated until the petition was dismissed as withdrawn on 16 December 1989. Thereafter, from the narration of facts, it has emerged that the appellant continued to pursue his rights. The District Inspector of Schools on 23 December 1989, the Director on 27 February 1990 and the Regional Director on 15 March 1990 directed the Management to pay salary but the Management did not comply. The Management filed a suit seeking a permanent injunction which was decreed on 10 April 1991. The appellant was not impleaded as a party to the suit. The Division Bench of this Court in its judgment dated 18 January 2012 noted that the suit did not seek to challenge the appointment of the appellant but was filed for restraining the selected person from joining as Principal. The Division Bench held that the suit can have no consequence on the rights of the appellant. As a matter of fact, the Management of the College eventually issued a letter of appointment on 19 June 2006.

7. There has been a clear failure on the part of the authorities to enforce their statutory powers including the power which has been conferred upon the Director under Section 17(3) of the Act. Under Section 17(2), the Director is empowered to direct the management to appoint the selected candidate and to pay him salary from the date specified in the order. The salary is recoverable as arrears of land revenue from the property belonging to or vested in the institution under sub-section (3) of Section 17. These statutory powers have been conferred for a salutary public purpose. Failure to comply with a direction under Section 17 is a criminal offence under Section 22 of the Act. The Director was obligated, upon being informed by the appellant, to have taken recourse to the provisions of Section 17(3) of the Act by issuing a direction to the Management of the College to pay arrears of salary and then proceeding to recover them as arrears of land revenue through the Collector. The appellant cannot be blamed for the failure of the statutory authorities to comply with their provisions. The conduct of the Management in obtaining an injunction in a proceeding to which the appellant was not even impleaded, speaks volumes of the manner in which the rights of a duly selected candidate have been defeated for no fault of his.

8. In these circumstances, we are of the view that the judgment of the learned Single Judge granting to the appellant relief only of the arrears of salary from 30 June 2006 would not sub-serve the ends of justice. We clarify that this part of the direction is not set aside as such. However, on the wider claim of the appellant, we direct that the Director of Education shall, within a period of three months from the receipt of a certified copy of this order, carry out an enquiry under sub-sections (2) and (3) of Section 17 and issue appropriate directions for the disbursal of salary to the appellant. The Director shall scrutinize all facts after due notice both to the appellant and to the Management. The retiral dues of the appellant shall thereupon be computed on the basis of the directions so issued.

9. The special appeal is allowed in these terms. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.02.2016

BEFORE
THE HON'BLE SHRI NARAYAN SHUKLA, J.
THE HON'BLE RAKESH SRIVASTAVA, J.

Service Bench No. 1185 of 2014

Smt. Mamta Srivastava ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Dr. Lalta Prasad Mishra, Prafulla Tiwari

Counsel for the Respondents:
C.S.C., Rajnish Kumar

Uttar Pradesh Public Services (Reservation for physically handicapped, dependents of freedom fighters & Ex-Serviceman)(Amendment) Act 2009-Section 2(b)-U.P. Act no. 4 of 1993-by amending original Act for first time on 20.08.99-married grand daughter also include-petitioner being married grand daughter of freedom fighter-participated in competitive examination in U.P. Subordinate Services-in pursuance of advertisement 15.12.94-seeking benefits of amended Act-petition challenging enactment 1993 being discriminatory between daughter and grand daughter-whether such amended provision-applicable prospectively or retrospectively ?-held-being purely new legislation without

explanatory effect-can not be said retrospective unless otherwise provided-petition dismissed.

Held: Para-19 & 20

19. The purpose of statement of objects and reasons as has been discussed by the Hon'ble Supreme Court in the case of Utkal Contractions and Joinery (P) Ltd. (Supra) is very limited to understand the background and the antecedent state of affairs leading up to the legislation. It shows the intention of the legislation to amend the Act. The object is very clear as the statement of objects and reasons states that the impugned amendment was made to remove the discrimination between daughter and grand daughter. It is purely a substantive amendment, which cannot be said to be a retrospective unless the Act provide so, whereas in this case no such provision is provided under the Act that the amendment in question shall have retrospective force.

20. In view of the aforesaid submissions, we are of the view that the impugned amendment of 2009 is prospective in nature and it does not apply from the date of substantive enactment of the Act 1993. In the result the writ petition stands dismissed.

Case Law discussed:

(2004) 8 SCC; (2001) 8 SCC 24; (2015) 1 SCC; (1985) 1 SCC 591; 1987 (Supp) SCC 751; AIR 1963 SC 1241.

(Delivered by Hon'ble Shri Narayan Shukla, J.)

1. Heard Dr.L.P.Mishra, learned counsel for the petitioner as well as Mr.Vivek Kumar Shukla, learned Additional Chief Standing Counsel.

2. The petitioner had claimed her candidature for selection in U.P. Upper Subordinate Services notified through the advertisement dated 15.12.1994 under the quota reserved for the dependents of freedom fighters. The petitioner's grand father Shri Brij Nath Prasad Srivastava was a freedom fighter. Earlier her name was not enlisted amongst the successful candidates, but later on, on the basis of recommendation done by the Commission, her name was recommended for appointment on the post of Assistant Accounts Officer. Since she could not submit the requisite certificate of dependent of freedom fighter in the prescribed proforma, a letter was issued by the U.P.State Public Service Commission (in short Commission) on 26.4.1999, whereby the petitioner was required to submit a requisite certificate, she submitted the said certificate to the Commission. However, vide letter dated 2.7.1999 issued by the Secretary of the Commission the petitioner's candidature was rejected on the ground that in her application the petitioner had mentioned that she was married, whereas the benefit provided under the U.P. Public Services (Reservation for Physically handicapped, dependents of freedom fighters and ex-servicemen) Act, 1993 (in short Act 1993) was not available to the married men/women.

3. Aggrieved petitioner submitted a representation to the Secretary of the Commission stating therein that at the time of submission of application pursuant to the advertisement dated 15.12.1994 the petitioner was not married, therefore, in her application against the Coloumn of marital status she marked as 'unmarried'. Later on she got married on 20.1.1995. The Secretary of the Commission rejected the petitioner's representation vide order dated 16.11.1999. The petitioner had instituted a writ petition being writ petition No.2024 (SB) of 1999, in which the petitioner had challenged the order dated 2.7.1999 as well as 16.11.1999, passed by the Commissioner rejecting the petitioner's representation.

4. Section 2(b) of the Act 1993 defines the word 'dependents' with reference to a freedom fighter as follows:-

(i) Son and daughter (married or unmarried) of freedom fighter.

(ii)Grand-son (son of a son) and unmarried grant-daughter (daughter of a son) of freedom fighter.

5. The relationship between the petitioner and her grand-father is not disputed. Thus she is a grand-daughter of Shri Brij Nath Prasad Srivastava, who had been declared as a freedom fighter. The provisions of Section 2(b) of the Act 1993 being discriminatory were amended and a married-grand daughter was included within the definition of 'dependents' of freedom fighters, therefore, the writ petition was dismissed as having become infructuous.

6. Since the married grand-daughter of the freedom fighter was included within the definition of dependents of freedom fighters, the State Government took a decision vide letter dated 12 April 2010 to appoint her on the post of Assistant Accounts Officer, however, no appointment order was issued, therefore, she submitted a representation dated 30.5.2014 before the State Government to appoint her on the post of Assistant Accounts Officer, but has failed to get an appointment.

7. Dr.L.P.Mishra, learned counsel for the petitioner drew attention of this Court towards the statement of objects and reasons of amendment introduced in the Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) (Amendment) Act, 2009 notified on 20 August 2009 and submitted that since the purpose of amendment was to remove the discrimination between the daughter and grand-daughter the State Government decided to amend the said Act to include the married grand-daughter of a freedom fighter in the said definition of word 'dependents'. He vehemently submitted that in case of daughter of the freedom fighter married or unmarried both had been included to be dependents of the freedom fighter, but in case of grand daughter only the unmarried grand daughter was defined to be dependent of the freedom fighter. The statement of objects and reasons of the amendment Act 2009 is extracted below:-

"Statement of Objects and Reason.- The Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Serviceman) Act, 1993 (U.P. Act No.4 of 1993) has been enacted to provide for the reservation of posts in favour of physically handicapped, dependents of freedom fighters and ex-servicemen. Clause (b) of Section 2 of the said Act defines the word "dependent". In accordance with the said definition son and daughter (married or unmarried) and grand son and unmarried grand daughter were the dependents of a freedom fighter. In order to remove the discrimination between daughter and grand daughter it was decided to amend the said Act to include the married grand daughter of a freedom fighter in the said definition of the word "dependent".

8. The amended provision of Section 2 of the Act 1993 is reproduced hereunder:-

"2. Amendment of Section 2 of U.P.Act No.4 of 1993.- In Section 2 of the Uttar

Pradesh Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993, hereinafter referred to as the principal Act, in clause (b) in sub-clause (ii) for the words "unmarried grand daughter (daughter of a son)" the words "grand daughter (daughter of a son) (married or unmarried)" shall be substituted."

9. In the present case the main facet of problem is the date of application of the said amendment published in the Gazette on 20 August 2009. Dr.Mishra has contended that since the purpose of amendment was to remove the discrimination between the daughter and grand daughter and once the grand daughter has been put at par with the daughter (married or unmarried) this amendment has to be given effect to from the date of incorporation of the Act 1993. He further tried to fortify his argument with the contentions that the amendment is purely clarificatory in nature, therefore, it becomes applicable from the previous date of enforcement of the Act 1993. In support of his submission he cited the following decisions:-

(1) Zile Singh versus State of Haryana and others reported in (2004) 8 SCC, relevant paragraphs 16 and 19 of the same are reproduced hereunder:-

"16. Where a statute is passed for the purpose of supplying an obvious omission in a former statute or to "explain" a former statute, the subsequent statute has relation back to the time when the prior Act was passed. The rule against retrospectivity is inapplicable to such legislations as are explanatory and declaratory in nature. A classic illustration is the case of Attorney General v. Pougett (1816) 2 Price 381:146 ER 130 (Price at p.392). By a Customs Act of 1873 (53 Geo.3), c.33) a duty was imposed upon hides of 9s 4d, but the Act omitted to state that it was to be 9s 4d per ewt., and to remedy this omission another Customs Act (53 Geo.3, c.105) was passed later in the same year. Between the passing of these two Acts some hides were exported, and it was contended that they were not liable to pay the duty of 9s 4d per ewt., but Thomson, C.B., in giving judgment for the Attorney General, said: (DR p.134).

"The duty in this instance was, in fact, imposed by the first Act; but the gross mistake of the omission of the weight, for which the sum expressed was to have been payable, occasioned the amendment made by the subsequent Act; but that had reference to the former statute as soon as it passed, and they must be taken together as if they were one and the same Act;" (Price at p.392).

(2) Shyam Sunder and others versus Ram Kumar and another, reported in (2001) 8 SCC 24, relevant paragraphs 39 and 40 of the same are reproduced hereunder:-

"39. Lastly, it was contended on behalf of the appellants that the amending Act whereby new Section 15 of the Act has been substituted is declaratory and, therefore, has retroactive operation. Ordinarily when an enactment declares the previous law, it requires to be given retroactive effect. The function of a declaratory statute is to supply an omission or to explain a previous statute and when such an Act is passed, it comes into effect when the previous enactment was passed. The legislative power to enact law includes the power to declare what was the previous law and when such a declaratory Act is passed, invariably it has been held to be retrospective. Mere absence of use of the word "declration" in an Act explaining what was the law before may not appear to be a declaratory Act but if the court finds an Act as declaratory or explanatory, it has to be

construed as retrospective. Conversely where a statute uses the word "declaratory", the words so used may not be sufficient to hold that the statute is a declaratory Act as words may be used in order to bring into effect new law.

40. Cries on Statute Law, 7th Edn. stated the statement of law thus: "If a doubt is felt as to what the common law is on some particular subject, and an Act is passed to explain and declare the common law, such an Act is called a declaratory Act."

(3) Commissioner of Income Tax (Central)-I, New Delhi versus Vatika Township Private Limited, reported in (2015) 1 SCC, relevant paragraph 32 of which is reproduced hereunder:-

"32.Let us sharpen the discussion a little more. We may note that under certain circumstances, a particular amendment can be treated as clarificatory or declaratory in nature. Such statutory provisions are labelled as "declaratory statutes". The circumstances under which provisions can be termed as "declaratory statutes" are explained by Justice G.P.Singh Principles of Statutory Interpretation, (13th Edn., Lexis Nexis Butterworths Wadhwa, Nagpur, 2012) in the following manner:

"Declaratory statutes

The presumption against retrospective operation is not applicable to declaratory statutes. As stated in CRAIES and approved by the Supreme Court: 'For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a Preamble, and also the word "declared" as well as the word "enacted". But the use of the words 'it is declared' is not conclusive that the Act is declaratory for these words may, at times, be used to introduce new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to be substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall be deemed always to have meant' is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory it would not be so construed when the pre-amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law which the Constitution came into force, the amending Act also will be part of the existing law."

The above summing up is factually based on the judgments of this Court as well as English decisions."

10. In view of the principles propounded above, the learned counsel

for the petitioner has submitted that the amendment made in the Act 1993 is purely declaratory as it declares that through the amendment 2009 the married grand-daughter shall also be included in the definition of 'dependent', this amendment shall came into force from the date of enactment of the Act itself. Therefore, the petitioner's candidature, which was considered for appointment on the post of Assistant Accounts Officer being 'dependent' of her grand-father a freedom fighter cannot be rejected.

11. Per contra Mr.Vivek Kumar Shukla, learned Additional Chief Standing Counsel contended that the statement of objects and reasons of the amendment Act 2009 itself speaks that in order to remove the discrimination between daughter and grand-daughter Section 2 of the Act 1993 was amended to include the married grand daughter of a freedom fighter in the definition of word 'dependent'. Since in the case of daughter, the Act has covered both married and unmarried daughter, whereas in the case of grand-daughter only unmarried grand daughter was included in the definition of 'dependent' of freedom fighter, the legislatures felt that non inclusion of married grand daughter of a freedom fighter appears to be discriminatory, therefore, it legislated a law to include the married grand daughter also in the definition of 'dependents' of freedom fighters. There was no ambiguity in the provisions of the Act, which had required clarification of the Act by way of legislation nor have the provisions of the Act stated clearly that the amendment in question is in a declaratory form, rather the provisions of the Act are very clear. Earlier only unmarried grand daughter was included in the definition of 'dependents' of freedom fighter and now married grand daughter of the freedom fighter has also been included in the definition of 'dependents'. The reasons assigned in the statement of objects and reasons of amendment that Section 2 of the Act 1993 has been amended in order to remove the discrimination between the daughter and grand daughter does not mean that there was ambiguity in the legislation, which has been clarified by way of amendment. The intention of the legislation to include married grand daughter is very much obvious i.e. to remove the discrimination between two, therefore, it cannot be said that the amendment in the Act being declaratory in nature shall become effective from the date of original enactment of the Act 1993.

12. Without disputing the proposition of law laid down by the Hon'ble Supreme Court, he submitted that definitely the clarification being explanatory/clarificatory will have the retrospective effect. He has urged that in this case the nature of amendment in question is not an explanatory or clarificatory, but by way of legislation the married grand daughter has been included in the definition of 'dependents' it is completely a substantive amendment in the Act, 1993.

13. He cited a case of S.Sundaram Pillai and others versus V.R.Pattabiraman and others, reported in (1985) 1 SCC 591. The Bench consisting of three Hon'ble Judges had considered the impact of explanation and had held that it is now well settled that an Explanation added to a statutory provision is not a substantive provision in any sense of the term. The Hon'ble Supreme Court considering the various aspects of the explanation and observed as under:-

" (a) The object of an Explanation is to understand the Act in the light of the explanation.

(b) It does not ordinarily enlarge the scope of the original section which it explains, but only makes the meaning clear beyond dispute."

14. The Hon'ble Supreme Court summed up its consideration in the following manner:-

"53. Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is-

(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working or an Act by becoming an hindrance in the interpretation of the same."

15. He further cited a decision of the Hon'ble Supreme Court rendered in the case of M/s. Utkal Contractors and Joinery (P) Ltd. and others versus State of Orissa, reported in 1987 (Supp) SCC 751, in which the Hon'ble Supreme Court has discussed the scope of statement of objects and reasons of the Act. The Supreme Court held that the authority of a statutory notification cannot be judged merely on the basis of statement of objects and reasons accompanying the bill. The Supreme Court further referred its another decision rendered in the case of State of West Bengal v. Union of India, reported in AIR 1963 SC 1241, in which it had held that:-

"It is however well settled that the Statement of Objects and Reasons accompanying a Bill, when introduced in Parliament, cannot be used to determine the true meaning and effect of substantive provisions of the statute. They cannot be used except for the limited purpose of understanding the background and the antecedent state of affairs leading up to the legislation. But we cannot use this statement as an aid to the construction of the enactment or to show that the legislature did not intend to acquire the proprietary rights vested in the State or in any way to affect the State Governments' rights as owner of minerals. A statute, as passed by Parliament, is the expression of the collective intention of the legislature as a whole, and any statement made by an individual, albeit a Minister, of the intention and objects of the Act cannot be used to cut down the generality of the words used in the statute."

16. Regard being had to the aforesaid submissions, we proceed to decide the core issue involved in the matter, whether the amended Act 2009 including the married grand-daughter in the definition of 'dependent' shall have a retrospective effect?

17. The statement of objects and reasons accompanying with the amendment Act 2009 speaks that the said amendment has been brought into the Act to remove the discrimination between the daughter and grand-daughter. The purpose of amendment is obvious as earlier the married daughter was included in the definition of 'dependents' of freedom fighter. Whereas in case of grand daughter only unmarried grand daughter was included in the definition of 'dependents' of freedom fighter. It appears that legislatures thought it discriminatory between the two and by amending the Act 1993, they had included the married grand-daughter also in the definition of 'dependents' of freedom fighters. It is purely new legislation without having any explanatory effect of any provision available under the Act.

18. The scope of explanation has been discussed by the Hon'ble Supreme Court in paragraph 53 of its judgment rendered in the case of S.Sundaram Pillai and others (Supra), in which the Hon'ble Supreme Court has held that the explanation cannot in any way interfere with or change the enactment, rather it assists the Court in interpreting the true purport and intendment of the enactment.

19. The purpose of statement of objects and reasons as has been discussed by the Hon'ble Supreme Court in the case of Utkal Contractions and Joinery (P) Ltd. (Supra) is very limited to understand the background and the antecedent state of affairs leading up to the legislation. It shows the intention of the legislation to amend the Act. The object is very clear as the statement of objects and reasons states that the impugned amendment was made to remove the discrimination between daughter and grand daughter. It is purely a substantive amendment, which cannot be said to be a retrospective unless the Act provide so, whereas in this case no such provision is provided under the Act that the amendment in question shall have retrospective force.

20. In view of the aforesaid submissions, we are of the view that the impugned amendment of 2009 is prospective in nature and it does not apply from the date of substantive enactment of the Act 1993. In the result the writ petition stands dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.01.2016

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Writ-C No. 1191 of 2016

Smt. Ram Sawari Devi & Ors. Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Aditya Kumar Singh

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226- Opportunity of hearing-when required-order entailing Civil consequence-opportunity of hearing must-petitioner being Pradhan of village in question and beneficiary of BPL Card holder-by impugned order recovery sought to be made-without opportunity of hearing-held-illegal-quashed.

Held: Para-12
Learned standing counsel has not been able to demonstrate from the perusal of recovery certificate that anywhere the version of the petitioners has been considered. It is settled law that any

order which leads to civil consequences must be passed in conformity with the principles of natural justice. Since here the impugned order has been passed in derogation of principle of natural justice, therefore, impugned orders/recovery certificates cannot be sustained in the eye of law.

Case Law discussed:
1952 SCR 284:AIR 1952 SC 75:1952 Cri LJ 510; (1978) 1 SCC 248:(1978) 2 SCR 621; AIR 1975 Supreme Court 266; air 1989 SC 620; AIR 2001 SC 3707; (2010 (6) AWC 5762); (2011 (6) ADJ 787)

(Delivered by Hon'ble Ran Vijai Singh, J.)

1. Heard Sri A.K. Singh, learned counsel for the petitioners and learned standing counsel for the State-respondents.

2. Through this writ petition, prayer has been made to issue writ of certiorari quashing the order dated 16.10.2015 passed by Block Development Officer, Lar Block, District Deoria as well as order dated 22.8.2015 passed by Chief Development Officer, Deoria- respondent no. 2 by which recovery certificate has been issued against each of the petitioners for illegal allotment of houses under the Indra Housing Scheme.

3. Petitioner no. 1 happened to be Pradhan and remaining petitioners are beneficiaries. The reasons assigned in the impugned order are that the petitioners no. 2, 3 and 4 (beneficiaries) were not BPL card holders. The submission is that the petitioners no. 2, 3 and 4 are the members of BPL family. Learned counsel for the petitioners also contends that before issuing the recovery certificate, any kind of show cause notice or opportunity was not offered to the petitioners.

4. Learned standing counsel appearing for the State-respondents submits that he may be granted time to seek instructions in this matter to verify as to whether opportunity was offered or not.

5. The Apex Court in the case of Mohinder Singh Gill Vs. Chief Election Commissioner, (1978) 1 SCC 405 : (1978) 2 SCR 272; has held that reasons cannot be supplied by filing counter affidavit. From perusal of the impugned recovery certificates, which have been brought on record as annexure- 4A, 4B and 4C and 6 to the writ petition, it transpires that neither any opportunity was offered to the petitioner nor their cases have been considered.

6. In its comprehensive connotation every thing that affects a citizen in his civil life inflicts a civil consequence must be passed in conformity with the principles of natural justice.

7. In State of Orissa Vs. (Miss) Birapani Dei this Court held that even an administrative order which involves civil consequences must be made consistently with the rules of natural justice. The person concerned must be informed of the case, the evidence in support thereof supplied and must be given a fair opportunity to meet the case before an adverse decision is taken. Since no such opportunity was given it was held that superannuation was in violation of principles of natural justice.

8. In State of W.B. Vs. Anwar Ali Sarkar, 1952 SCR 284: AIR 1952 SC 75: 1952 Cri LJ 510; per majority, a seven judge Bench held that the rule of procedure laid down by law comes as much within the purview of Article 14 of

the Constitution as any rule of substantive law. In Maneka Gandhi Vs. Union of India (1978) 1 SCC 248: (1978) 2 SCR 621 another Bench of seven judges held that the substantive and procedural laws and action taken under them will have to pass the test under article 14. The test of reasons and justice cannot be abstract. They cannot be divorced from the needs of the nation. The tests have to be pragmatic otherwise they would cease to be reasonable. The procedure prescribed must be just, fair and reasonable even though there is no specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken against an individual, which affects the right of that individual. The duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action. Even executive authorities which take administrative action involving any deprivation of or restriction on inherent fundamental rights of citizens, must take care to see that justice is not only done but manifestly appears to be done. They have a duty to proceed in a way which is free from even the appearance of arbitrariness, unreasonableness or unfairness. They have to act in a manner which is patently impartial and meets the requirement of natural justice.

9. The law must therefore be now taken to be well settled that procedure prescribed for depriving a person of livelihood must meet the challenge of Article 14 and such law would be liable to be tested on the anvil of Article 14 and the procedure prescribed by a statute or statutory rule or rules or orders affecting the civil right or result in civil consequences would have to answer the requirement of Article 14. So it must be right, just and fair and not arbitrary, fanciful or oppressive. There can be no distinction between quasi-judicial function and an administrative function for the purpose of principles of natural justice. The aim of both administrative inquiry as well as the quasi judicial inquiry is to arrive at a just decision and if a rule or natural justice is calculated to secure justice or to put in negatively, to prevent miscarriage of justice, it is difficult to see why it should be applicable only to quasi-judicial inquiry and not to administrative inquiry. It must logically apply to both.

10. Therefore, fair play in action requires that the procedure adopted must be just, fair and reasonable. The manner of exercise of the power and its impact on the rights of the person affected would be in conformity with the principles of natural justice. Article 21 clubs life with liberty, dignity of person with means of livelihood without which the glorious content of dignity of person would be reduced to animal existence. When it is interpreted that the colour and content of procedure established by law must be in conformity with the minimum fairness and processual justice, it would relieve legislative callousness despising opportunity of being heard and fair opportunities of defence. Article 14 has a pervasive processual potency and versatile quality, equalitarian in its soul and allergic to discriminatory dictates. Equality is the antithesis of arbitrariness. It is thereby, conclusively held by this Court that the principles of natural justice are part of Article 14 and the procedure prescribed by law must be just, fair and reasonable.

11. Since the order impugned leads to civil consequences, therefore the same could not be passed without affording any opportunity of hearing. Reference may be had to the judgments of the Apex Court in M/s Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal & Anr., A.I.R. 1975 Supreme Court 266, Raghunath Thakur Vs. State of Bihar & Ors., A.I.R 1989 SC 620, and M/s. Southern Painters (Supra), Gronsons Pharmaceuticals (P) Ltd. & Anr. Vs. State of Uttar Pradesh & Ors., A.I.R. 2001 SC 3707, as well as Division Bench judgment of this Court in (Smt Rajni Chauhan Vs. State of U.P. & Ors.), (2010 (6) AWC 5762) and (Society for Education and Welfare Awareness (Sewa) thru it secretary vs. Union of India thru Ministry of Human welfare (Manav Sansadhan) New Delhi and others) (2011 (6) ADJ 787).

12. Learned standing counsel has not been able to demonstrate from the perusal of recovery certificate that anywhere the version of the petitioners has been considered. It is settled law that any order which leads to civil consequences must be passed in conformity with the principles of natural justice. Since here the impugned order has been passed in derogation of principle of natural justice, therefore, impugned orders/recovery certificates cannot be sustained in the eye of law.

13. In the result, writ petition succeeds and is allowed and the impugned order dated 22.8.2015 (annexure- 4A, 4B, 4C) and the recovery certificate dated 16.10.2015 (annexure-6) are hereby quashed. However, allowing the writ petition will not preclude the respondents to proceed in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.02.2016

BEFORE
THE HON'BLE DINESH MAHESHWARI, J.
THE HON'BLE RAKESH SRIVASTAVA, J.

Service Bench No. 1517 of 2001

Sewak Saran Gupta [Objection filed] ...Petitioner

Versus

State of U.P. ...Respondent

Counsel for the Petitioner:
C.S. Pandey, Chandra Shekhar Pandey, Vijay Dixit

Counsel for the Respondent:
C.S.C., A.K. Srivastava, Ashok Kumar Srivastava, Deepak Seth, Sanjieva Shankhdhar

Constitution of India, Art.-226-claim of interest-delay in payment of retiral benefits-petitioner retired on 31.03.99 working as District Judge-03.08.99 pension paper forwarded to Director Pension 29.01.2000 pension payment order send to Accountant General-after 8 months error rectified on 20.09.2000 pension paid on 12.02.01-held-entitled for interest @ 12% p.a on delayed payment-payable within 30 days-after expiry of aforesaid period 9% interest shall be payable on total amount of interest-from the date of judgment to actual payment made.

Held: Para-30 & 31

30. Retiral benefits are the accumulated savings of a lifetime of service of a Government servants. In a large number of cases, the retiral benefits are the only source of livelihood and means of survival not only for the retired Government servant but for his entire family. If the retirel benefits are not paid in time, the very survival of the retired employee and his family members comes

under question. The respondents should realise that the delay in payment of the retiral dues of a retired Government servant may have a devastating effect on the lives of the retired Government servant and his family causing untold hardship. In the matter of grant of retiral benefits to the retired government servants, the respondents are expected to be alive to the problem of the retired employee and are expected to strictly adhere to the time-schedule prescribed.

31. In the facts and circumstances mentioned above, we are of the firm opinion that there is no justification on the part of the contesting respondents for the inordinate delay in processing the pension papers of the petitioner. The claim of the petitioner for interest on delayed payment of his retiral benefits is, thus, upheld.

Case Law discussed:
(1985) 1 SCC 429; (1999) 3 SCC 438; (2008) 3 SCC 44.

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

1. Shri Sewak Saran Gupta, a retired District Judge, has preferred this writ petition praying inter alia for a direction to the respondents to pay interest @ 18% per annum on the delayed payment of his retiral dues.

2. After putting in 33 years of unblemished service, the petitioner, on attaining the age of superannuation, retired from service from the post of District Judge, Deoria on 31.03.1999. Nine months before the petitioner retired, in July, 1998, the petitioner was served with a letter dated 07.07.1998 sent by the Registry of High Court, requiring him to submit his pension papers. It is alleged that in response to the said letter, the petitioner sent his pension papers, duly completed in all respect, along with his letter dated 03.08.1998 to the Registry of High Court. Just before his retirement, the petitioner sent a letter dated 19.03.1999 to the Registry with a request that his pension and gratuity papers be forwarded to the Directorate of Pension at the earliest so that he may get his retiral dues immediately after his retirement and he may not have to face any financial hardship. The petitioner further requested that in case it was not possible to process his pension papers at an early date, for any reason, whatsoever, then provisional pension and gratuity be paid to him as per the rules. The petitioner is said to have sent reminders on 19.06.1999 & 04.08.1999 for expediting the payment of his retiral dues. On 03.08.1999 the respondent no.5 forwarded the pension papers of the petitioner to the Director, Directorate of Pension, Lucknow-the respondent no. 2. The respondent no. 2, after about four months, on 29.01.2000, sent the 'Pension Payment Order' to the Accountant General (A&E) II, UP, Allahabad-the respondent no.3. Eight months thereafter, the respondent no.3 on 20.09.2000, after getting the alleged error in the 'Pension Payment Order' rectified by the respondent no.2, sent the requisite order to the Accountant General (A&E), Madhya Pradesh, Gwalior - the respondent no.6 for disbursement of petitioner's pension and other retiral benefits. The respondent no.6, in turn, on 20.12.2000 forwarded the pension papers of the petitioner to the Treasury Officer, District Datia, Madhya Pradesh - the respondent no.7. Ultimately, on 12.02.2001, the petitioner was paid a sum of Rs. 3,49,470/- towards gratuity and on 19.02.2001, the petitioner was paid a sum of Rs 4,76,531/- towards commutation of pension and Rs. 1,85,938/- towards arrears of pension. A sum of Rs 36,092/- towards Group Insurance had already been paid to the petitioner on 25.07.2000. Shortly thereafter the petitioner was paid a sum of Rs 530/- towards gratuity which was earlier withheld

for want of some "No Dues Certificate'. The petitioner made a representation to the respondent no.5 claiming interest @ 18% per annum on delayed payment of his retiral dues. But, as no action was taken by the authority concerned, the petitioner approached this Court by means of the present writ petition claiming penal interest on delayed payment of his retiral dues.

3. The respondents (except respondent no.4) have filed their separate counter affidavits. In their respective counter affidavits, the contesting respondents have stated the manner in which the matter was dealt with at their end and have tried to account for the time taken by them in processing the pension papers of the petitioner and have submitted that there was no deliberate or willful delay on their part.

4. In the counter affidavit filed on behalf of the opposite party no.5, it has been stated that as the petitioner was due to retire on 31.03.1999 and a such, in view of the G.O. dated 28.07.89, a letter dated 07.07.1998 was sent to the petitioner requiring him to submit his pension and gratuity papers. A copy of the said letter was also endorsed to the District Judge, Siddharthnagar and Ballia and to the Senior Accounts Officer, Accountant General, U.P., Allahabad for submission of "No Dues Certificate'. A copy of the said letter was also endorsed to the Joint Director (Treasury), Camp Office, Allahabad, requiring the latter to submit the History/Statement of Service of the petitioner to the former. In response to the said letter, the petitioner sent his pension papers, along with his letter dated 03.08.1998 to the Registry of High Court. The District Judge, Siddharthnagar and Ballia and the office of the Accountant General sent the desired "No Dues Certificate' on 04.08.1998, 17.09.1998 and 03.08.1998 respectively. The petitioner also submitted his revised pension papers according to the revised enhanced pay along with his letter dated 18.12.1998. It has been then alleged that after obtaining reports from various sections, the then Additional Registrar of High Court along with his office note dated 25.05.1999 forwarded the pension papers of the petitioner to the Registrar General for laying the file before Hon'ble the Chief Justice for his perusal and orders; and vide Court's order dated 29.05.1999, Hon'ble the Chief Justice granted his approval for sending the pension papers of the petitioner to the respondent no. 2 for necessary action.

5. In paragraph 13 of the said counter affidavit, it has been alleged that the orders of Hon'ble the Chief Justice along with the papers pertaining to the petitioner were received by the Deputy Registrar (M) on 31.05.1999 and on the same day it was sent to Administration 'A' Section and was given to the then dealing assistant. It has been stated that after 31.05.1999 there were summer vacations from 01.06.1999 to 30.06.1999 and the dealing assistant proceeded to avail summer holidays from 02.06.1999 to 15.06.1999 and then from 16.06.1999 to 30.06.1999, the concerned dealing assistant was deputed on the work of codification of cases and thereafter he proceeded on medical leave w.e.f. 04.07.1999 to 20.07.1999. He resumed duty on 21.07.1999 after availing medical leave and thereafter prepared the draft letter on 22.07.1999 for sending the pension papers of the petitioner to the Director, Directorate of Pension, U.P., Lucknow for necessary action and

thereafter on 03.08.1999, the respondent no. 5 forwarded the pension papers of the petitioner to the respondent no. 2 for settlement of his pension and gratuity etc.

6. According to the respondent no.5, there was no deliberate delay in processing the pension papers of the petitioner. On the contrary, it has been alleged, that prompt action was taken in forwarding the pension papers of the petitioner to the respondent no. 2. It has been further alleged that the request for payment of provisional pension made by the petitioner in his letter dated 19.03.1999 could not be acceded to as the file was already under submission to Hon'ble the Chief Justice for approval. The only duty cast upon the respondent no. 5, in so far as the District Judiciary was concerned, it is alleged, was to forward the pension papers of the petitioner to the Directorate of Pension. It has been submitted that the respondent no. 5 was not responsible for the disbursement of retiral dues of the petitioner and, as such, the respondent no. 5 was not obliged to pay any penal interest for the delay, if any, in disbursement of the retiral dues of the petitioner.

7. As per the counter affidavit filed on behalf of the respondent nos. 1 & 2, the pension papers of the petitioner sent by respondent no. 5 along with his letter dated 03.08.1999 were received in the office of respondent no. 2 on 13.09.1999 and on 29.01.2000 the "Pension Payment Order' for making necessary payments was sent to the respondent no. 3. It has been stated that the details of service history and average pay, which were necessary for processing the pension papers of the petitioner, were supplied to the respondent no. 2 by respondent no. 4 on 13.12.1999 and immediately thereafter the pension papers of the petitioner were processed and payment order was issued. It has been categorically stated that the retiral dues of the petitioner had been paid and as per rule the petitioner was entitled for interest on delayed payment of gratuity only @ 12% per annum which was to be sanctioned by the opposite party no. 5.

8. A counter affidavit has also been filed on behalf of respondent no.3 in which it has been stated that the 'Pension Payment Order' received by the respondent no.3 from the office of respondent no.2 contained certain omissions/errors and, as such, the same could not be processed at his end. It has been stated that respondent no.3 in this regard sent a letter to respondent no.2 on 19.04.2000 for rectifying 'Pension Payment Order' of the petitioner. It has been stated that after rectification of the pension payment order it was received in the concerned section of the office of respondent no.3 in the month of August, 2000 and on 20.09.2000 Special Seal Authority was issued by the respondent no.3 to the Accountant General (A&E), MP, Gwalior -the respondent no.6 for necessary action in the matter. In his counter affidavit the respondent no.3 has alleged that there was no delay on his part in processing the pension papers of the petitioner and as such the petitioner was not entitled to any relief against respondent no.3

9. The respondent no.6, in his counter affidavit has alleged that the pension papers of the petitioner, forwarded by respondent no.3 under his Special Seal Authority, were received in

his office on 12.10.2000 and on 20.12.2000, with great promptitude, the papers were forwarded by him to the respondent no.7 for necessary action at his end. It has been alleged that the respondent no.6 was in no way responsible for the delay, in any, in payment of the retiral dues of the petitioner.

10. The respondent no.7 has also filed his counter affidavit alleging therein that there was no delay, whatsoever, on his part in making payment of the retiral dues of the petitioner. It has been alleged that the certain information was required to be furnished by the petitioner and as soon the said information was furnished by the petitioner, the retiral dues were paid to him.

11. The petitioner, by filing rejoinder affidavits to the counter affidavits filed on behalf of the contesting respondents, has refuted the stand taken by the respondents and has reiterated the contents of the writ petition. Though the petitioner has made a prayer in the writ petition for a direction to the respondents to pay the remaining gratuity and G.P.F. alongwith interest but since all the outstanding amount has been paid to the petitioner, the learned counsel for the petitioner has confined his prayer for payment of interest to the petitioner on delayed payment of his retiral dues.

12. Sri Vijay Dixit, the learned counsel for the petitioner, has submitted that the petitioner had completed all the formalities and had submitted all the papers required for grant of his retiral benefits much before his retirement, but unnecessarily and without any justification, the petitioner was paid his retiral dues after a considerable delay on each count, causing uncalled for financial hardship and as such the petitioner is entitled to interest on delayed payment of his retiral dues.

13. Per contra, the learned Standing Counsel appearing on behalf of the respondent nos.1 to 4 and Sri Gaurav Mehrotra, the learned counsel appearing on behalf of the respondent no.5 have submitted, in unison, that the delay, if any, in payment of the retiral dues of the petitioner was neither deliberate nor it was caused on account of any inaction on the part of the contesting respondents and as such the contesting respondents could not be blamed for the delay, if any, in payment of the retiral dues of the petitioner.

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

15. Pension is not a bounty payable on the sweet will and the pleasure of the Government is a well-settled legal proposition. It is also well settled that the retiral dues of an employee have to be paid with promptitude or else the Government is liable to pay interest unless the delay can be attributed to the employee concerned or the Government is able to show that there was some cogent and valid justification for the delay.

16. In the case at hand, the petitioner retired from service on 31.3.1999 and his retiral dues were paid to him in February, 2001. Thus, there cannot be any dispute that there has been an inordinate delay in payment of the retiral dues of the petitioner. In the counter affidavits filed on behalf of the contesting respondents, the delay has not been attributed to any

fault or omission on the part of the petitioner. What is to be seen now is as to whether the respondents have any justification on their part for the inordinate delay in making payment of the retiral dues to the petitioner.

17. The petitioner retired from service on 31.3.1999 and, admittedly, for the first time a letter dated 07.07.1998 was sent by the Registry of High Court to the petitioner for submission of his papers for payment of his retiral dues. It is not in dispute that in response to the said letter, the petitioner submitted his pension papers along with his letter dated 03.08.1998 to the Registry of High Court but eventually it was on 25.05.1999, after more than nine and a half months, that the pension papers of the petitioner were forwarded by the Registry for laying the file before Hon'ble the Chief Justice for perusal and orders. Nine months is too long a time for the Registry of High Court to process the pension papers of the petitioner, a Judicial Officer belonging to the District Judiciary, when apparently there was nothing adverse against the petitioner. Admittedly, the "No Dues Certificate' from the District Judge, Siddharthnagar and Ballia and the office of the Accountant General were received on 04.08.1998, 17.09.1998 and 03.08.1998 respectively. It is hard to comprehend that it took eight months for the Registry to process the pension papers of the petitioner and place it before Hon'ble the Chief Justice for approval. The explanation given by respondent no.5 for the delay in processing the pension papers of the petitioner is, thus, far from satisfactory and is unacceptable.

18. Apart from the above, after the Hon'ble Chief Justice granted his approval, the pension papers of the petitioner should have been forwarded to the respondent no.2 for necessary action forthwith. But, the Registry of High Court took almost two months to do so. We are of the firm opinion that the explanation offered by the respondent no.5, in paragraph 13 of the counter affidavit, for the time taken by the Registry in forwarding the pension papers of the petitioner after the Hon'ble the Chief Justice granted his approval is flimsy and is an attempt to cover up the failure in taking prompt action in the matter.

19. In so far as the respondent nos.2 & 3 are concerned, the pension papers forwarded by the respondent no.5 were received in the office of respondent no.2 on 13.09.1999 and on 29.01.2000 the "Pension Payment Order' for making necessary payments was sent by him to the respondent no.3. The respondent no.2 took three and a half months to process the pension papers of the petitioner. The respondent no.3 has justified the time taken by him by stating that the information relevant for processing the papers was furnished by the respondent no.4 only on 13.12.1999 and immediately thereafter the pension papers of the petitioner were processed and payment order was issued. But, noticeably, the date on which information was sought from the respondent no.4 has no where been mentioned.

20. In the counter affidavit, filed on behalf of respondent no.3 it has been stated that there was no delay on his part in processing the pension papers of the petitioner and as such the petitioner was not entitled to any relief against respondent no.3. Explaining the time taken by him, the respondent no.3 has stated that in the 'Pension Payment Order'

received by him from the office of respondent no.2 there were certain omissions/ errors and, as such, a letter dated 19.04.2000 was sent to respondent no.2 for its rectification. After rectification, it is alleged that the 'Pension Payment Order' was received in the office in the month of August, 2000 and on 20.09.2000 Special Seal Authority was issued by the respondent no.3 to the Accountant General (A&E), MP, Gwalior -the respondent no.6 for necessary action in the matter. There is nothing on record to indicate as to why it took almost two and a half months to write to respondent no. 2 for rectification of the alleged omission / error and why it took almost four months for the respondent no.2 to make the necessary rectification and send the "Pension Paper Order' back to the respondent no.3. It can be safely inferred that the respondent no.2 did not act with the kind of promptness expected of him in such matters. In any case, it was a matter between respondent nos.2 and 3 and the delay on their part is not attributable to the petitioner.

21. As per the counter affidavit filed by respondent no.6, the Special Seal Authority sent by respondent no.3 was received in his office on 12.10.2000 and on 20.12.2000, with great promptitude, the papers were forwarded by him to the respondent no.7 for necessary action at his end. The respondent no.6 took more than two months, just to forward the pension papers of the petitioner to the respondent no.7. By no stretch of imagination it can be said that the respondent no.6 acted with promptitude as alleged by him.

22. There is no quarrel between the parties that as per the Rules and instructions laying down the time-schedule for the various steps to be taken in regard to the payment of pension of a government servant in the State of Uttar Pradesh, the Head of Office, or other authority responsible for preparing the pension papers is obliged to initiate the pension case, two years before retirement of the government servant and after collecting the essential information necessary for working out the qualifying service, the deficiencies and imperfections, if any, in the service-book/records is to be removed at least eight months in advance of the date of retirement of the government servant. Then the process of determining the admissible pension and gratuity is to be positively completed within a period of 2 months and the pension papers are to be sent to the Accountant General not later than 6 months before the date of retirement. The office of the Accountant General is obliged to issue the pension payment order one month in advance of the date of retirement. The authorities are obliged to ensure that the payment of superannuation pension commences on the first of the month following the month in which the government servant retires.

23. In the case at hand, the time-schedule for processing the pension papers of the petitioner has not been adhered to. Admittedly, the process for preparing the pension papers of the petitioner was initiated only on 07.07.1998, nine months before the date of retirement of the petitioner. Whereas, the said process ought to have been initiated two years before the date of retirement of the petitioner. In the counter affidavit filed on behalf of the respondent no.5, there is no explanation, whatsoever, for the delay in initiating the process for preparing the pension papers of the

petitioner in time. The Registry of High Court was well aware of the date of retirement of the petitioner and as such, there was no justification on the part of the Registry in not initiating the process for preparing the pension papers of the petitioner in time. Moreover, after receiving the pension papers, the Registry took almost a year to process the same for which, there is no valid justification. Similarly, the other contesting respondents have not been able to justify the time taken by them at their end in processing the pension papers of the petitioner.

24. After giving thoughtful consideration to the rival submissions and after examining the material placed on record, we are satisfied that the petitioner is entitled to receive interest for the inordinate delay in payment of his retiral dues.

25. The learned counsel for the petitioner has referred to a G.O. dated 15.07.1997 which provides that a Government employee is entitled to interest on delayed payment of gratuity over and above three months from the date it became due till the time of its actual payment. In fact, in the counter affidavit filed on behalf of respondent nos.1 & 2, it has been admitted that the petitioner was entitled to interest on delayed payment of gratuity amount as per G.O. dated 06.12.1994 & 15.07.1997. When confronted, the other contesting respondents have also admitted the said entitlement of the petitioner to interest. Paragraph 4 (relevant portion) and 13 of the counter affidavit filed on behalf of respondent nos.1 & 2 being relevant are being quoted below:

"4. ..... As per rule, the petitioner is entitled for interest on delayed payment of gratuity amount of @ 12%, which ought to have been sanctioned by the Head of the Department of the petitioner i.e. Registrar, High Court, Allahabad.

13. That in reply to the contents of, Paras 18 & 19 of the writ petition, it is submitted that payment of interest on delayed payment of gratuity amount only is admissible to the petitioner as per G.O. dated 6.12.1994 and 15.7.1997 (copy plays at Annexure No. 10 to the writ petition). Necessary orders in this regard is required to be issued by the Head of the Department of the petitioner and responsibility for delay is also to be ascertained, for further necessary action."

26. Though the respondents have admitted their liability and have stated that in the facts and circumstances of the case, the petitioner was entitled to be paid interest on gratuity from the date of expiry of three months from the date, it became due, as regards interest on delayed payment of pension on other retirel dues, the respondents have stated that there was no provision in the rules for payment of interest.

27. The question of payment of interest on delayed payment of retiral dues is no more res integra and is settled by a catena of decisions of the Apex Court. In State of Kerala & Ors.Vs. M. Padmanabhan Nair, (1985) 1 SCC 429, the Apex Court in paragraph no. 2 of the said report held as follows:-

"2. Usually the delay occurs by reason of non-production of the L.P.C. (last pay certificate) and the N.L.C. (no liability certificate) from the concerned Departments but both these documents pertain to matters, records whereof would be with the concerned Government Departments. Since

the date of retirement of every Government servant is very much known in advance we fail to appreciate why the process of collecting the requisite information and issuance of these two documents should not be completed at least a week before the date of retirement so that the payment of gratuity amount could be made to the Government servant on the date he retires or on the following day and pension at the expiry of the following month. The necessity for prompt payment of the retirement dues to a Government servant immediately after his retirement cannot be over-emphasised and it would not be unreasonable to direct that the liability to pay penal interest on these dues at the current market rate should commence at the expiry of two months from the date of retirement."

28. In Dr. Uma Agarwal Vs. State of UP & Anr., (1999) 3 SCC 438, the while considering the Rules and instructions which prescribe the time-schedule for the various steps to be taken in regard to the payment of pension and other retiral benefits of government servants in the State of Uttar Pradesh, the Apex Court has held that the Government was obliged to follow the rules and the delay in settlement of retiral dues should be avoided at all costs. Paragraph no. 5 of the said report is reproduced below:-

"5. We have referred in sufficient detail to the Rules and instructions which prescribe the time-schedule for the various steps to be taken in regard to the payment of pension and other retiral benefits. This we have done to remind the various governmental departments of their duties in initiating various steps at least two years in advance of the date of retirement. If the Rules/instructions are followed strictly, much of the litigation can be avoided and retired government servants will not feel harassed because after all, grant of pension is not a bounty but a right of the government servant. The Government is obliged to follow the Rules mentioned in the earlier part of this order in letter and in spirit. Delay in settlement of retiral benefits is frustrating and must be avoided at all costs. Such delays are occurring even in regard to family pension for which too there is a prescribed procedure. This is indeed unfortunate. In cases where a retired government servant claims interest for delayed payment, the court can certainly keep in mind the time-schedule prescribed in the Rules/instructions apart from other relevant factors applicable to each case."

29. In the case of S.K. Dua v. State of Haryana, (2008) 3 SCC 44, the Apex Court has held that in the absence of statutory rules, administrative instructions or guidelines, an employee can claim interest relying on Articles 14, 19 and 21 of the Constitution. :

14. In the circumstances, prima facie, we are of the view that the grievance voiced by the appellant appears to be well founded that he would be entitled to interest on such benefits. If there are statutory rules occupying the field, the appellant could claim payment of interest relying on such rules. If there are administrative instructions, guidelines or norms prescribed for the purpose, the appellant may claim benefit of interest on that basis. But even in absence of statutory rules, administrative instructions or guidelines, an employee can claim interest under Part III of the Constitution relying on Articles 14, 19 and 21 of the Constitution. The submission of the learned counsel for the appellant, that retiral benefits are not in the nature of "bounty" is, in our opinion, well

founded and needs no authority in support thereof. In that view of the matter, in our considered opinion, the High Court was not right in dismissing the petition in limine even without issuing notice to the respondents.

30. Retiral benefits are the accumulated savings of a lifetime of service of a Government servants. In a large number of cases, the retiral benefits are the only source of livelihood and means of survival not only for the retired Government servant but for his entire family. If the retirel benefits are not paid in time, the very survival of the retired employee and his family members comes under question. The respondents should realise that the delay in payment of the retiral dues of a retired Government servant may have a devastating effect on the lives of the retired Government servant and his family causing untold hardship. In the matter of grant of retiral benefits to the retired government servants, the respondents are expected to be alive to the problem of the retired employee and are expected to strictly adhere to the time-schedule prescribed.

31. In the facts and circumstances mentioned above, we are of the firm opinion that there is no justification on the part of the contesting respondents for the inordinate delay in processing the pension papers of the petitioner. The claim of the petitioner for interest on delayed payment of his retiral benefits is, thus, upheld.

32. In view of the above, this writ petition is allowed. The respondents are directed to calculate and make payment of interest on the delayed payment of gratuity to the petitioner, as per the G.O.'s 06.12.1994 & 15.07.1997. The respondents are further directed to calculate and pay to the petitioner interest on the delayed payment of other retiral dues @ 12% per annum from the date the same became due, till the time of its actual payment. The respondents shall ensure that the actual payment is made to the petitioner within 30 days from the date of this order, failing which, the entire payable amount shall carry interest at the rate of 6% per annum from the date of this order. The respondents shall be expected to hold necessary inquiry/inquiries to fix the responsibility for delay and defaults in this matter and to take further necessary action against the erring officers/employees in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.01.2016

BEFORE
THE HON'BLE AMIT STHALEKAR, J.

Writ-A No. 1575 of 2016

Umesh Chand Yadav ...Petitioner
Versus
The I.G. and Chief Security Comm. & Ors. ...Respondents

Counsel for the Petitioner:
Rajeev Chaddha

Counsel for the Respondents:
Sudhir Bharti

Constitution of India-Art.-226-Service Law-Petitioner being selected on post of constable in RPF-during training period on its own filed affidavit regarding involvement in criminal case as well as discharged by CJM-much prior to advertisement-dismissal order-treating concealment of this fact in verification forum-not available-even non consideration of eligibility-order illegal-quashed-direction for reconsideration keeping in view of Ram Kumar Gupta case-given.

Held: Para-9

In my opinion in the present case the judgement of the High Court in the case of Ram Kumar (supra) squarely applies. The respondents while passing the impugned order cancelling the candidature of the petitioner have not taken into consideration the question of eligibility of the petitioner or the fact that he had himself at the time of being sent for training filed an affidavit disclosing the fact that he had been involved in a criminal case and discharged as far back as in 2001.

Case Law discussed:

Civil Appeal No. 7106 of 2011; Civil Appeal No. 3470 of 2008; Special Appeal No. 181 of 2015

(Delivered by Hon'ble Amit Sthalekar, J.)

1. Supplementary affidavit filed today is taken on record.

2. Heard Shri Rajeev Chaddha, learned counsel for the petitioner and Shri Sudhir Bharti, learned counsel for the respondents. .

3. The petitioner is seeking quashing of the order dated 19.2.2015 whereby his candidature for the post of Constable recruit has been cancelled on the ground that he has submitted false attestation form with regard to criminal case.

4. The facts which are not in dispute between the parties are that the petitioner applied for the post of Constable in the Railway Protection Force. In the attestation form he was required to disclose as to whether he has ever been arrested or prosecuted or kept under detention. The petitioner did not fill this part of the attestation form. However, at the time of training he himself filed affidavit, Annexure-5 to the writ petition, stating that he was involved in a criminal case under section 465/468/471 I.P.C. in district Gorakhpur and case crime no. 15 of 2000 had been registered against him but he was discharged by the order of the A.C.J.M. Gorakhpur dated 15.1.2001, Annexure-6 to the writ petition.

5. Learned counsel for the petitioner submits that it was never the intention of the petitioner to withhold any information from the respondents in that though due to error he had omitted to fill up the requisite application form disclosing the criminal proceedings against him but at the very first instance at the time of training he had filed his own affidavit disclosing these facts without even same being called for by the respondents. In support of his contention, learned counsel has placed reliance upon the judgement of the Supreme Court passed in Civil Appeal No. 7106 of 2011 (Ram Kumar Vs. State of U.P. and others) wherein also the petitioner had applied for the post of Constable and omitted to fill up his attestation application regarding pendency of criminal case against him. In that case the facts were that in the criminal case the petitioner therein had been acquitted and therefore he did not think it necessary to state the said case regarding involvement in a criminal case in his attestation form. When these facts were discovered his appointment was cancelled. Referring to the facts of the case, the Supreme Court held that the facts on which the petitioner/appellant had been acquitted was not examined by the S.S.P. Ghaziabad as to whether they were of serious nature or whether on the grounds mentioned therein the petitioner may be ineligible for appointment and accordingly the impugned order of cancellation of appointment of the petitioner therein was quashed by the Supreme Court. Paragraphs 7,8,9 and 10 of the said judgement read as under:

" 7. In the facts of the present case, we find that though Criminal Case No.275 of

2001 under Sections 324/323/504 IPC had been registered against the appellant at Jaswant Nagar Police Station, District Etawah, admittedly the appellant had been acquitted by order dated 18.07.2002 by the Additional Chief Judicial Magistrate, Etawah. On a reading of the order dated 18.07.2002 of the Additional Chief Judicial Magistrate would show that the sole witness examined before the Court, PW-1 Mr. Akhilesh Kumar, had deposed before the Court that on 02.12.2000 at 4.00 p.m. children were quarrelling and at that time the appellant, Shailendra and Ajay Kumar amongst other neighbours had reached there and someone from the crowd hurled abuses and in the scuffle Akhilesh Kumar got injured when he fell and his head hit a brick platform and that he was not beaten by the accused persons by any sharp weapon. In the absence of any other witness against the appellant, the Additional Chief Judicial Magistrate acquitted the appellant of the charges under Sections 323/34/504 IPC. On these facts, it was not at all possible for the appointing authority to take a view that the appellant was not suitable for appointment to the post of a police constable.

8. The order dated 18.07.2002 of the Additional Chief Judicial Magistrate had been sent along with the report dated 15.01.2007 of the Jaswant Nagar Police Station to the Senior Superintendent of Police, Ghaziabad, but it appears from the order dated 08.08.2007 of the Senior Superintendent of Police, Ghaziabad, that he has not gone into the question as to whether the appellant was suitable for appointment to service or to the post of constable in which he was appointed and he has only held that the selection of the appellant was illegal and irregular because he did not furnish in his affidavit in the proforma of verification roll that a criminal case has been registered against him. As has been stated in the instructions in the Government Order dated 28.04.1958, it was the duty of the Senior Superintendent of Police, Ghaziabad, as the appointing authority, to satisfy himself on the point as to whether the appellant was suitable for appointment to the post of a constable, with reference to the nature of suppression and nature of the criminal case. Instead of considering whether the appellant was suitable for appointment to the post of male constable, the appointing authority has mechanically held that his selection was irregular and illegal because the appellant had furnished an affidavit stating the facts incorrectly at the time of recruitment.

9. In Kendriya Vidyalaya Sangathan and Others v. Ram Ratan Yadav (supra) relied on by the respondents, a criminal case had been registered under Sections 323, 341, 294, 506-B read with Section 34 IPC and was pending against the respondent in that case and the respondent had suppressed this material in the attestation form. The respondent, however, contended that the criminal case was subsequently withdrawn and the offences in which the respondent was alleged to have been involved were also not of serious nature. On these facts, this Court held that the respondent was to serve as a Physical Education Teacher in Kendriya Vidyalaya and he could not be suitable for appointment as the character, conduct and antecedents of a teacher will have some impact on the minds of the students of impressionable age and if the authorities had dismissed him from service for suppressing material information in the attestation form, the decision of the authorities could not be interfered with by the High Court.

The facts of the case in Kendriya Vidyalaya Sangathan and Others v. Ram

Ratan Yadav (supra) are therefore materially different from the facts of the present case and the decision does not squarely cover the case of the appellant as has been held by the High Court.

10. For the aforesaid reasons, we allow the appeal, set aside the order of the learned Single Judge and the impugned order of the Division Bench and allow the writ petition of the appellant and quash the order dated 08.08.2007 of the Senior Superintendent of Police, Ghaziabad. The appellant will be taken back in service within a period of two months from today but he will not be entitled to any back wages for the period he has remained out of service. There shall be no order as to costs."

6. Shri Sudhir Bharti, learned counsel for the respondents on the other hand has placed reliance upon another judgement of the Supreme Court passed in Civil Appeal No. 3470 of 2008 (Union of India Vs. Bipad Bhanjan Gayen) wherein the Supreme Court has held that non disclosure of information regarding pendency of criminal case under section 376 and 417 I.P.C. in the attestation form was a deliberate attempt by the petitioner to conceal material fact from the respondents. In that case it is noticed that the criminal case against the petitioner was still pending in the court at the time when the petitioner Bipad Bhanjan Gayen had filled the attestation form and, therefore, the Supreme Court held that it was a case of deliberate concealment of material fact by the petitioner from the respondents while filling the attestation form. Therefore, in my view the aforesaid judgement of the Supreme Court was on its own facts and has no application to the facts of the present case.

7. The next case relied upon by the learned counsel for the respondents is the decision of the Division Bench of this Court in Special Appeal No. 181 of 2015 (Veer Pal Singh Vs. State of U.P. and 3 others) and in that case also the facts as emerging in paragraph 8 of the judgement are that the appellant had applied for recruitment in pursuance of advertisement dated 2.5.2006 as a Constable in the PAC. Before he applied for selection a case Crime No. 136 of 2004 had been registered against him under sections 323, 452, 504 and 506 I.P.C. and a charge sheet had also been filed on 10.8.2004. When the appellant applied for recruitment he expressly stated that no criminal case had been registered against him and that no prosecution was pending against him in any court. He was selected on 28.8.2006 . On 31.8.2006 he applied for and was granted bail by the court of C.J.M. The judgement of acquittal was rendered by the C.J.M. on 27.8.2007. The Division Bench held that from these facts it cannot be even disputed that the disclosures which the appellant made when he sought appointment as a Constable were palpably false and that he had suppressed the material fact relating to the pendency of the criminal case against him. Paragraph 8 of the judgement reads as under:

"The facts in the present case are not in dispute. The appellant applied for recruitment in pursuance of an advertisement dated 2 May 2006 as a Constable in the PAC. Admittedly, before he applied for selection, Case Crime No.136 of 2004 had been registered against him under Sections 323, 452, 504 and 506 of the IPC and a charge sheet had been filed on 10 August 2004. Again, it is not in dispute

that when he applied for recruitment, the appellant expressly stated that no criminal case had been registered against him and that no prosecution was pending against him in any Court. When he filed an affidavit, the appellant also undertook that if his disclosures were found to be incorrect or, if he was found to have materially suppressed any true facts, his selection would stand cancelled and that he would be terminated from service without notice. The appellant was selected on 28 August 2006. It is his specific case in the submissions of Counsel that thereafter on 31 August 2006 he applied for and was granted bail by the Court of the Chief Judicial Magistrate. The judgment of acquittal was rendered by the Chief Judicial Magistrate on 27 August 2007. From these facts, it cannot not even be disputed that the disclosures which the appellant made when he sought appointment as a Constable were palpably false and that he had suppressed a material fact relating to the pendency of the criminal case against him. The appellant was clearly on notice that his appointment was liable to be terminated and the selection would be cancelled if his disclosures were found to be incorrect and if there was a suppression of material facts."

8. The judgment of the Division Bench in the case of Veer Pal Singh (supra) is on its own facts and has absolutely no application to the facts of the present case.

9. In my opinion in the present case the judgement of the High Court in the case of Ram Kumar (supra) squarely applies. The respondents while passing the impugned order cancelling the candidature of the petitioner have not taken into consideration the question of eligibility of the petitioner or the fact that he had himself at the time of being sent for training filed an affidavit disclosing the fact that he had been involved in a criminal case and discharged as far back as in 2001.

10. In this view of the matter, the impugned order 19.2.2015 cannot survive and is quashed. The writ petition is allowed and the matter is remitted to the respondent no. 3-Senior Divisional Security Commissioner, R.P.F. Ambala Division, Incharge of PRTC/Jehankhelan Hoshiarpur to reconsider the matter in the light of the observations made above as well as having regard to the judgement of the Supreme Court in the case of Ram Kumar (supra) within a period of one month from the date of receipt of the certified copy of this order.

.APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.02.2016

BEFORE
THE HON'BLE V.K. SHUKLA, J.
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Special Appeal No. 1829 of 2010

Shreyas Gramin Bank & Anr. ..Appellants
Versus
Smt. Kasturi Devi ...Respondent

Counsel for the Appellants:
Yashwant Varma

Counsel for the Respondent:
Bharat Pratap Singh, Amrish Sahai

Constitution of India, Art.-226-compassionate appointment class 4th

employee working Gramin Bank died in harness on 27.09.2005-applied for compassionate appointment rejection on ground of new scheme under clause 13-entitled for ex-gratia lump sum amount-Learned Single Judge exceeded its jurisdiction by directing compassionate appointment-can not be claimed as matter right to this extent-order passed by Single Judge modified with direction to consider ex-gratia payment within 3 months.

Held: Para-29

Hon'ble Apex Court considered various aspects of service jurisprudence and came to the conclusion that as the appointment on compassionate ground may not be claimed as a matter of right nor an applicant becomes entitled automatically for appointment, rather it depends on various other circumstances i.e. eligibility and financial conditions of the family, etc., the application has to be considered in accordance with the scheme. In case the Scheme does not create any legal right, a candidate cannot claim that his case is to be considered as per the Scheme existing on the date the cause of action had arisen i.e. death of the incumbent on the post. In State Bank of India & Anr. (supra), this Court held that in such a situation, the case under the new Scheme has to be considered.

Case Law discussed:

JT 2007 (3) SC 35; 2010 (5) SCC 186; 2006 (1) ADJ 440; Special Appeal No. 840 of 2004; W.P. No. 24066 of 2000; Special Appeal No. 1511 of 2012; Special Appeal No. 954 of 2009; Special Appeal Defective No. 884 of 2015; 1994 AIR (II) 2148; (1994) 4 SCC 138; (2004) 7 SCC 271; (2006) 7 SCC 350; 2010 Law Suit (SC) 1214; (2015) 7 SCC 412; 2014 (2) ADJ 742 (FB); (1989) 4 SCC 468; (1994) 4 SCC 138; (1994) 2 SCC 718; (1996) 1 SCC 301; (1996) 5 SCC 308:AIR 1996 SC 2445; (1997) 8 SCC 85; 2006 AIR SCW 3708; Special Appeal No. 356 of 2012;

(Delivered by Hon'ble M.C. Tripathi, J.)

1. Gramin Bank of Aryavart (earlier known as 'Shreyas Gramin Bank) through its Chairman and the General Manager, Gramin Bank of Aryavart are before this Court assailing the validity of the judgement and order dated 22.9.2010 passed by learned Single Judge of this Court in Writ A No.43145 of 2007 (Smt. Kasturi Devi vs. Shreyas Gramin Bank and ors) wherein he had proceeded to allow the writ petition and the appellant-bank was directed to forthwith re-consider the claim for compassionate appointment within two months.

2. The factual situation that is accepted before us is that husband of the petitioner-respondent was working as a Class-IV employee under the appellant-bank and he died in harness on 27.9.2005. Thereafter being as widow of late Lala Ram, the petitioner-respondent had proceeded to move an application for compassionate appointment on 8th October, 2005. The claim of the petitioner was rejected on 7.12.2010 precisely on the ground that in view of the new Scheme having been enforced, the petitioner-respondent is only entitled for ex-gratia lump sum amount which satisfies her claim, and as such, she was not entitled for compassionate employment. The said order was assailed before learned Single Judge on the ground that in the case of State Bank of India and others Vs. Jaspal Kaur reported in JT 2007 (3) SC 35, Hon'ble Apex Court had held that it is the scheme, which was applicable at the time of moving of the application, which has to be enforced and consequently the claim of the petitioner-respondent was liable to be considered for compassionate appointment. It had been pleaded before learned Single Judge that in view of Scheme, which was prevailing at the time of death of her husband, she was entitled for being considered for compassionate appointment and subsequent

Circular issued by the appellant-bank would not divest her legitimate expectation for compassionate employment. Therefore, it was urged that she was entitled for consideration on the basis of the then existing Rules and the appellant-bank could not reject her claim on the basis of subsequent Circular.

3. It has been argued by learned counsel for the appellant-bank that the petitioner was not entitled for consideration for compassionate employment in terms of the new Scheme as per the decision taken by the Bank. Reliance had also been placed to Clause 13 of the Model Scheme for payment of ex-gratia (lum sum amount), which recites that if any application is pending as on the effective date on the promulgation of the new Scheme, which is admittedly 21.10.2006, the same will be governed by the new Scheme and it had also been pleaded that compassionate employment is not vested right and as such, the date of consideration will be an appropriate date. Consequently the Scheme applicable on such date would be the criteria for consideration of such claim. The appellant-bank had placed reliance on the judgement passed by Hon'ble Supreme Court in State of Kerala Vs. B-Six Holiday Resorts (P) Ltd. reported in 2010 (5) SCC 186, in which it was held in paragraph 22 as follow:-

" Where the rules require grant of a licence subject to the fulfilment of certain eligibility criteria either to safeguard public interest or to maintain efficiency in administration, it follows that the application for licence would require consideration and examination as to whether the eligibility conditions have been fulfilled or whether grant of further licences is in public interest. Where the applicant for licence does not have a vested interest for grant of licence and where grant of licence depends on various factors or eligibility criteria and public interest, the consideration should be with reference to the law applicable on the date when the authority considers applications for grant of licences and not with reference to the date of application."

4. In this background, learned Single Judge had proceeded to allow the writ petition filed by the petitioner-respondent on the basis of decision taken by Hon'ble Apex Court in State Bank of India and others Vs. Jaspal Kaur (supra). The relevant part of the judgement is reproduced as follows:-

"In view of the ratio of the said decision it is clear that the applicability of the circular which was not in existence at the time of moving of the application, is not relevant. The judgement in the Case of State of Kerala (supra) as relied by the respondents' counsel is in relation to grant of liquor licence which is a judgment on a different proposition of law. It would not be applicable to the present controversy when the judgment directly in issue holds that the benefit of compassionate appointment is available to the petitioner.

The question as to whether a person has a vested right for compassionate appointment is no longer res-integra. The right has limited only to the extent of consideration in accordance with rules. The authority has discretion but the said discretion is also circumscribed by rules.

Accordingly the authority has to exercise a judicious discretion and not a whimsical decision so as to frustrate the very purpose of the rule. Reference may be had to the decision of the Apex Court

reported in 2006 (10) SCC 1 paragraphs 26 to 35, Reliance Airport Developers (P) Ltd. Vs. Airports Authority of India and others. In the instant case the authority has proceeded to reject the claim of the petitioner on the ground that in view of the new scheme having been enforced the petitioner is entitled only to ex gratia payment which satisfies her claim. The rejection therefore is not inconsonance with the law laid down in the case of Jaspal Kaur (Supra) as pointed out herein above. The petitioner in my considered opinion has a right to be considered for compassionate appointment in accordance with the provisions that were then existing.

Accordingly the impugned order dated 07.12.2006 is quashed. The writ petition is allowed. The respondent Bank is directed to forthwith re-consider the claim for compassionate appointment in view of the observations made herein above and issue necessary orders within two months from the date of production of a certified copy of this order before the concerned authority.

5. Shri Amrish Sahai, learned counsel appearing for the appellant-bank submitted that it is settled that an application seeking benefits of compassionate appointment must be decided in accordance with the law/rules/regulations as prevailing on the date of consideration of the application and when the petitioner-respondent had proceeded to move an application on 8.10.2005 for compassionate appointment, she did not have any vested right in her favour to obtain appointment on compassionate ground precisely in the backdrop that by the Circular of Indian Banks Association dated 31.7.2004 appellant-bank had already taken a policy decision for doing away with the system of compassionate appointment and the same was eventually adopted by the appellant-bank on 27.10.2006. Even though the Circular of Indian Banks Association was moved on 31.7.2004 and the final adoption took place on 27.10.2006, the delay was occurred on account of clarification, which was sought from the concerned Ministry of Government of India to the extent, as to whether the said guidelines would also apply to the Regional Rural Banks created under powers vested in Rural Bank Act, 1976. Once the Apex Body i.e. Indian Banks Association framed a Model Scheme for payment of ex-gratia for all Public Sector Banks in pursuance of the decision taken by the Government of India, then the same had binding effect. Therefore, at the time of submission of her application, the policy decision was already taken by the Indian Banks Association and the same was widely circulated to all Public Sector Banks alongwith Model Scheme for payment of ex-gratia in lieu of compassionate employment.

6. Learned counsel appearing for the appellant-bank has also placed his reliance on the judgments passed by this Court in Abhimanyu Ratan Bhardwaj vs. State of UP and ors 2006 (1) ADJ 440 (All. DB; Special Appeal No.840 of 2004 (Vidyavrat Rajpoot vs. Mukhya Vittiya Adhikari Zila Parishad & ors); Writ Petition No.24066 of 2000 (Ashutosh Arya vs. the Indian Bank and ors) decided on 27.7.2012; Special Appeal No.1511 of 2012 (Ashutosh Arya vs. the Indian Bank) decided on 2.4.2014; Special Appeal No.954 of 2009 decided on 14.7.2009 and Special Appeal Defective No.884 of 2015 (State of UP & 3 ors vs. Mahaveer Singh and 2 ors) decided on

12.1.2016. He has also relied upon judgments of Supreme Court in LIC of India vs. Asha Ram Chandran Ambedkar 1994 AIR (II) SC 2148; General Manager (D & PB) & ors vs. Kunti Tiwari & ors (1994) 2 SCC 418; Umesh Kumar Nagpal vs. State of Haryana & ors (1994) 4 SCC 138; Punjab National Bank and ors vs. Ashwani Kumar Taneja (2004) 7 SCC 271; Union of India and ors vs. M.T. Latheesh (2006) 7 SCC 350; State Bank of India and another vs. Raj Kumar 2010 LawSuit (SC) 1214; Civil Appeal No. 6348 of 2013 (MGB Gramin Bank vs. Chakrawati), arising out of SLP (C) No.13957/2010, decided on 7 August, 2013 and Canara Bank vs. M. Mahesh Kumar (2015) 7 SCC 412 in support of his submission.

7. On the other hand, it has been submitted by Shri Bharat Pratap Singh, appearing on behalf of the petitioner-respondent that learned Single Judge has rightly allowed the writ petition relying on the judgement in State Bank of India and ors vs. Jaspal Kaur (supra) which holds the field and no interference is required at this stage and the petitioner has already suffered a lot. He has placed reliance on the judgment in Canara Bank and another vs. M. Mahesh Kumar (2015) 7 SCC 412 in which it was held by Hon'ble Supreme Court that the rescission of a scheme for compassionate appointment will not affect an application submitted when the scheme was in force and which was held to be governed by the scheme then prevailing on the date of the application.

8. Heard rival submissions and perused the record.

9. This much is reflected from the record in question that the Scheme for compassionate appointment was introduced in the erstwhile Aligarh Gramin Bank as per the directives issued by the Government of India vide Circular No.71/82 dated 23.9.1982. The features of the Scheme are as under:-

"SCHEME FOR APPOINTMENT OF DEPENDENTS OF DECEASED EMPLOYEES ON COMPASSIONATE GROUNDS IN REGIONAL RURAL BANKS:

1. Short title and commencement:-

This scheme may be called "scheme for appointment in clerical and sub-ordinate cadres of dependents of deceased employees of Regional Rural Banks on compassionate grounds. The scheme shall come into force from 1.10.1982.

2. Definition:

a) In this scheme, unless the context otherwise requires "Bank" means Aligarh Gramin Bank.

b) "Board" means The Board of Directors of Aligarh Gramin Bank.

c) "Chairman" means The Chairman of the Board of Directors.

d) "Employees" means a regular employee whether in the sub-ordinate, clerical or Officers cadre, whether confirmed or on probation and whether working full time or part time but will not include temporary or casual employee.

e) "Dependent" means a widow, a son, a daughter, a brother, a sister of the deceased employee or any other close relative nominated by the widow when deceased employee has left behind no children or his own eligible for appointment and on whom she will be wholly dependent.

3. Appointment under the Scheme:

The Bank may, at its discretion, appoint in the Bank in any of the points mentioned the reunder the widow or a son or daughter of a deceased employee of the Bank or a near relative nominated by the widow on whom she will be wholly dependent and who would give in writing that he or she would look after the family of the deceased employee, if the widow or son or daughter or a near relative as the case may be, fulfills the criteria for appointment under the scheme, where the deceased employee was a widower or a bachelor, the bank may exercise its discretion in this regard, by making inquiries of the next elder in the family. The appointment under this scheme shall be made in clerical and sub-ordinate cadres which is as under:

1. Junior clerk cum Cashier
2. Junior Clerk cum Typist
3. Steno Junior cadre
4. Driver
5. Sweeper/ Messenger."

10. As per record this much is also reflected that a policy decision was taken by the Government of India to abolish the scheme of compassionate employment. The Indian Banks Association vide their letter dated 31.7.2004 had advised all Public Sector Banks a model scheme for payment of ex-gratia lump sum amount to the need of kin of the deceased employee in lieu of appointment on compassionate grounds. Certain clarification was also asked from the Government of India as well as NABARD whether the subsequent scheme was applicable to Regional Rural Banks. In this background, the General Manager, Canara Bank (A Government of India undertaking) had informed to the Chairman, Aligarh Gramin Bank, Aligarh on 26.2.2005 informing that IBA, vide their letter No.PD/CIR/76/532/153 dated 31.7.2004 had advised all Public Sector Banks a model scheme for payment of ex-gratia lump sum amount to the need of Kin of the deceased employee in lieu of appointment on compassionate grounds. Consequently, it had also been informed that the Bank had already proceeded for clarification with NABARD/Government of India in this regard to examine whether the guidelines applicable to RRBs need any change in the light of the scheme formulated by IBA for adoption by Public Sector Banks. Finally the Board of Directors of the appellant bank resolved that bank is permitted to implement the scheme for payment of ex-gratia (lump sum amount) in lieu of appointment on compassionate grounds as per Model Scheme of IBA on 27.10.2006 at Agenda No.52.

11. We have occasion to peruse the Model Scheme in question. Clause-11 of the said Scheme provides that the ex-gratia relief under the above Scheme is not an entitlement but may be granted at the sole discretion of the bank looking into the financial condition of the family and in deserving and eligibility cases only. Clause-13 of the Model Scheme clearly proceeds to make a mention that the Scheme will come into force from the date it is approved by the Board of the bank and all applications for compassionate appointment/grant of lump sum financial relief, if any, pending as on the effective date will be dealt with in accordance with the above Scheme approved by the Board. This much is also reflected from the record in question that subsequent Scheme, which was floated by IBM in the year 2004, was also accorded approval by the Board of Directors of the appellant bank on 27.10.2006. Clause-13 is quoted here under:-

"13. The Scheme will come into force from the date it is approved by the Board of the bank and all applications for compassionate appointment/grant of lump sum financial relief, if any, pending as on the effective date will be dealt with in accordance with the above Scheme approved by the Board."

12. The decision of the Supreme Court in Canara Bank (supra) dealt with a situation where there was a dying-in-harness scheme under a circular of the Canara Bank dated 8.5.1993. An employee of the bank died while on duty on 10.10.1998 and an application was made on 30.11.1998 by his heirs for seeking compassionate appointment. The bank rejected the application on 30.6.1999. Learned Single Judge of the Kerala High Court allowed the writ petition on 30.5.2003 with direction to the bank to reconsider the claim in accordance with law. The judgment of the learned Single Judge was upheld by a Division Bench of the Kerala High Court on 24.8.2006. By the time the Division Bench had decided the writ appeal, the scheme for compassionate appointment was scrapped and the Indian Bank Association formulated a scheme based on guidelines of the Union Government stipulating ex-gratia payment in lieu of compassionate appointment. A circular was issued on 14.2.2005 and it was asserted on behalf of the bank that as on the date of consideration of the application for compassionate appointment, there was no policy to provide such an appointment under the 1993 Scheme. The Supreme Court, in these facts, held that the father of the respondent had died in October, 1998 when the dying-in-harness scheme dated 8.5.1993 was in force and in fact, the bank had rejected the claim on 30.6.1999. Hence, the cause of action to be considered for compassionate appointment had arisen when the circular of 8.5.1993 was in force and the circular of 2005 being an administrative order was held not to have retrospective effect. Moreover, the Supreme Court also observed that the 2005 scheme which provided only for ex-gratia payment in lieu of appointment had in fact been substituted (during the pendency of the proceedings before the Supreme Court) in 2014 and a new scheme had been arrived at for providing compassionate appointment. Hence, as on the date of the judgment of the Supreme Court, the scheme in force provided for the grant of compassionate appointment. It was in these facts, which are clearly distinguishable, that the Supreme Court held that the Bank was not justified in contending that the application for compassionate appointment could not be considered in view of the passage of time.

13. In the present matter, what we find from the record in question that husband of the petitioner-respondent, who was working as Class-IV employee in the appellant-bank, died in harness on 27.9.2005. The petitioner-respondent moved an application for compassionate employment on 8.10.2005. Pending consideration of the above claim, a new scheme known as "Model Scheme for Payment of Ex-gratia (Lump Sum Amount) in lieu of Appointment on Compassionate Grounds in RRB" came into effect. On 13.7.2006 the Chief General Manager, National Bank for Agriculture and Rural Development informed the General Manager, all Sponsor Banks, RRB Division that the effective date for implementation of the scheme will be the date on which the Board of the individual RRB approves the same. As indicated in Para 13 of the Model Scheme, all applications for compassionate appointment/grant of lump

sum financial relief, if any, pending as on the effective date will be dealt with in accordance with the above scheme approved by the bank. The Board of Directors of the appellant-bank accepted the said scheme on 27.10.2006 and resolved that the bank is permitted to implement the scheme for payment of ex-gratia (lump sum amount) in lieu of appointment on compassionate grounds as per Model Scheme of IBA. Consequently, the appellant-bank rejected the claim of the petitioner-respondent vide order/letter dated 7.12.2006.

14. Any scheme or rule, which comes is always prospective in nature unless the scheme itself provides that it is applicable from retrospective effect. In the said Scheme in question, there is specific provision that the Scheme will come into force from the date it is approved by the Board of the Bank and all applications for compassionate appointment/grant of lump sum financial relief, if any, pending as on the effective date, will be dealt with in accordance with the above Scheme approved by the Board. This much is also reflected from the record in question that there was no challenge to Clause-13 of the Scheme in question in the writ petition or any other circulars which require the appellant-respondent to decide the application as per the Scheme in question.

15. In Anand Kumar Sharma vs. State of U.P. and Ors 2014 (2) ADJ 742 (FB) a Full Bench of this Court held that the petitioner did not acquire any vested right on making the application on 25/7/2005 to get his application considered on the basis of the policy as existing on the date of making the application. The Government order dated 04/8/2006 was fully applicable w.e.f. 04/8/2006 and no error was committed by the Collector taking into consideration the policy dated 04/8/2006 when the application was rejected on 18/12/2006.

16. In Smt. Sushma Gosain & Ors. V. Union of India & Ors. (1989) 4 SCC 468, it was observed that in claims of appointment on compassionate grounds, there should be no delay in appointment. The purpose of providing appointment on compassionate ground is to mitigate the hardship due to death of the bread earner in the family. Such appointments should, therefore, be provided immediately to redeem the family in distress.

17. In Umesh Kumar Nagpal V. State of Haryana & ors. (1994) 4 SCC 138, it was ruled that public service appointment should be made strictly on the basis of open invitation of applications and on merits. The appointment on compassionate ground cannot be a source of recruitment. It is merely an exception to the requirement of law keeping in view the fact of the death of employee while in service leaving his family without any means of livelihood. In such cases, the object is to enable the family to get over sudden financial crisis. Such appointments on compassionate ground, therefore, have to be made in accordance with Rules,Regulations or administrative instructions taking into consideration the financial condition of the family of the deceased. This favorable treatment to the dependent of the deceased employee must have clear nexus with the object sought to be achieved thereby, i.e. relief against destitution. At the same time, however, it should not be forgotten that as against the destitute family of the deceased, there are millions and millions of other families which are equally, if not more, destitute. The

exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectation, and the change in the status and affairs of the family engendered by the erstwhile employment, which are suddenly upturned.

18. In Life Insurance Corporation of India V. Asha Ramchandra Ambekar (Mrs.) & Anr. (1994)2 SCC 718, it was indicated that High Courts and Administrative Tribunals cannot confer benediction impelled by sympathetic considerations to make appointments on compassionate grounds when the regulations framed in respect thereof do not cover and contemplate such appointments.

19. The Supreme Court in the case of Jagdish Prasad V. State of Bihar and another reported in (1996) 1 SCC 301 dismissing the appeal filed by the son of deceased employee held in paragraph 3 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 caused 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."

20. In State of Haryana and Ors. Vs. Rani Devi and Anr (1996) 5 SCC 308 : AIR 1996 SC 2445), it was held that the claim of applicant for appointment on compassionate ground is based on the premise that he was dependent on the deceased employee. Strictly this claim cannot be upheld on the touchstone of Article 14 and 16 of the Constitution. However, such claim is considered reasonable as also allowable on the basis of sudden crisis occurring in the family of the employee who had served the State and died while in service. That is why it is necessary for the authorities to frame Rules, Regulations or to issue such administrative instructions which can stand the test of Articles 14 and16 . Appointment on compassionate ground cannot be claimed as a matter or right.

21. The Supreme Court in the case of Haryana State Electricity Board and another V. Hakim Singh reported in (1997) 8 SCC 85 has observed that If the family members of the deceased employee can manage for fourteen years after his death one of his legal heirs cannot put forward a 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 succor to the family to tide over the sudden financial crisis befallen the dependents on account of the untimely demise of its sole earning member.

22. Hon'ble Apex Court in the case of State of J. & K. vs. Sajad Ahmed Mir, 2006 AIR SCW 3708, has taken the view that

compassionate appointment cannot be claimed as matter of right, at the cost of others. Normally, an employment in Government or other public sectors should be open to all eligible candidates who can come forward to apply and compete with each other. It is in consonance with Article 14 of the Constitution. On the basis of competitive merits, an appointment should be made to public office. This general rule should not be departed except where compelling circumstances demand, such as, death of sole bread earner and likelihood of the family suffering because of the setback. Once it is proved that in spite of death of bread earner, the family survived and substantial period is over, there is no necessity to say 'goodbye' to normal rule of appointment and to show favour to one at the cost of interests of several others ignoring the mandate of Article 14 of the Constitution.

23. A Full Bench of this Court, while deciding Special Appeal No.356 of 2012 (Shiv Kumar Dubey vs. State of U.P. & others) and other connected cases, has formulated the principles governing appointments on compassionate grounds under the Dying in Harness Rules, 1974. The principles elucidated in para 29 of the judgment read as follows:-

"29. We now proceed to formulate the principles which must govern compassionate appointment in pursuance of Dying in Harness Rules:

(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 26 C.M.W.P. No. 13102 of 2010 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."

24. In fact, as held by the Full Bench of this Court in Anand Kumar Sharma (supra), the mere making of an application would not confer an indefeasible or vested right for appointment on compassionate ground. A new Scheme for payment of ex-gratia in lieu of appointment on compassionate ground in RRBs came into effect on 31.7.2004 and the Board of Directors of appellant-bank accepted the said scheme on 27.10.2006 and as per Para-13 of the Scheme in question, all applications for compassionate appointment/grant of lump sum financial relief, if any, pending as on the effective date, will be dealt with in accordance with the above Scheme approved by the appellant-bank. Consequently the claim of the petitioner-respondent was rejected on 7.12.2006.

25. Learned Single Judge had observed in the impugned judgment dated 22.9.2010 that the petitioner has a right to be considered for compassionate appointment in accordance with the provisions that were then existing and the appellant-bank was directed to forthwith re-consider the claim of petitioner-respondent for compassionate appointment.

26. In A. Umarani v Registrar, Co-operative Societies & Ors., AIR 2004 SC 4504, Hon'ble Apex Court has held that the Courts should not exercise the extraordinary jurisdiction issuing a direction to give compassionate appointment in contravention of the provisions of the Scheme/Rules etc., as the provisions have to be complied with mandatorily and any appointment given or ordered to be given in violation of the scheme would be illegal.

27. The word "vested' is defined in Black's Law Dictionary (6th Edition) at page 1563, as "vested', fixed; accrued; settled; absolute; complete. Having the character or given in the rights of absolute ownership; not contingent; not subject to be defeated by a condition precedent. Rights are "vested' when right to enjoyment, present or prospective, has become property of some particular person or persons as present interest; mere expectancy of future benefits, or contingent interest in property founded on anticipated continuance of existing laws, does not constitute vested rights.

28. In Webster's Comprehensive Dictionary (International Edition) at page

1397, "vested' is defined as Law held by a tenure subject to no contingency; complete; established by law as a permanent right; vested interest. (Vide: Bibi Sayeeda v State of Bihar AIR 1996 SC 516; and J.S. Yadav v State of Uttar Pradesh (2011) 6 SCC 570) Thus, vested right is a right independent of any contingency and it cannot be taken away without consent of the person concerned. Vested right can arise from contract, statute or by operation of law. Unless an accrued or vested right has been derived by a party, the policy decision/ scheme could be changed. (Vide: Kuldip Singh v Government, NCT Delhi AIR 2006 SC 2652)

29. Hon'ble Apex Court considered various aspects of service jurisprudence and came to the conclusion that as the appointment on compassionate ground may not be claimed as a matter of right nor an applicant becomes entitled automatically for appointment, rather it depends on various other circumstances i.e. eligibility and financial conditions of the family, etc., the application has to be considered in accordance with the scheme. In case the Scheme does not create any legal right, a candidate cannot claim that his case is to be considered as per the Scheme existing on the date the cause of action had arisen i.e. death of the incumbent on the post. In State Bank of India & Anr. (supra), this Court held that in such a situation, the case under the new Scheme has to be considered.

30. In view of the above position, the reasoning given by the learned Single Judge is not sustainable in the eyes of law. The Special Appeal is allowed and the impugned judgment passed by learned Single Judge of this Court is set aside. Consequently, the writ petition filed by the petitioner-respondent shall stand dismissed.

31. The respondent-petitioner may apply for consideration of her case under the new Scheme and the appellants shall consider her case strictly in accordance with Clause 13 of the said new Scheme within a period of three months from the date of receiving of application.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.02.2016

BEFORE
THE HON'BLE ANIL KUMAR, J.

Misc. Single No. 2173 of 2016

Arun Kumar Singh @ Pappu Singh & Ors. Petitioners

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Rajesh Bahadur Singh Rath

Counsel for the Respondents:
Govt. Advocate

Constitution of India, Art.-227-petition against direction by Magistrate to register and investigate the case-whether can prospective accused be allowed to challenge such order? held-'No'-in view of Full Bench decision of Shushma Thomus case-only remedy to file writ petition under Art. 226.

Held: Para-13

In the instant matter on the application moved by opposite party no.3 under Section 156(3) Cr.P.C. order has been passed by Additional Chief Judicial Magistrate, Kunda, Pratapgarh for registering and investigating the case against the petitioners so they are prospective accused have no right to say that Magistrate does not have any power to direct the police authorities to lodge F.I.R. for cognizable offence. Further if the F.I.R. is registered in compliance of the order passed under Section 156(3) Cr.P.C. against

the petitioners, the proper remedy available to them to invoke the jurisdiction under Article 226 of the Constitution of India for quashing of the F.I.R. as well as for staying the arrest. In view of the said facts at this stage, petitioners cannot derive any benefit from the law as cited on their behalf as laid down in cases of Shambu Das @ Bijoy Das (Supra) as well as Priyanka Srivastava (Supra) in order to challenge the order dated 23.1.2016, thus I do not find any illegality or infirmity in the order dated 23.1.2016 passed by Additional Chief Judicial Magistrate, Kunda, Pratapgarh.

Case Law discussed:
2010 (71) ACC 367; 2015 Supreme Court Cases 287; 2008 (2) ACR 1950; 2011 (72) ACC 564.

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

1. Heard Sri R.B.S. Rathaur, learned counsel for the petitioners, Sri Anurag Verma, learned Additional Government Advocate for opposite parties no. 1 and 2 and perused the record.

2. Facts, in brief, of the present case are that on 9.12.2015 an election for the post of Gram Pradhan in Gram Panchayat Rai Askaranpur, Block Babaganj, District Pratahpgarh was held in which 'Bhabhi' of petitioner no.1, namely, Smt. Pushpa Singh contested for the said post . In the said matter certain controversy has taken place so opposite party no.3 moved an application under Section 156(3) Cr.P.C. in the Court of Additional Chief Judicial Magistrate, Kunda, Pratapgarh, registered as Criminal Case no.6 of 2016 (Ajai Pratap Singh Vs. Pappu and others), allowed by order dated 23.1.2016 under challenge in the present writ petition.

3. Sri Anuraj Verma , learned Additional Government Advocate appearing on behalf of opposite parties no.1 and 2 raised a preliminary objection that as in the present case by an order dated 23.1.2016 Additional Chief Magistrate Kunda Pratapgarh on the application under Section 156(3) Cr.P.C. has directed the police authorities to register and investigate the case, so keeping in view of the law laid down by this Court in the case of Gurbachan Singh and others Vs. State of U.P. and others, 2008(2) ACR 1950 petitioners being prospective accused have no right to challenge the said order as such the present writ petition liable to be dismissed.

4. Sri R.B.S Rathaur, learned counsel for the petitioners, while rebutting the said contention, submits that against the order dated 23.1.2016 passed under Section 156(3) Cr.P.C. it is not open for petitioners to raised their grievance by filing revision hence the writ petition is maintainable.

5. In support of his contention, he placed reliance on a Full Bench decision of this Court in the case of Father Thomas Vs. State of U.P. and others, 2011 (72) ACC 564 the relevant paragraph is quoted as under:-

"65.A. The order of the Magistrate made in exercise of powers under Section 156(3) Cr.P.C directing the police to register and investigate is not open to revision at the instance of a person against whom neither cognizance has been taken nor any process issued.

B. An order made under Section 156(3) Cr.P.C is an interlocutory order and remedy of revision against such order is barred under sub-section (2) of Section 397 of the Code of Criminal Procedure, 1973.

C. The view expressed by a Division Bench of this Court in the case of Ajay Malviya Vs. State of U.P and others reported in 2000(41) ACC 435 that as an order made under Section 156(3) of the Code of Criminal Procedure is amenable to revision, and no writ petition for quashing an F.I.R registered on the basis of the order will be maintainable, is not correct."

6. Next arguments raised by learned counsel for the petitioners are that from the bare perusal of the material on record, the position which emerge out is that no allegation has been made out against the petitioners, so there is no justification or reason to pass an order dated 23.1.2016 directing the police authorities to register and investigate the case against the petitioners on an application moved under Section 156(3) Cr.P.C. and also placed reliance on the decision given by Hon'ble teh Apex Court in the case of Shambu Das @ Bijoy Das and another Vs. State of Assam, 2010(71) ACC 367 in which it has been held as under:-

" Section 157 of the Code says that if, from the information received or otherwise an officer incharge of a police station has reason to suspect the commission of an offence which he is empowered to investigate, he shall forthwith send a report of the same to the Magistrate concerned and proceed in person to the spot to investigate the facts and circumstances of the case, if he does not send a report to the Magistrate, that does not mean that his proceedings to the spot, is not for investigation. In order to bring such proceedings within the ambit of investigation, it is not necessary that a formal registration of the case should have been made before proceeding to the spot. It is enough that he has some information to afford him reason even to suspect the commission of a cognizable offence. Any step taken by him pursuant to such information, towards detention etc., of the said offence, would be part of investigation under the Code.

The principles now well settled is that when information regarding a cognizable offence is furnished to the police that information will be regarded as the FIR and all enquiries held by the police subsequent thereto would be treated as investigation, even though the formal registration of the FIR takes place only later."

7. Last arguments raised by learned counsel for the petitioners are that in view of the law laid by Hon'ble the Apex Court in the case of Priyanka Srivastava and another Vs. State of U.P. And others, (2015 6 Supreme Court Cases 287 an application under Section 156(3) Cr.P.C. seeking directions for registering the First Information Report should be accompanied by an affidavit. The said position does not exits in the present case so the order dated 23.1.2016 passed by Additional Chief Judicial Magistrate Kunda, Pratapgarh, liable to be set aside.

8. After hearing learned counsel for the parties and going through the record, the first and foremost question which to be considered is that if an application has been moved under Section 156(3) Cr.P.C. and the order has been passed for registering the case and investigate the matter in that circumstances petitioners, who are prospective accused have any right to challenge the same.

9. Answer to the said question find place in the case of Gurbachan Singh and others(Supra) wherein it has been held as under :-

"If information regarding the cognizable offence is not registered by the concerned police, the application should have been made regarding the alleged incident to the Superintendent of Police or higher authorities of the police according to the provision of Section 154(3) Cr.P.C. and even then the case is not registered, in such circumstances remedy is also available under Section 156(3) Cr.P.C. wherein the Magistrate concerned may pass orders upon the said application for registering and investigating the case regarding the cognizable offence. The same view has been reiterated in Sakiri Vasu Vs. State of U.P. (Crl. Appeal No.1685 of 2007) decided on 7.12.2007 by Hon'ble Markandey Katju, J. In the present case, it has been alleged in the said application that deceased was subjected to cruelty due to non-fulfillment of dowry of Rs.50,000/- and she died at the house of the petitioners. The post mortem was conducted and viscera was preserved therefore, there is no dispute that she died within seven years of her marriage. Unless the until the viscera report is received in negative, the presumption would be that it is a case of unnatural death within seven years of the marriage. The information was also given regarding her death by her 'Devar' but the same was not registered. Then a complaint was also made to the concerned Superintendent of Police. Thereafter, the application 156(3) Cr.P.C. was moved by the opposite party. Therefore, the concerned Magistrate has not committed any illegality in passing the impugned order and the same has been passed according to law.

It is worthwhile to mention here that the application moved under Section 156(3) Cr.P.C. has been allowed and the order for registering and investigating the case has been passed against the petitioners. In such circumstances, the prospective accused, who are petitioners, do not have any right to say that the Magistrate does not have any power to direct the police to lodge the F.I.R. for cognizable offence as has been held in the case of Ram Kishore Purohit vs. State of U.P. and Ors. Reported in 2007(2) JIC-194(Allahabad H.C.). and in the case of Rakesh Kumar and Ors. vs. State of U.P. and Ors. reported in 2007(2) 191 (Alld.), The same view has also been taken by me in my judgment dated Sept.10, 2007 passed in Criminal Revision No. 2549 of 2007 Smt. Gulistan and others vs. State of U.P. and others.

10. So far as the arguments advanced by learned counsel for the petitioners that the present writ petition has been filed because of the fact that in view of the Full Bench decision rendered by this Court in the case of Father Thomos (supra), in the said matter it has been held that revision against the order passed on the application under Section 156(3) Cr.P.C. is not maintainable as the order is interlocutory in nature which is barred under Section 397 (2) Cr.P.C., even the application under Section 482 Cr.P.C. against the order passed on the application under Section 156(3) Cr.P.C. is not maintainable, so no alternative, equally efficacious remedy is available to them except to invoke the jurisdiction of this Court under Article 227 of the Constitution of India, has got no force because the stage of the disposal of application under Section 156(3) Cr.P.C. is a pre-cognizance stage.

11. And by directing the police to register and investigate, the Magistrate

does not take cognizance of the offence. He simply sets the machinery into motion so that the police may perform his duty, in case, the police has refused to register First Information Report on the written application of the complainant. It has also been held in several decisions that a prospective accused has no right to be heard before the any court unless the court takes cognizance. The prospective accused at the most can watch the proceeding going on against him but he can not have a right to either oppose or say anything unless the court takes cognizance and issue process against the accused person. Since by the impugned order, the Additional Chief Judicial Magistrate, Kunda Pratapgarh has only directed the police to register and investigate, the petitioners being prospective accused have no locus standi to challenge the said order passed on the application of the opposite party no.3.

12. Further, a perusal of the Full Bench decision of this Court in the case of Father Thomas (supra) reveals that three questions for consideration were framed. The question no.2 was framed as to whether whether an order made under Section 156(3) Cr.P.C. is an interlocutory order and remedy of revision against such order is barred under Sub-Section (2) of Section 397 of the Code of Criminal Procedure. This question was answered by the Full Bench in negative and it was held that the order under Section 156(3) Cr.P.C. is not amenable to challenge in a criminal revision or an application under Section 482 Cr.P.C. The Full bench has also gone to observe that the initial order for registration is not opened to challenge in a writ petition and it is beyond controversy that the Province of investigation by the police and the judiciary are not overlapping but complimentary. Since in view of the Full Bench decision the remedy of filing a revision or invoking the inherent jurisdiction of this Court under Section 482 Cr.P.C. is completely barred, I am of the view that writ jurisdiction also can not be invoked in such matters where the matter is still in the pre-cognizance stage and the prospective accused has no right to be heard unless the court takes cognizance or issues process against the accused person.

13. In the instant matter on the application moved by opposite party no.3 under Section 156(3) Cr.P.C. order has been passed by Additional Chief Judicial Magistrate, Kunda, Pratapgarh for registering and investigating the case against the petitioners so they are prospective accused have no right to say that Magistrate does not have any power to direct the police authorities to lodge F.I.R. for cognizable offence. Further if the F.I.R. is registered in compliance of the order passed under Section 156(3) Cr.P.C. against the petitioners, the proper remedy available to them to invoke the jurisdiction under Article 226 of the Constitution of India for quashing of the F.I.R. as well as for staying the arrest. In view of the said facts at this stage, petitioners cannot derive any benefit from the law as cited on their behalf as laid down in cases of Shambu Das @ Bijoy Das (Supra) as well as Priyanka Srivastava (Supra) in order to challenge the order dated 23.1.2016, thus I do not find any illegality or infirmity in the order dated 23.1.2016 passed by Additional Chief Judicial Magistrate, Kunda, Pratapgarh.

14. For the forgoing reason, the writ petition lacks merit and is dismissed.

ORIGINAL JURISDICTION
TAXATION SIDE
DATED: LUCKNOW 03.02.2016

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE ATTAU RAHMAN MASOODI, J.

Misc. Bench No. 2238 of 2016

Uttar Pradesh Bhumi Sudhar Nigam Lko.
...Petitioner
Versus
Principal Commissioner of Income Tax & Ors. Respondents

Counsel for the Petitioner:
Pradeep Agarwal

Counsel for the Respondents:
Manish Misra

Income Tax Act 1961-Section 220(6)- Pendency of Appeal-against assessment order assessee to approach before assessment officer-to get interim protection.

Held: Para-12
In the circumstances of the case, we leave it open to the petitioner to approach the assessing officer under Section 220 (6) of the Act within a period of two weeks from today and in case any application is filed by the petitioner before the assessing officer, he shall pass necessary order after affording an opportunity to the petitioner within three months from the date of filing of any such application. Until decision on the application, filed if any, or until decision of the appeal itself within a period of three month, the recovery proceedings in relation to the assessment year 2012-2013 for the disputed amount shall remain in abeyance and the same shall abide by to the outcome of the appeal.

Case Law discussed:
[1994] 208 ITR 461 (All); (2010) 321 ITR 491 (All.); (1969) 71 ITR 815; (1985) 154 ITR 172; AIR 1956 All. 130; AIR 1957 Andhra Pradesh 114; AIR 1957 Andhra Pradesh 671.

(Delivered by Hon'ble A. R. Masoodi, J.)

1. Heard Sri Pradeep Agarwal, learned counsel for the petitioner and Sri Manish Misra, learned counsel who has accepted notice on behalf of the respondents.

2. By means of this writ petition, the petitioner has assailed the recovery notice issued by the assessing officer on 3.11.2015 in respect of the amount due for the assessment year 2012-13.

3. The contention of the learned counsel for the petitioner is that the petitioner has already filed an appeal against the assessment order passed by the assessing authority in relation to the assessment year 2012-13 and has also filed an application for the grant of interim stay against the assessment order. The appeal as well as interim stay application are pending before the C.I.T. (Appeals) i.e. respondent no. 2.

4. Referring to Section 220 (6) of the Income Tax Act, 1961, it is argued that since the assessee has preferred an appeal against the assessment order, it is not open to the authorities to proceed with the recovery pursuant to the assessment order once the appeal is pending. This argument has been raised on the strength of Section 220 (6) of the Income Tax Act and the same is extracted below:

"220 (6) Where an assessee has presented an appeal under section 246, the Assessing] Officer may, in his discretion, and subject to such conditions as he may think fit to impose in the circumstances of the case, treat the assessee as not being in default in respect of the amount in dispute in the appeal,

even though the time for payment has expired, as long as such appeal remains undisposed of."

5. The aforesaid provision clearly refers to the appeal filed under Section 246 or 246-A of the Act and to this extent there is no dispute with regard to the pendency of appeal being filed by the petitioner alongwith an application for interim stay. However, the difficulty has arisen due to the fact that the appellate authority not being empowered with the jurisdiction of granting interim stay under the appellate jurisdiction, can it be said that such a jurisdiction is either ancillary or incidental to the appellate power under Section 246 or 246-A particularly when Section 220(6) of the Act regulates the situation in a different manner.

6. The assessing officer, it is provided under the Statute, while the appeal remains undisposed of, may impose the conditions as he thinks fit in the circumstances of the case so as to treat the assessee as not being in default in respect of the amount in dispute. The plain reading of Section 220(6) of the Act rather imposes a restriction on the appellate authority not to entertain any interim stay application leaving the matter open to be dealt with by the assessing authority during the course of pendency of appeal, inter alia, by establishing his due co-operation in the pending appeal or pointing out the failure on the part of the appellate authority to decide the appeal despite his cooperation.

7. The intention of the statute is very clear to the extent that an assessee during pendency of an appeal has primarily to satisfy the assessing officer under Section 220(6) at the first instance for seeking deferment as regards the execution of an assessment order. In the present case, the petitioner admittedly has filed an appeal alongwith an application for interim stay but the fact remains that the petitioner has not approached the assessing officer under Section 220 (6) for the exercise of his discretion to defer the recovery proceedings.

8. Learned counsel for the petitioner while arguing the matter, has referred to the judgements rendered in the case of Prem Prakash Tripathi v. Commissioner of Income-tax and others, [1994] 208 ITR 461 (All) and the judgement reported in (2010) 321 ITR 491 (All.): Smita Agarwal (Individual) v. Commissioner of Income Tax and others, and it is urged, that in terms of the law settled by this Court, the proposition that during pendency of an appeal, recovery proceedings have to be stayed during pendency of appeal or at least till the disposal of interim stay application, is inevitable.

9. From a perusal of the aforesaid decisions, it is seen that the High Court has read the authority of dealing with the interim stay applications by the first appellate authority under Section 246 or 246-A, keeping in view the law laid down by the apex court in the case of ITO V. M. K. Mohammed Kunhi (1969) 71 ITR 815, wherein the following observation has been made:

"But the Appellate Tribunal must be held to have the power to grant stay as incidental or ancillary to its appellate jurisdiction."

10. The apex court in the decision mentioned supra while dealing with the

provision of Section 255 (5) of the Act, opined that once the tribunal had an authority to regulate its procedure to deal with the appeals, in that situation the power to grant stay can be read as incidental or ancillary to its appellate jurisdiction. The situation in the present case is different inasmuch as during pendency of an appeal under Section 246 or 246-A, the power of interim stay instead of being conferred upon the appellate authority is rather, vested with the assessing officer by virtue of Section 220 (6). The power conferred on the assessing officer in view of the aforesaid provision by its very nature, is discretionary but at the same time it is to be read so long as an appeal remains pending or undisposed of by the appellate authority under Section 246 or 246-A of the Act. The assessee, in such a situation, is left with no other remedy except to approach the assessing officer for the exercise of his discretioni conferred under Section 220 (6). The intention of restricting the power of appellate authority to grant interim stay may have a purpose of dealing with such appeals by the appellate authority expeditiously which in the event of grant of interim stay would prolong the proceedings due to non-cooperation of the assessee like in the present case where appeal is pending since last about a year.

11. It is not the case of the petitioner that he has filed any application under Section 220 (6) of the Act for seeking an order of interim stay within the scope of said provision but what is argued is that the assessee once having exercised the right of appeal, is entitled to a protection of not being treated to be an assessee in default as a natural consequence of the mere filing of an appeal. In our considered opinion, this proposition in the context of the case laws referred to above is not the correct proposition of law and is contrary to the legislative intention. The scheme of the Act provides a specific remedy under Section 220 (6) and the same having not been invoked by the petitioner in the present case, does not entitle him to the protection as has been prayed for on the ground of mere pendency of the appeal or till the disposal of interim stay application. From the perusal of impugned notice dated 3.11.2015, we do find that the assessing authority has not considered the aspect of the pendency of appeal nor the grievance raised by the petitioner to this effect has been considered in accordance with law but at the same time it is found that the petitioner has not brought any material whatsoever to the knowledge of the assessing authority. Although the petitioner has also made a reference to some circulars issued by CBDT but the same are not filed before the Court nor before the assessing authority, therefore, the Court has no choice except to interpret the intention of legislation from its plain reading. In civil disputes Order XLI Rule 5 and 6 Code of Civil Procedure, 1908 specifically confer jurisdiction on the appellate court or the court passing the decree for stay of orders/decree appealed against or for imposing conditions to secure the ends of justice. The benefit of Section 144 CP.C. is also available to a litigant in all judicial proceedings, therefore, the exclusion of power of interim stay at the first appellate stage under Income Tax Act, 1961 has to be read in the manner provided for in Section 220 (6) of the Act but not otherwise. The provisions of Section 144 C.P.C. may not be applicable to the proceedings under the Income Tax Act, 1961 but the principles do apply. It is true that an appeal is the continuity of proceedings but the legislative

intention of securing the interest of revenue by imposing just conditions at the first appellate stage, can also not be held to be arbitrary and reading a principle contrary to the intention of Section 220 (6) amounts to adding something in the appellate jurisdiction which the law neither expressly nor by implication does provide. The apex court judgement placed reliance upon in the Division Bench judgements cited before us, does appear to have led to the incorporation of Rule 35-A in the Rules of 1963 but no such amendment was made in pursuance of the apex court judgement incorporating any such provision which may authorise the appellate authority at the stage of proceedings under Section 246 or 246-A to pass an interim stay order. The position of law becomes further doubtful when it is noticed that the writ petition in the case of Prem Prakash Tripathi (supra) was dismissed, as such a direction issued therein becomes binding merely between the parties and is not a judgement in rem. On the other hand, looking to the scheme of the Act and law laid down by the apex court in the case of Assistant Collector of Central Excise v. Dunlop India Ltd. (1985) 154 ITR 172 and the judgements reported in AIR 1956 All. 130: Goverdhan Lal Jagdish Kumar v. Commissioner of Income Tax and others; AIR 1957 Andhra Pradesh 114:Vetcha Sreeamamurthy v. Income Tax Officer and another and AIR 1957 Andhra Pradesh 671: Shrimathi Mokhamatla Mondamma and another v. Shrimathi Mokhamatla Venkatalakshmidevi, we are not in agreement with the proposition of law as has been canvassed by the learned counsel for the petitioner in the writ petition. It is, however, open to the CBDT to issue guidance to the assessing authority to deal with the matters, during pendency of the appeals filed under Section 246 and 246-A so that the recovery of revenue of direct taxes may not suffer a set back and the assessee is equally relieved of unnecessary torture.

12. In the circumstances of the case, we leave it open to the petitioner to approach the assessing officer under Section 220 (6) of the Act within a period of two weeks from today and in case any application is filed by the petitioner before the assessing officer, he shall pass necessary order after affording an opportunity to the petitioner within three months from the date of filing of any such application. Until decision on the application, filed if any, or until decision of the appeal itself within a period of three month, the recovery proceedings in relation to the assessment year 2012-2013 for the disputed amount shall remain in abeyance and the same shall abide by to the outcome of the appeal.

13. With the aforesaid observations, the writ petition is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.02.2016

BEFORE
THE HON'BLE RAJAN ROY, J.

Service Single No. 3426 of 2016

Mohd. Ishtiaq ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Alok Mishra

Counsel for the Respondents:
C.S.C., Amit Kr. Singh Bhaduriya

Indian Evidence Act-Section 107 and 108-presumption of Civil death father of

petitioner disappeared more than 7 years ago-Civil Suit for declaration of civil death-dismissed with finding in view of specific provision in Evidence Act-no declaration required-claim of compassionate appointment denied unless-declaration made by Court-authorities given all post retirel benefits-which itself denotes-acceptance of civil death-denial of compassionate appointment-not proper-direction for fresh consideration given.

Held: Para-9

A perusal of the said circular does not indicate any declaration is required under it from a Court. It only refers to the satisfaction of a competent authority which in this case appears to be the authority competent to provide compassionate appointment. In any case in view of the judgments cited herein above, the said circular can not come in the way if the conditions for applicability of Section 108 of the Indian Evidence Act are satisfied. Moreover, in the present case, it has been averred that the death-cum-retirement benefits consequent to the death of the father have been released in favour of the petitioner and other family members, therefore, this raises a presumption about the disappearance and civil death of the father having been accepted by the opposite parties themselves otherwise even this benefit would not have been extended.

Case Law discussed:

2005 (23) LCD 169; Special Appeal No. 767 of 2012

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

1. Heard learned counsel for the parties.

2. The father of the petitioner is said to have disappeared more than seven years ago, therefore, he claims compassionate appointment presuming his civil death in terms of Section 107 and 108 of the Indian Evidence Act.

3. The question as to whether in such cases declaration is required by the Civil Court or not was considered by the Division Bench of this Court in the case of Ramakant Singh Vs. State of U.P. and others reported in 2005 (23) LCD 169 wherein it was held that even if the suit had not been filed, a presumption could be drawn, if the conditions imperative for raising the presumption were satisfied. Once a presumption of civil death is raised on the satisfaction of the conditions given in Section 108 of the Indian Evidence Act, the burden of proof that he is alive, is then shifted to the person who affirms that the person reported missing was seen and is alive.

4. Similar view has been taken by another Division Bench of this Court in the case of District Judge Vs. Saurabh Kumar, (Special Appeal No. 767 of 2012).

5. In the present case, father of the petitioner is said to have disappeared while in service on 06.10.2007. An F.I.R. is said to have been lodged on 11.10.2007.

6. According to the petitioner, a final report was submitted in respect thereto before a Court of competent jurisdiction. However, learned counsel for the petitioner is unable to inform the Court as to whether the same has been accepted or not. The mother of the petitioner is said to have filed a Regular Suit bearing No. 128 of 2015 seeking declaration regarding the civil death of her husband which was dismissed on the ground that under Section 108 of the

Indian Evidence Act a presumption of civil death exists but the said provision does not require any declaration by the Court. A suit for declaration can only be filed under Section 34 of the Specific Relief Act. However, such declaration is to be accompanied by such further relief as may be necessary. As the Plaintiff did not seek any relief other than declaration, therefore, only for this reason the Suit was dismissed. The appeal against the said judgment was also dismissed.

7. Nevertheless the petitioner herein applied for compassionate appointment. The same has been rejected on the ground that unless the competent authority gives a declaration about the civil death of his father he can not be provided compassionate appointment.

8. Shri Amit Kumar Singh Bhadauriya, learned counsel for the opposite parties 2 and 3 relies upon a Circular of the Board dated 16.08.1996 which requires a declaration about the civil death by the competent authority.

9. A perusal of the said circular does not indicate any declaration is required under it from a Court. It only refers to the satisfaction of a competent authority which in this case appears to be the authority competent to provide compassionate appointment. In any case in view of the judgments cited herein above, the said circular can not come in the way if the conditions for applicability of Section 108 of the Indian Evidence Act are satisfied. Moreover, in the present case, it has been averred that the death-cum-retirement benefits consequent to the death of the father have been released in favour of the petitioner and other family members, therefore, this raises a presumption about the disappearance and civil death of the father having been accepted by the opposite parties themselves otherwise even this benefit would not have been extended.

10. In view of the aforesaid, the order impugned can not be sustained and the same is quashed. The competent authority which is empowered to provide compassionate appointment is directed to have a re-look at the matter in the light of the observations and the pronouncements referred herein above, after ascertaining the correct factual position as regards the acceptance or otherwise of the final report submitted as referred above, and take a decision regarding the entitlement of the petitioner to compassionate appointment within a period of two months from the date a certified copy of this order is submitted. Consequences shall follow as per law.

11. With the aforesaid observations, the writ petition is disposed of.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 05.02.2016

BEFORE
THE HON'BLE BACHCHOO LAL, J.

Bail No. 6864 of 2014

Badey Lal ...Applicant

Versus

State of U.P. ...Opp. Party

Counsel for the Applicant:
Vishnu Kumar Srivastava

Counsel for the Opp. Party:
Govt. Advocate

Cr.P.C.-Section 439-Third bail application offence under Section 498-A, 304 B IPC and ¾ DP Act-applicant is father-in-law-Hasiya

used in murder of deceased recovery on pointing out of applicant-21 prosecution witness examined who supported prosecution version-being head of family not given information about offence-no new ground in third bail application-held-not entitled for bail-rejected.

Held: Para-4

Per contra; learned A.G.A. has opposed the prayer for bail and argued that the applicant is father-in-law of the deceased who is head of the family. In postmortem report incised wounds have been found on the body of both the deceased. The Hasia used in the commission of the murder of the deceased was also recovered on the pointing out of the applicant. It has further been submitted that in this case, the statements of witnesses of the fact have been recorded in which they have supported the prosecution version. It has further been submitted that in this case, the statements of 13 witnesses have been recorded by the trial court. The person who were released on bail are mather-in-law and Jeth of the deceased. The applicant is head of the family and no information with regard to the death of the deceased has been given to the Police Station concerned. It has further been submitted that the second bail application of the applicant has been rejected on the merit. There is no new ground in this third bail application, therefore, the applicant is not entitled for bail.

(Delivered by Hon'ble Bachchoo Lal, J.)

1. This third bail application has been moved on behalf of the applicant Badey Lal who is involved in Case Crime No. 665 of 2011, under sections 498A, 304B, 302 IPC and 3/4 D.P. Act, P.S. Gilaula, District Shrawasti. The first bail application of the applicant was rejected on 12.11.2013 for non- prosecution and the second bail application of the applicant was rejected on merit on 9.4.2014 by another bench of this Court.

2. Heard learned counsel for the applicant, learned A.G.A. for the State and perused the record.

3. Learned counsel for the applicant submits that the applicant is father-in-law of the deceased. There is general allegation against the applicant. No specific role has been assigned to the applicant. It has further been submitted that the applicant has not committed the alleged offence. False allegation has been made against the applicant. It has further been submitted that co-accused Bitta Devi and Nan Babu mother-in-law and Jeth of the deceased have already been granted bail by another bench of this Court vide orders dated 27.2.2013 and 5.2.2013 respectively, therefore, the applicant is also entitled for bail. There is no criminal history against the applicant and is in jail since 12.6.2011.

4. Per contra; learned A.G.A. has opposed the prayer for bail and argued that the applicant is father-in-law of the deceased who is head of the family. In postmortem report incised wounds have been found on the body of both the deceased. The Hasia used in the commission of the murder of the deceased was also recovered on the pointing out of the applicant. It has further been submitted that in this case, the statements of witnesses of the fact have been recorded in which they have supported the prosecution version. It has further been submitted that in this case, the statements of 13 witnesses have been recorded by the trial court. The person who were released on bail are mather-in-law and Jeth of the deceased. The applicant is head of the family and no information with regard to the death of the deceased has been given to the Police Station concerned. It has further been submitted that the second bail application of the applicant has been rejected on the merit. There is no new ground in this

third bail application, therefore, the applicant is not entitled for bail.

5. Considering the facts and circumstances of the case and without expressing any opinion on the merits of the case, I am not inclined to release the applicant on bail.

6. Consequently, the prayer for bail of the applicant Badey Lal is hereby refused and the bail application is rejected.

7. However, the trial court is directed to proceed with the trial and conclude the same expeditiously preferably within a period of four months from the date of production of the certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.02.2016

BEFORE
THE HON'BLE RAJAN ROY, J.

Service Single No. 6978 of 2015

Connected with

Service Single No. 6979 of 2015, Service Single No. 7302 of 2015, Service Single No.7304 of 2015, Service Single No. 7326 of 2015, Service Single No. 7338 of 2015, Service Single No.7341 of 2015, Service Single No. 7344 of 2015, Service Single No. 7346 of 2015, Service Single No. 7347 of 2015, Service Single No. 6809 of 2015, Service Single No. 7424 of 2015, Service Single No. 7425 of 2015, Service Single No. 7434 of 2015, Service Single No.7435 of 2015, Service Single No. 7436 of 2015, Service Single No. 7445 of 2015, Service Single No. 7446 of 2015, Service Single No. 7474 of 2015 and Service Single No. 7558 of 2015

Shailendra Kumar ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sanjay Mishra

Counsel for the Respondents:
C.S.C., R.K.S. Suryavanshi

U.P. Intermediate Education Act 1921-Section 16 E (II)-payment of salary-short terms appointment-without creation of post under Section-9-or continuance of such teachers beyond academic session-appointment made by management-de-hors to rules-liability can not be fastened upon state exchequer-even on substantive vacancy after 2002-can be appointed under Section 16 of Act 1982 in view of regulation 21 of Act 1921.

Held: Para-15

In the case of an appointment against temporary vacancy in terms of Section 16-E(11) of the U.P. Intermediate Act, 1921 a teacher may be entitled for salary but only till the end of academic session and not beyond that, that too, only if the appointment is against a post sanctioned/created as per Section 9 of the U.P. High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act 1971 (hereinafter referred to as 'the Act 1971).

Case Law discussed:

(2004) 3 UPLBEC 2671; [2010 (28) LCD 1375]; 2015 (33) LCD 2402

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

1. Heard learned counsel for the parties.

2. All these writ petitions involve same issue relating to the entitlement of the Committee of Management to make appointment of teachers against substantive vacancies and the consequential entitlement of such teachers to salary from the State-Exchequer.

3. In all these writ petitions, the petitioners have been appointed by the Management Committee of the educational institution which are recognized and allegedly aided by the State. The claim of the petitioners herein is that in the absence of a regularly selected candidate the teaching in the institution could not be allowed to suffer, therefore, in these compelling circumstances the Managing Committee proceeded to make appointments on ad-hoc temporary basis against sanctioned post. They have placed reliance on the judgment of Rakesh Chandra Misra vs. State of U.P. and others reported in (2004) 3 UPLBEC 2671 as upheld in the case of Daya Shanker Mishra vs. District Inspector of Schools and others reported in [2010(28) LCD 1375] on the applicability of Section 16-E(11). They have claimed that the appointments are referable to the said provision and therefore, they are entitled to the payment of salary from the State-Exchequer.

4. The issue involved herein is no longer res-integra as the same has been considered and decided by a Division Bench of this Court on 17.12.2015 in the case of Abhishek Tripathi vs. State of U.P. through Secretary, Secondary Education, Lucknow and others wherein their Lordships have held as under:-

"We hence, find merit in the contention which has been urged on behalf of the State that the general considerations which weighed with the learned Single Judge in the decision in Sanjay Singh (supra) cannot form the foundation of a sustainable direction in law, that the State can be issued a writ of mandamus to pay salaries from the public exchequer in respect of an appointment made by the management against a substantive vacancy on an ad-hoc basis. The scope and ambit of the power of the management to fill up temporary vacancies is clearly defined by the provisions of Section 16-E (11) of the Act of 1921 and its regulations. The legislature in its wisdom has enacted the Act of 1982 so as to provide in Section 16 that notwithstanding anything contained in the Act of 1921, an appointment shall be made by the management only on the recommendation of the Board. The legislature further specified that any appointment made in contravention of the provisions of sub- section (1) of Section 16 would be void. During the period when the Removal of Difficulties Orders held the field, which contained a provision for making ad hoc appointments, the law was well settled both by the Supreme Court and by this Court that any appointment made in violation of the provisions contained in those orders would be void and that a direction for the payment of salary could not be sustained on the basis of such an appointment. After Section 18 was amended successively, a procedure was provided initially for making ad-hoc appointments but, as we have noticed, Section 18, in its present form is confined only to Principals and Headmasters. The only source of power then for making appointments of an ad-hoc nature is relatable to the provisions of Section 16-E (11) of the Act of 1921 read with regulations. Any appointment which is de-hors the provisions of the Act of 1921 and the regulations cannot be countenanced in law. A mandamus cannot be issued to the State for the payment of salary where the appointment by its very nature is in contravention of law and void.

There can be no dispute about the basic principle of interpretation which was sought to be emphasized by the petitioner that, in the course of interpreting a statute, it would be open to the Court to adopt an interpretation which, while being in accord with the terms of the statute, makes the statute workable. But equally in this process, it would not be

open to the Court to re-write statutory provisions or to mandate an act such as the payment of salary in respect of an appointment which is made otherwise than in accordance with the statutory provisions and the rules. Article 21-A of the Constitution upon which reliance has been placed by the learned Single Judge in Sanjay Singh's case (supra) mandates that the State shall provide free and compulsory education to all children between ages of six to fourteen in such manner as the State may, by law, determine. The law undoubtedly, has to be fair, just and reasonable.

This Court in repeated judgments has drawn the attention of the State to the need to streamline the procedures in a line of precedent from this Court culminating in the judgment of the Full Bench in Santosh Kumar Singh (supra). The observations of this Court shall be taken up by the State with a sense of the highest priority and with all seriousness to ensure that a situation does not emerge where vacancies of a substantive nature are left unfilled over a long period of time to the detriment of education. The State Government must take up the matter with necessary alacrity and immediacy.

For these reasons, we have come to the conclusion that the view of the learned Single Judge in Sanjay Singh's case (supra) cannot be upheld as laying down the correct position in law. The view of the learned Single Judge shall stand, accordingly, overruled. The judgment in Pradeep Kumar (supra) is upheld subject to the principles which, we have enunciated in this judgment.

The second issue which has been referred for decision before the Division Bench is the scope of Section 16-E (11) when read in the context of Sections 16, 22, 32 and 33-E of the Act of 1982. We have already dealt with the interpretation of these provisions in the course of the judgment.

The reference to the Division Bench shall stand answered in the aforesaid terms. The record of these proceedings shall now be remitted back to the learned Single Judge, according to roster, for disposal in the light of the questions answered".

5. In view of the above the Managing Committee of a College does not have any statutory authority to appoint a teacher against a substantive vacancy de-hors the provisions of Section 16 of the Act, 1982, consequently such appointee is not entitled to salary from the State-Exchequer.

6. As far as appointment under Section 16-E (11) of the Intermediate Act, 1921 is concerned, the law in this regard has already been explained and settled by the Full Bench decision in the case of Santosh Kumar (supra) as also in the aforesaid Division Bench decision in the case of Abhishek Tripathi (supra).

7. The relevant extracts of the Full Bench decision in Santosh Kumar are quoted herein below:-

19. Sub-section (11) of Section 16-E has thus made a specific provision in regard to appointments in the case of temporary vacancies caused by (i) the grant of leave to an incumbent for a period not exceeding six months; or (ii) by death, termination or otherwise of an incumbent occurring during an educational session. The object of the provision is to ensure that where a temporary vacancy arises as a result of fortuitous circumstances, such as leave, death, termination or otherwise, the educational needs of students should not be disturbed. The purpose of making an arrangement in the case

of a temporary vacancy is to protect the interest of education so that students are not left in the lurch by the absence of a teacher in the midst of an academic session. The proviso to sub-section (11), however, stipulates that an appointment which is made under the provisions of sub-section (11) shall, in no case, continue beyond the end of the educational session during which the appointment was made. The proviso is intended to ensure that the purpose of appointment against a temporary vacancy caused due to the absence of a teacher in the midst of an academic session is met by continuing the appointment during and until the end of the academic session but not further. This is a provision which has been made by the state legislature in its legislating wisdom. The statutory provision provides both for the circumstances in which a temporary vacancy can be filled up and the length of an appointment made against a temporary vacancy. The difficulty which arises is because the Board, which has been constituted under the Act, does not fulfill its mandate of promptly selecting teachers for regular appointment. The District Inspector of Schools is in possession of necessary factual data in regard to the dates of appointment and retirement of teachers of aided institutions. This can be summoned by the Board even if the management does not comply with its duty to intimate vacancies. There can be no justification for the Board not to discharge its duties with dispatch and expedition. This is liable to result in a situation where the educational needs of students are seriously disturbed due to the unavailability of duly selected teachers. Ad hoc appointments in temporary vacancies also cause a state of uncertainty for teachers and lay them open to grave exploitation at the hands of certain managements of educational institutions. Thus, considering the matter both from the perspective of the interest of education as well as the welfare of teachers, it is necessary that the Board must take due and proper steps well in advance of an anticipated vacancy to initiate the process of selection. Similarly, the State Government would do well to streamline the procedure for making appointments in respect of temporary vacancies consistent with the mandate of Section 16-E (11) so that, while the interest of students is protected, the teachers are not exposed to exploitation.

"20. We consequently answer the reference in the following terms:

(a) .....

(b) .....

(c) Under Section 16-E of the Intermediate Education Act, 1921, the Committee of Management is empowered to make an appointment against a temporary vacancy caused by the grant of leave to an incumbent for a period not exceeding six months or in the case of death, termination or otherwise, of an incumbent occurring during an educational session. An appointment made under sub-section (11) of Section 16-E as provided in the proviso thereto shall, in any case, not continue beyond the end of educational session during which the appointment was made; and

(d) The judgment of the Division Bench in Subhash Chandra Tripathi (supra) is affirmed as laying down a correct interpretation of the judgment in A A Calton (supra)."

8. In view of the above pronouncement, appointment against temporary vacancy in terms of Section 16-E (11) of the Uttar Pradesh Intermediate Education Act, 1921 (For short 'the Intermediate Act, 1921') can be made only till the end of academic session meaning thereby such appointments can be made in the academic session in which the vacancy

arises thereby creating a corresponding need for such appointment till the end of the academic session and not beyond that. Thus, appointment under Section 16-E (11) of the U.P. Intermediate Act, 1921 can not be made in a subsequent academic session.

9. Apart from an appointment against a temporary vacancy caused on account of leave of an incumbent for a period not exceeding six months, appointment in the case of a vacancy caused by 'death, termination or otherwise' of an incumbent during an educational session is also permissible under Section 16-E(11) of the Act 1921, with the rider that such appointments shall not in any case continue beyond another educational session during which such appointment was made.

10. Purport of the word 'or otherwise' has not been considered in any of the pronouncements referred to hereinabove and no such pronouncement has been placed before the Court by either of the parties wherein it may have been considered. As in the present case, most of the vacancies have arisen on account of retirement or promotion of the incumbent, which is not specifically mentioned in Section 16-E(11) of the Act, therefore, it is necessary to consider the purport and meaning of the words 'or otherwise' so as to determine the applicability of Rules 16-F (11) as has been pressed by the petitioners. Etymologically, the word 'otherwise' as per Black's Law Dictionary means "in a different manner; in another way; or in other ways". The word 'other' has been defined in the same dictionary to mean "different or distinct from that already mentioned; additional, or further, "following an enumeration of particular classes "other" must be read as "other such like" and includes only others of like kind and character." The use of words 'death or termination' is indicative of the fortuitous circumstances giving rise to the vacancy referred in the provision. In the pronouncements of this Court referred and quoted hereinabove it has already been said that the object of Section 16-E(11) is to ensure that where a temporary vacancy arises as a result of fortuitous circumstances, such as leave, death, termination or otherwise, the educational needs of students should not be disturbed, therefore, the aforesaid provision caters to the need created by fortuitous circumstances. The word 'Fortuitous' is defined in Black's Law Dictionary to mean "happening by chance or accident. Occurring unexpectedly, or without known cause, Accidental; undesigned; adventitious. Resulting from unavoidable physical causes". Vacancies on account of Death and Termination cannot be anticipated. They are based on fortuitous circumstances.

11. The rule of Ejusdem generis is that words of a general nature following specific and particular words should be construed as limited to things which are of the same nature as those specified. This rule is not to be applied where the context manifests a contrary intention.

12. In the present case the context is the provision contained in Section 16-E(11) of the Act providing for filling up of temporary vacancies and those of a fortuitous nature other than the vacancies which are to be filled up substantively under other provisions. Death and termination also creates a substantive vacancy but they are distinct from other substantive vacancies as they are fortuitous. They cannot be anticipated or known before hand nor pre-determined, therefore, they have been included under sub section 11 for being filled up temporarily in keeping with the object of the said provision.

13. Applying the principle of Ejusdem generis the general word "otherwise" is to be understood by giving a restricted meaning limited to matters of the same class, category or genus as the specific words preceding it. The principle underlying this approach to statutory is that the subsequent general words were only intended to guard against some accidental omission in the objects of the kind mentioned earlier and were not intended to extend to objects of a wholly different kind. The specific words preceding the general word "or otherwise" i.e. death and termination can be placed under a common category indicative of vacancies arising out of fortuitous circumstances, therefore, the general word "otherwise" following the specific words death and termination has to be read and understood as indicative of other vacancies which may also arise fortuitously such as resignation etc. If the word "otherwise" is given a wide meaning so as to include all other kinds of vacancies it will render the very provision of section 16-E (11) nugatory being contrary to its very object and the spirit underlying it. If this was the intention then there was no necessity of using the words death or termination, therefore, it has to be understood as referring to other vacancies of similar nature i.e. fortuitous vacancies. This is in consonance with the object of the provision as explained by Full Bench of this Court in the case of Santosh Kumar (Supra).

14. A vacancy created by retirement is a substantive vacancy which is not fortuitous in nature. It can be anticipated and in fact is pre-determinable, therefore, against such vacancies appointments can not be made under Section 16-E(11) of the Act but can only be made under Section 16 of the Act, 1982, afortori because of Regulations of 21 of the Regulations made under U.P. Intermediate Act 1921 under which a teacher who attains the age of superannuation in the midst of an academic session is entitled to continue till the end of the session. Likewise a vacancy created by promotion can also not be said to be purely fortuitous, as, it can, in a given situation, very well be anticipated. Moreover it does not create absence of a teacher in the institution which is also one of the consequences of a vacancy arising out of death or termination. On promotion the teacher is very much available in the institution and he can also teach the lower classes if the need arises, therefore, the said vacancy is not covered by the aforesaid provision of Section 16-E(11). The provision does not evince any contrary intention so as to allow substantive vacancies, which are not of a fortuitous nature, to be filled under the said provision.

15. In the case of an appointment against temporary vacancy in terms of Section 16-E(11) of the U.P. Intermediate Act, 1921 a teacher may be entitled for salary but only till the end of academic session and not beyond that, that too, only if the appointment is against a post sanctioned/created as per Section 9 of the U.P. High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act 1971 (hereinafter referred to as 'the Act 1971).

16. As per the dictum of the Full Bench decision of this Court in the Special Appeal defective No. 673 of 2014 (State of U.P. vs. Committee of Management, Sri Sukhpal Intermediate College) no direction for payment of salary to a teacher of an Educational Institution governed by the Payment of Salary Act, 1971 can be issued by this Court unless he has been appointed against a post sanctioned/created with compliance of Section 9 thereof. The

relevant extracts of the aforesaid Full Bench decision are quoted herein below:-

"In our view, the field of dispute in the present case, is governed by the judgment of the Full Bench in Gopal Dubey (supra). The judgment in Gopal Dubey clearly holds that the Act of 1971 operates in a field which is distinct from the Act of 1921. The mere fact that recognition has been granted to an institution or, for that matter, for conducting a new course or subject or for an additional section, would not give rise to a presumption of a financial sanction having been granted to the creation of a post. A financial liability cannot be foisted on the State to reimburse the salary payable to the employee or the teacher on the basis of such a presumption. For the purpose of creating a new post of a teacher or other employee, the management has to obtain the prior approval of the Director as required under Section 9 of the Act 1971. Without the prior approval of the Director, a new post cannot be sanctioned or created. Section 9 is mandatory. This principle in Gopal Dubey's case follows specifically the judgment of the Supreme Court in Gajadhar Prasad Verma's case which was rendered while interpreting the provisions of Section 9 of the Act of 1971. The High Court cannot issue a direction contrary to the mandate of Section 9. Orders under Article 226 must conform to law and cannot be contrary to the mandate of law. No mandamus can issue - interim or final - for the payment of salary by the state in the absence of the prior approval of the Director.

For these reasons, we answer the questions which have been framed for reference to the Full Bench in the following terms:

In the absence of a sanctioned post, a direction cannot be issued to the state in the exercise of powers under Article 226 of the Constitution for the payment of salary. The position in law, with which we respectfully concur, is as laid down in the judgment of the Full Bench in Gopal Dubey's case. The judgment in Om Prakash Verma is consistent with the law laid down in Gopal Dubey's case. In the absence of a sanctioned post, the High Court under Article 226 of the Constitution would not be justified in issuing a mandamus for the payment of salary, particularly since a mandamus cannot lie in the absence of a legal right, based on the existence of a statutory duty."

17. When considered against the aforesaid legal backdrop the factual position which emerges in these bunch of petitions and the alleged entitlement of petitioners to salary from the State Exchequers is as under:-

18. As far as the Writ Petition No. 7474(SS) of 2015 is concerned, the appointment having been made by the Managing Committee de-hors the statutory provisions and Rules made thereunder no direction for Payment of salary can be issued. Moreover from a bare reading of the averments made in the writ petition it is evident that though the matter pertaining to creation of post in the institution in question was referred by the Director to the State Government but no post was created and the appointment of the petitioner(s) was not against any sanctioned post, therefore, in view of another Full Bench decision of this Court dated 12.05.2015 rendered in Special Appeal Defective No. 673 of 2014, State of U.P. through Secretary, Secondary Education and Ors. Vs. Committee of Management, Sri Sukhpal Intermediate College, Tirhut, Sultanpur and Ors., for this reasons also no such direction for payment of salary can be issued as has been prayed for, in absence of the appointment against a sanctioned post.

19. In Writ Petition No. 7436(SS) of 2015 the vacancy on account of leave allegedly arose on 30.06.2012, however, the advertisement for filling up the same was issued on 26.09.2014 by the Committee of Management. Clearly the appointment has not been made as per the relevant statutory provisions referred above. As far as, application of Section 16-E(11) of the U.P. Intermediate Act 1921 is concerned, the vacancy having arisen on 30.06.2012 appointment against the same could not have been made towards the end of 2014 for the reasons already mentioned herein above as also indicated in the Full Bench decision in Santosh Kumar Vs. State of U.P. and others reported in 2015 (33) LCD 2402, therefore, the said appointment is also de-hors the statutory provisions and the rules made thereunder including Section 16-E(11), consequently, no direction for payment of salary from the State Exchequer can be issued.

20. As far as the Writ Petition No. 7425(SS) of 2015 is concerned, the appointment has not been made by the Board in terms of statutory provisions nor is it against a sanctioned post as has been categorically mentioned in the order dated 17.12.2012 which is impugned in this writ petition, therefore, no direction for the payment of salary can be issued.

21. In Writ Petition No. 6978(SS) of 2015 the vacancies are said to have arisen in the year in 2011, 2013 and lastly on 30.06.2014 on account of retirement against one of which the sole petitioner is said to have been appointed on 22.06.2015, in pursuance to which he submitted his joining on 01.07.2015 i.e. in the next academic session, therefore, clearly the appointment can not be sustained under the Statutory Provisions and rules made thereunder including Section 16-E (11) of the U.P. Intermediate Act 1921, as, even under the latter provision such appointment could not be made against a substantive vacancy arising on account of retirement. Even if it could the appointment should have been given effect during the academic session in which the vacancy arose whereas the petitioner admittedly joined on 01.07.2015 i.e. after the end of academic session on 30.06.2015 as per the earlier definition of the academic session, consequently, no direction for payment of salary from the State Exchequer can be issued.

22. In Writ petition No. 6979(SS) of 2015 a substantive vacancy is said to have arisen on 01.07.2013 on account of retirement of the incumbent against which the Managing Committee is said to have made the appointment as a short term measure on 27.08.2015. Clearly the appointment is de-hors the Statutory Provisions and Rules made thereunder, including Section 16-E (11) of the Intermediate Act, 1921, therefore, no direction for payment of salary from the State Exchequer can be issued.

23. In Writ Petition No. 7302(SS) of 2015 a substantive vacancy is said to have arisen in June, 2015 on account of retirement. The appointment has been made by the Committee of Management on 28.10.2015, in pursuance to which the petitioner is said to have joined on 02.11.2015. Clearly the appointment is de-hors the Statutory Provisions and Rules made thereunder, including Section 16-E (11) of the Intermediate Act, 1921, therefore, no direction for payment of salary from the State Exchequer can be issued.

24. In Writ Petition No. 7304(SS) of 2015 a substantive vacancy is said to have arisen in June, 2013 on account of

retirement of the incumbent against which the Managing Committee is said to have made the appointment on 15.02.2015, therefore, clearly the appointment is de-hors the statutory provisions and rules made thereunder including Section 16-E (11) of the U.P. Intermediate Act 1921, consequently, no direction for payment of salary from the State Exchequer can be issued.

25. In Writ Petition No. 7326(SS) of 2015 a substantive vacancy arose on 30.06.2012 on account of retirement of the incumbent which was allegedly filled up in 2014, therefore, such appointment assuming for a moment it was made under Section 16-E (11) of the Intermediate Act 1921, was also de-hors the said provisions as per the law laid down by the Full Bench in Santosh Kumar Singh's (supra), consequently, no direction for payment of salary can be issued.

26. In Writ Petition No. 7338(SS) of 2015, a substantive vacancy arose on 30.06.2007 on account of retirement against which the Committee of Management made the alleged appointment in the year 2015, therefore, clearly such appointment could not have been made under Section 16-E (11) of the Intermediate Act, 1921, consequently, no direction for payment of salary can be issued.

27. In Writ Petition No. 7341(SS) of 2015 a substantive vacancy occurred due to retirement of the incumbent on 30.06.2012 against which the Managing Committee allegedly made appointment in the year 2014, therefore, clearly the appointment was de-hors the Statutory Provisions, including Section 16-E (11) of the Intermediate Act 1921, consequently, no direction for payment of salary from the State Exchequer can be issued in this case also. .

28. In Writ Petition No. 7344(SS) of 2015 a substantive vacancy is said to have occurred due to retirement of the incumbent on 30.06.2010 against which the Committee of Management made the appointment in the year 2015, therefore, clearly such appointment was also de-hors the Statutory Provisions including Section 16-E (11) of the U.P. Intermediate Act 1921, therefore, no direction for payment of salary from the State Exchequer can be issued in this case also.

29. In Writ Petition No. 7346(SS) of 2015 a substantive vacancy arose on 02.12.2013 due to promotion of the incumbent against which the Committee of Management made the appointment allegedly on 25.06.2014 i.e. barely five days prior to the end of the academic session and in pursuance of such appointment the petitioner, as stated in paragraph 13 of the writ petition, joined on 02.07.2014 that is after the commencement of the next academic session. As, such appointment, assuming it was under Section 16-E (11) of the U.P. Intermediate Act 1921, can not spill over to the next academic session and the petitioner did not work during the academic session which came to an end on 03.06.2014, therefore, no direction for payment of salary can be issued in this case also.

30. In Writ Petition No. 7347(SS) of 2015 a vacancy is alleged to have arisen on 01.07.2014 on account of retirement on 30.06.2014 and the Managing Committee is said to have held the selection and appointed the petitioner on 28.07.2014 in pursuance to which he is said to have joined on 02.08.2014. Clearly the appointment is de-hors the Statutory Provisions and Rules made thereunder, including Section 16-E (11) of the Intermediate Act, 1921, therefore, no

direction for payment of salary from the State Exchequer can be issued.

31. In Writ Petition No. 6809(SS) of 2015 there are two petitioners and it has been alleged that three posts fell substantively vacant due to retirement of the incumbents on 30.06.2011, 30.06.2013 and 30.06.2014. Against the aforesaid, posts were advertised on 05.06.2016 i.e. barely 25 days prior to the end of the academic session and the appointment letters are said to have been issued on 22.06.2015. Apart from the fact that a substantive vacancy consequent to retirement could not be filled under Section 16-E(11), the petitioners as per their own admission in paragraph 9 of the writ petition joined on 01.07.2015 i.e. in the next academic session, therefore, clearly their case is not covered by Section 16-E (11) of the U.P. Intermediate Act 1921, as under the said provisions appointments and joining should have taken place in the same academic session and could continue only till the end of such academic session in which the vacancy had arisen, consequently, no direction for payment of salary can be issued in this case also.

32. In Writ Petition No. 7424(SS) of 2015 a substantive vacancy is said to have arisen on 10.02.2015 on account of promotion which was advertised on 17.03.2015 against which the Managing Committee made the appointment on 10.04.2015 in pursuance to which the petitioner is said to have joined on 18.04.2015. For the reasons already mentioned in the earlier part of the judgment a vacancy arising out of retirement cannot be filled under Section 16-W(11) of the Act, therefore, the appointment of the petitioner is not in accordance with statutory provisions and the Rules made thereunder including under Section 16-E(11) as such no direction for payment of salary from the State-Exchequer can be issued.

33. In Writ Petition No. 7434(SS) of 2015, a substantive vacancy is said to have arisen on 01.07.2013 due to retirement against which the Managing Committee is said to have made the appointment on 16.01.2015, therefore, clearly such appointment is de-hors the Statutory Provisions and the rules including Section 16-E (11) of the U.P. Intermediate Act 1921, consequently, no direction for salary can be issued in this case also.

34. In Writ Petition No. 7435(SS) of 2015, a substantive vacancy arose on 01.07.2014 due to retirement against which the Managing Committee made the appointment on 10.01.2015 i.e. during the academic session 2014-15 as per the definition of the academic session prevalent at that time. Clearly the appointment having not been made under Section 16-E(11) 1982 as such vacancies are not amenable to the provisions of Section 16-E(11) of the Act, no direction for payment of salary from the State-Exchequer can be issued.

35. In Writ Petition No. 7445(SS) of 2015, a substantive vacancy is said to have arisen on account of promotion on 15.05.2013 against which the Managing Committee is said to have made the appointment on 15.01.2015, therefore, clearly the appointment is de-hors the statutory provisions and rules made thereunder, including Section 16-E (11) of the Intermediate Act 1921, consequently, no direction for payment of salary can be issued.

36. In Writ Petition No. 7446(SS) of 2015 a vacancy is said to have occurred substantively on 30.06.2015 on account of retirement against which the appointment has been made by the Committee of Management on 04.07.2015, therefore, clearly the appointment, if any, is de-hors the statutory provisions and the rules made thereunder, including Section 16-E (11) of the U.P. Intermediate Act, 1921, consequently, no direction for payment of salary from the State Exchequer can be issued.

37. In Writ Petition No. 7558(SS) of 2015 a challenge has been made to the Government Order dated 10.05.2002 restraining the institutions from making appointments against the vacancies arisen on 30.06.2002 with the stipulation that such appointments can only be made by the Board. In this case, the vacancies are said to have arisen on 30.06.1999, 30.06.2002 and 30.06.2007 on account of promotion and retirement of the incumbent. The writ petition has been filed in the year 2015. Against the aforesaid vacancies it is alleged that the appointments were made in September, 2010. Clearly, the appointments, if any, made by the Committee of Management was de-hors the Statutory Provisions and rules made thereunder including Section 16-E (11) of the U.P. Intermediate Act, 1921, therefore, no direction for payment of salary can be issued in this case also. The Government Order dated 10.05.2002 has to be read and understood in the light of pronouncement referred herein above.

38. All the Writ Petitions are disposed of in the aforesaid terms.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.02.2016

BEFORE

THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE YASHWANT VARMA, J.

Writ-C No. 7078 of 2016

C/M Madhav U.M. Vidyalaya & Anr. ...Petitioners

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Chandra Jeet Yadav, Anjali

Counsel for the Respondents:
CSC

Constitution of India, Art.-226-Writ to declare-the provisions of Section 5 of Payment of Salaries Act 1971-Ultra Vires-being contrary to Section 16-A (7) of U.P. Intermediate Education Act 1921-held-both provisions are state legislation-to read harmoniously-no least confliction-petition dismissed.

Held: Para-6

The Payment of Salaries Act is an Act to regulate the payment of salaries to teachers and employees of High School and Intermediate Colleges receiving State aid. The first proviso to Section 5(1) empowers the Inspector to order single operation of the bank account in the circumstances which are referred to therein. Section 6 (3) empowers the Regional Deputy Director to supersede the Management. In that event the Authorised Controller is appointed, upon which he shall exercise all powers of the Management including single operation of the bank account. There is, thus, no conflict of jurisdiction much less any conflict between the statutory provisions. Both sets of provisions are of State legislation and have to be read harmoniously so as to give full effect to the statutory scheme.

(Delivered by Hon'ble Dr. Dhananjaya Yeshwant Chandrachud, J.)

1. The petitioners have sought the Section 5 (1) of the Uttar Pradesh High School and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 19711 as being ultra vires to Section 16-A(7) of the Uttar Pradesh Intermediate Education Act 19212.

2. Section 16-A of the Intermediate Education Act provides for the framing of a Scheme of Administration. Under sub-section (7), it has been provided thus:

"(7) Whenever there is dispute with respect to the Management of an institution, persons found by the Regional Deputy Director of Education, upon such enquiry as is deemed fit to be in actual control of its affairs may, for purposes of this Act, be recognised to constitute the Committee of Management of such institution until a Court of competent jurisdiction directs otherwise:

Provided that the Regional Deputy Director of Education shall, before making an order under this sub-section, afford reasonable opportunity to the rival claimants to make representations in writing.

Explanation. - In determining the question as to who is in actual control of the affairs of the institution the Regional Deputy Director of Education shall have regard to the control over the funds of the institution and over the administration, the receipt of income from its properties, the Scheme of Administration approved under sub-section (5) and other relevant circumstances."

3. Sub-section (7) of Section 16-A applies where there is a dispute with respect to the Management of an institution. In such an event, persons found by the Regional Deputy Director of Education, upon enquiry "to be in actual control of its affairs" may, for the issuance of a writ for declaring the provisos to purpose of the Act, be recognized to constitute the Committee of Management of the institution, until otherwise directed by a court of competent jurisdiction. This provision indicates that under sub-section (7), a power has been conferred upon the Regional Deputy Director of Education to recognize as a Committee of Management such body which is found to be in actual control of the affairs of the institution. However, this is for the purposes of the Act and the direction operates until a court of competent jurisdiction decides otherwise. The Explanation to sub-section (7) of Section 16-A provides the circumstances which are to be borne in mind in determining as to who is in actual control of the affairs of the institution. The Regional Deputy Director of Education is to have regard to (i) control over the funds of the institution; (ii) control over the administration; (iii) control over the receipt of income from its properties; (iv) the Scheme of Administration approved under sub-section (5); and (v) other relevant circumstances.

4. The Payment of Salaries Act contains a provision in Section 5 for the payment of salary of recognized institutions which receive a maintenance grant from the State Government. Under sub-section (1) of Section 5, the Management is, for the purpose of disbursement of salaries to its teachers and employees, required to open a separate bank account which is to be opened jointly by a representative of the Management and by the Inspector or an officer authorised by him. Under the first proviso to sub-section (1) of Section 5, a provision has been made for single operation of accounts if the Inspector is satisfied that it is expedient in public interest so to do. In such an event, the Inspector would instruct the bank that the account would be operated by the representative of the Management

alone. In other words, joint operation is replaced by a direction for single operation when it is expedient in public interest to do so under the first proviso to sub-section (1) of Section 5. Section 5(1) is extracted herein below for convenience of reference:

"5. Procedure for payment of salary in the case of certain institutions.- (1) The management of every institution shall, for the purpose of disbursement of salaries to its teachers and employees, open in a Scheduled Bank or a Co-operative Bank a separate account to be opened jointly by a representative of the management and by the Inspector or such other officer as may be authorised in that behalf:

Provided that after the account is opened, the Inspector may, if he is, subject to any rules made under this Act, satisfied that it is expedient in the public interest so to do, instruct the bank that the account shall be operated by the representative of the management alone, and may at any time revoke such instruction:

Provided further that in the case referred to in the proviso to sub-section (2), or or where a difficulty arises in the disbursement of salaries due to any default of the management, the Inspector may instruct the Bank that the account shall be operated only by himself or by such other officer as may be authorised by him in that behalf and may at any time revoke such instruction."

5. Section 6 of the Payment of Salaries Act empowers the Inspector to recommend action being taken against an institution where he is satisfied that the Management has committed default in complying with its statutory obligations under Sections 3, 4 or 5. Under sub-section (3) of Section 6, the Regional Deputy Director is empowered, upon considering the cause shown by the Management, to supersede the Management. Thereupon, after an order is made under sub-section (3), the Authorised Controller shall, to the exclusion of the Management, exercise all the powers and perform the functions of the Management including in respect of management of the property belonging to or vested in the institution. The Authorised Controller would operate singly the bank account referred to in Section 5. In other words, once an Authorised Controller is appointed under the provision of sub-section (3) of Section 6, sub-section (4) mandates that the bank account shall be operated singly; the bank account being that which is referred to in Section 5.

6. Once the provisions of Section 16-A(7) of the Intermediate Education Act and those of Section 5(1) and Section 6(4) of the Payment of Salaries Act are appreciated in their proper perspective, it is evident that there is no conflict between the two sets of provisions. Sub-section (7) of Section 16-A empowers the Regional Deputy Director of Education to recognize who should constitute the Committee of Management where there is a dispute with respect to management, and the Explanation to sub-section (7) contains a reference to the circumstances which are to be borne in mind, including control over the funds of the institution. The Payment of Salaries Act is an Act to regulate the payment of salaries to teachers and employees of High School and Intermediate Colleges receiving State aid. The first proviso to Section 5(1) empowers the Inspector to order single operation of the bank account in the circumstances which are referred to therein. Section 6 (3) empowers the Regional Deputy Director to supersede the Management. In that event the Authorised Controller is appointed, upon which he shall exercise all powers of the Management including single operation of the bank account. There is, thus, no conflict

of jurisdiction much less any conflict provisions are of State legislation and have to be read harmoniously so as to give full effect to the statutory scheme.

7. We do not find any reason or justification to entertain the second prayer for seeking enforcement of a Government Order. The State Government is vested with adequate powers to ensure that its orders are duly enforced, albeit in accordance with the provisions of law.

8. Consequently, we see no reason to entertain the writ petition. The writ petition is accordingly dismissed. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.02.2016

BEFORE
THE HON'BLE ANIL KUMAR, J.

Misc. Bench No. 7573 of 2015

Jagroop Singh (U/A 227) ...Petitioner
Versus
Dist. Judge Hardoi & Ors. Respondents

Counsel for the Petitioner:
Bhagwandeen Sharma

Counsel for the Respondents:
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C.P.C.-Order VI Rule-16-Amendment in written statement-after closure of evidence-by proposed amendment petitioner wants rescind from earlier admission of written statement-certainly affecting rights of plaintiff-rightly rejected-petition dismissed.

Held: Para-12
In the instant matter from the perusal of the judgment and order passed by the court below , the admitted position which between the statutory provisions. Both sets of emerge out is that petitioner's application for amendment in written statement has been rejected on the ground that petitioner cannot resile from the admission made by him earlier in the written statement. Keeping in view the above said fact as well as settled proposition of law, defendant cannot be allowed from reciling rather taking U turn from the earlier statement made by him in the written statement in the garb of amendment that will prejudice the case of the plaintiff and it will cause injustice to him.

Case Law discussed:
2009 (27) LCD 1096; L.Rs. 2008 (3) ARC 911

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

1. Heard Sri Bhagwandeen Sharma, learned counsel for the petitioner and perused the record.

2. Facts,in brief, of the present case are that respondent no.3-Krishan Lal Gupta/ plaintiff filed a Regular Suit No.1048 of 2008 (Krishan Lal Vs. Jagroop) in the Court of Civil Judge(S.D.) Hardoi. In the said matter petitioner Jagroop Singh/ defendant filed written statement thereafter an evidence on behalf of the plaintiff was also closed. At this stage, on behalf of petitioner/ defendant an application for amendment in written statement has been filed on 28.2.2014 to which plaintiff/ respondent has filed objection . The trial court/ Civil Judge (S.D.) Hardoi by order dated 10.7.2014 rejected the application under Order VI Rule 17 CPC moved on behalf of petitioner on the ground that plaintiff cannot resile from the admission which has made in the written statement. The order dated 10.7.2014 was challenged by the petitioner by filing Revision No. 43 of 2014(Jagroop Singh Vs. Krishan Lal

Gupta) . The District Judge Hardoi by order dated 23.7.2015 rejected the same.

3. Learned counsel for the petitioner while challenging the impugned order submits that the impugned order passed by opposite parties thereby rejecting the case of the petitioner for amendment is contrary to the provisions of law, liable to be set aside.

4. In support of his arguments, he has placed reliance on the judgment given by Hon'ble Apex Court in the case of Shushil Kumar Jain Vs. Manoj Kumar and another, 2009(27) LCD 1096.

5. The provisions of amendment of pleading provided under Order 6 Rule 17 CPC as exits today can be summarized and crystallized as under:-

" Order 6 Rule 17 of the Code deals with amendment of pleadings . By Amendment Act 46 of 1999, this provision was deleted . It has against been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment to any stage. Now , if application is filed after commencement of trial, it has to be shown that in spite of the due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous application which are filed to delay the trial. There is no illegality in the provision."

6. Thus, object of Order 6, Rule 17 primarily is that if because of certain facts not being pleaded or because of deficiencies in the pleadings, the question involved between the parties cannot be finally determined and unless it is finally determined, there is likelihood of multiplicity of proceedings. Order 6, Rule 17 empowers the Court to permit such amendments which are necessary for final determination of the issues in dispute or real point in dispute between the parties. Expression "new case" has been the subject matter of discussion and that expression has been defined to mean a new claim based on altogether new facts and new ideas. New case does not mean and include in itself where there is an additional approach to the same facts already in the pleadings as an alternative approach. So, in the context of the amendment application, an additional approach to same facts cannot amount to making out a new case.

7. The principles established by judicial decisions in respect of amendment of plaint are :

(i) All amendments will be generally permissible when they are necessary for determination of the real controversy in the suit;

(ii) All the same, substitution of one cause of action or the nature of the claim for another in the original plaint or change of the subject-matter of or controversy in the suit is not permissible;

(iii) Introduction by amendment of inconsistent or contradictory allegations in negation of the admitted position on facts, or mutually destructive allegations of facts are also impermissible though inconsistent pleas on the admitted position can be introduced by way of amendment;

(iv) In general, the amendments should not cause prejudice to the other side which cannot be compensated in costs; and

(v) Amendment of a claim or relief which is barred by limitation when the amendment is sought to be made should not be allowed to defeat a legal right accrued except when such consideration is out-weighed by the special circumstances of the case.

8. Amendment can be refused in the following circumstances :

(i) where it is not necessary for the purpose of determining the real question in controversy between the parties;

(ii) where the plaintiff's suit would be wholly displaced by the proposed amendment;

(iii) where the effect of amendment would take away from the defendant a legal right which has accrued to him by lapse of time;

(iv) where the amendment would introduce totally different, new and inconsistent case and the application is made at a late stage to the proceeding; and

(v) where the application for amendment is not made in good faith.

9. Accordingly, in brief, it can be held that all amendments should be allowed which satisfy the following conditions :

(a) of not working injustice to the other side; and

(b) of being necessary for the purpose of determining the real question in controversy between the parties. They should be refused only when the other party cannot be placed in the same position as if the pleading had originally been correct but the amendment would cause him an injury which cannot be compensated by costs.

10. Further in the case of North Eastern Railway Administration, Gorakhpur Vs. Bhawan Das (d) By L.Rs.2008 (3) ARC 911 wherein Hon'ble Supreme Court has held as under:-

"In so far as the principles which govern the question of granting or disallowing amendments under Order VI, Rule 17 C.P.C, (as it stood at the relevant time) are concerned, these are also well settled. Order VI , Rule 17 C.P.C. Postulates amendment of pleadings at any stage of the proceedings. In Pirgonda Hongonda Patil Vs. Kalgaonda Shidgonda Patil and others, AIR 1957 SC 363, which still holds the field, it was held that all amendments ought to be allowed which satisfy the two conditions (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real question in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs.(Also see: Gajanan Jaikishan Joshi Vs. Prabhakar Mohanlal Kalwar, (1990) 1 SCC 166: 1990 SCFBRC 134)".

11. Hon'ble the Apex Court in the case of vide judgment dated 22.03.2006, passed in Appeal (Civil) No. 5350-5361 of 2002 (Rajesh Kumar Aggarwal & Ors. Vs. K.K. Modi & Ors), while considering the scope of amendment, held as under (relevant paragraph):-

" In cases like this, the Court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard rights of both parties and to sub-serve the ends of justice. It is settled by catena of decisions of this Court that the rule of amendment is essentially a rule

of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the Court.

While considering whether an application"

12. In the instant matter from the perusal of the judgment and order passed by the court below , the admitted position which emerge out is that petitioner's application for amendment in written statement has been rejected on the ground that petitioner cannot resile from the admission made by him earlier in the written statement. Keeping in view the above said fact as well as settled proposition of law, defendant cannot be allowed from reciling rather taking U turn from the earlier statement made by him in the written statement in the garb of amendment that will prejudice the case of the plaintiff and it will cause injustice to him.

13. So far the law laid down by Hon'ble the Apex Court in the case of Sushil Kumar Jain (Supra) is concerned,Lordship of Hon'ble Supreme Court in the said case has held in para -9 which on reproduction reads as under:-

" That apart a careful reading of the application for amendment of the written statement , we are of the view that the appellant seeks to only elaborate and clarify the earlier inadvertence and confusion made in his written statement. Even assuming that there was admission made by the appellant in his original written statement, then also , such admission can be explained by amendment of his written statement even by taking inconsistent pleas or substituting or altering his evidence."

14. The said position does not exists in the present case so the petitioner cannot derive any benefit of law as laid down by Hon'ble Apex Court in the case of Sushil Kumar Jain (Supra) rather the same is not applicable in the fact and circumstances of the case.

15. For the foregoing reasons, writ petition lacks merit and is dismissed.
